# Florida Evidentiary Code, Exceptions to Evidence Code And Crawford v. Washington

*Issues and Cases in Florida*

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# INTRODUCTION

This edition is an addendum to the previous work. It does not propose to be all encompassing, but to be used by employing the table of contents headings to go to the specific cases. It is updated to April 21, 2016.

# DEDICATION

This edition is dedicated to the memory of DAVID WAKSMAN, with and against whom the author litigated many jury trials, argued many capital case motions, and laughed uproariously at the wonderfully crazy stories in and out of the courtrooms.

## ACKNOWLEDGEMENTS

My sincere thanks to Kristen Kawass, who very ably arranged and researched all the cases and captions to produce a more coherent legal document. There really are no sufficient thanks.

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# I. DEFINITION OF HEARSAY

## § 90.801(1)(a)2: Non-Verbal Conduct

## *Farinacci v. State*, 29 So.3d 1212 (Fla. 4th DCA 2012)

**Detective's demonstration and testimony about how child victim told detective that defendant touched him was inadmissible hearsay.**

**Defendant was charged with lewdly and lasciviously fondling the clothed buttocks of a child under 12. The event occurred in the aisle of a crowded supermarket in the afternoon. A video camera recorded the interior of the store. He admits he patted the child on the back but denies that he ever touched buttocks. The critical issue turns on evidence given by a police officer investigating the matter two days later.**

**On appeal, as he did at trial, defendant argues the detective's evidence was inadmissible hearsay. The State responds it is not hearsay and, even if so, would be admissible as a prior consistent statement. We conclude the detective's testimony and demonstration were inadmissible. It is inescapable that this evidence was introduced—as the predicate question asked—to "show the jury *how he described it to you* " and that "he described it to me *in great detail.*" [e.s.]**

**At the outset, we stress the detective's evidence is not being justified as permissible child hearsay under § 90.803(23). That statute requires the State to give an accused prior notice of the potential use of a child's statements about an event, which then requires the Court to conduct a**

**separate hearing to determine the reliability of the proposed evidence.[2] Here the State gave no such notice. Consequently there was no separate hearing to determine the child's reliability as a witness.**

**When at trial the State sought to present this evidence, defendant objected on hearsay grounds. The principal justification for the detective's evidence is that it was mostly demonstrative and not a specific recitation of out-of-court statements by the victim. Section 90.801(1)(a)2 expressly defines hearsay to embrace "nonverbal conduct of a person if it is intended by the person as an assertion." So even if the child had not said a word to the officer but merely demonstrated the act, it would still qualify as nonverbal conduct intended as an assertion.**

**In short, there is no mime exception to the hearsay rule. When the testimony of the witness at trial is founded on a communication with another person, the result of which is to connect the testifying officer to the defendant later charged with the crime, that connection is manifestly the result of inadmissible hearsay. That is the identical basis for the officer's testimony in this case. *Postell* describes this inadmissible connection as "egregious hearsay" and holds that "defendant's right of confrontation is defeated, notwithstanding that the actual statements made by the non-testifying witness are not repeated."**

**We cannot distinguish the detective's evidence in this case from that principle. It is unavoidable that the detective's evidence all came from**

**something communicated to him by the child. The detective did not actually see the conduct he described. His testimony depended entirely on the accuracy and believability of statements and nonverbal conduct communicated to him by the child. This evidence was undeniably used to portray out-of-court statements by the victim to the detective for the sole purpose of establishing defendant's guilt.**

## § 90.801(1)(c): Offered for Truth of the Matter Asserted

## *Summerall v. State*, 171 So.3d 150 (Fla. 1st DCA 2015)

**If the only possible relevance of an out-of-court statement is directed to the truth of the matters, it is classic hearsay**

**During her testimony at appellant's trial, Hawkins revealed that prior to appellant's arrival at her home, she received a telephone call from his mother, Mary Summerall. When the prosecutor asked what Ms. Summerall said to her, defense counsel objected on the basis of hearsay. The prosecutor responded that Ms. Summerall's statement was not being offered for the truth of the matter asserted but for "the effect on the listener," which she claimed was a "material element." The trial court overruled the objection and Hawkins was permitted to testify that Ms. Summerall told her to call the police because appellant was in the yard with a gun and had told her he was going to Hawkins' house to put four bullets in her head. Hawkins further testified that Ms. Summerall called a second time, and, again, over defense objection, Hawkins was allowed to testify to what she said. According to Hawkins, Ms. Summerall told her to call the police because appellant was**

**going to shoot her and was on his way over to her house.**

**We agree with appellant's argument that the testimony concerning Mary Summerall's calls constituted hearsay as defined in section 90.801(1)(c), Florida Statutes. In *Keen v. State,* 775 So.2d 263, 274 (Fla.2000), the Florida Supreme Court observed, "[w]hen the only possible relevance of an out-of-court statement is directed to the truth of the matters stated by the declarant, the subject matter is classic hearsay even though the proponent of such evidence seeks to clothe such hearsay under a nonhearsay label." *See also Conley v. State,* 620 So.2d 180, 183–84 (Fla.1993) (holding trial court erred in permitting a police officer to testify as to the contents of a dispatch he heard over his radio to the effect that a man was chasing a girl with a gun, emphasizing that "[r]egardless of the purpose for which the State claims it offered the evidence, the State *used* the evidence to prove the truth of the matter asserted").**

## *Eugene v. State*, 53 So.3d 1104 (Fla. 4th DCA 2011)

**Victim's e-mail messages to defendant were nonhearsay offered to establish defendant's motive**

**Appellant contends that the victim's emails to him were inadmissible hearsay. However, the emails were not hearsay because they were offered not for the truth of the matters they contained but to establish the effect that the statements had on appellant, the recipient of the emails.**

**Subsection 90.801(1)(c), Florida Statutes (2008), defines "hearsay" as a "statement other than one made by the declarant while testifying at the**

**trial or hearing, offered in evidence to prove the truth of the matter asserted." The Supreme Court has recognized that a statement may "be offered to prove a variety of things besides its truth."** *Foster v. State,* **778 So.2d 906, 914–15 (Fla.2000). When a statement is not offered for the truth of its contents, but to prove a material issue in a case, it is not hearsay.** *Id.* **at 915. A recognized, non-hearsay use of an out of court statement is to "show motive."** *Id.*

**As were the statements in** *Blackwood* **and** *Foster,* **the victim's emails to appellant in this case were admissible to establish a motive for the homicide—the sudden deterioration of appellant's intense relationship with the victim. The state offered the statements not for their truth, but to demonstrate their impact on appellant. Because appellant was the recipient of the victim's emails, this case is distinguishable from the line of cases involving a victim's statement to a third person expressing fear of a defendant.** *See Johnson v. State,* **969 So.2d 938, 951 (Fla.2007);** *Thomas v. State,* **993 So.2d 105, 109–10 (Fla. 1st DCA 2008). In such cases, the victim's statement cannot have had an effect on the defendant who did not hear it, so it cannot be offered for a material, non-hearsay purpose.**

## *Walden v. State*, 17 So.3d 795 (Fla. 1st DCA 2009)

**911 recording of hotel clerk's out-of-court statement was inadmissible hearsay**

**At trial, Anisha Patel testified that she was robbed at gunpoint while working as a clerk at Baymeadows Inn and Suites in Jacksonville on the**

**evening of July 24, 2007. After she emptied the cash register-of some $200 to $300-the robber instructed her to lie down facing a wall. She remained lying on the floor until, after the robber left, a hotel guest entered the lobby and told her to get up. Explaining to the guest that she had just been robbed, she dialed 911. In the course of the phone call, which was recorded and played to the jury, the 911 operator asked whether the robber had left on foot or in a vehicle. Ms. Patel first responded: "On foot as far as I know."**

**Before the jury heard it, trial counsel made timely objection on hearsay grounds to a portion of the recording of the 911 call, including the following:**

**(Ms. Patel:) A red Cadillac.**

**(911 operator:) Did they say which way he went?**

**(Ms. Patel:) I guess he must have gone (inaudible)?**

**(911 operator:) He was on Baymeadows Circle toward Baymeadows Road?**

**(Ms. Patel:) (Inaudible) I left (inaudible) road to get.**

**(911 operator:) Okay. Did anybody see any part of the tag at all on the vehicle, tag number or anything?**

**(Ms. Patel:) No, sir. He just saw-***he saw him getting into a red Cadillac.*

**(911 operator:) Could they tell two door, four door, what kind of Cadillac it was?**

**(Ms. Patel:) Four door, red Cadillac.**

**Arguing that the portion of the 911 tape recording to which the defense had objected was not hearsay, the state asserted it was offered, not for its truth, but simply to explain how police officers obtained a description of the vehicle they chased. Other witnesses testified to a police chase of a red, four-door Cadillac from which (after the police shot and killed the driver) Mr. Walden ultimately emerged.**

**Ms. Patel's trial testimony, unlike the tape recording of her out-of-court statement, was not hearsay.**

**Even though testimony on cross-examination rendered the trial court's error in admitting the hearsay statements in the 911 call harmless beyond a reasonable doubt in the present case, *see State v. DiGuilio,* 491 So.2d 1129, 1138-39 (Fla.1986), this case illustrates the most important reason why hearsay should be vigilantly excluded: it may well be unreliable. Had Ms. Patel and Mr. Fowler not taken the witness stand and undergone cross-examination, the inaccuracy in the tape-recorded hearsay statement would not have come to light: the jury would have been left with the mistaken impression, in a case where it was pivotal for the state to place the robber in the red Cadillac, that an eyewitness saw a man get into the red Cadillac outside of the hotel, minutes after the robbery took place. Because the inaccuracy was exposed, however, and the jury heard the account of what happened from witnesses with firsthand knowledge, the error was cured.**

## Proof of State of Mind is Non-Hearsay

### *Jenkins v. State*, 2015 WL 8950643 (Fla. 4th DCA, Dec. 16, 2015)

**When a statement is offered to prove what a person thought after the person heard the statement, it is being offered to prove the person's state of mind as if not hearsay**

**Ernest Jenkins ("Appellant") appeals his conviction and sentence for failure to reregister as a sexual predator. Appellant argues that the trial court reversibly erred by excluding an out-of-court statement of a stockade employee which Appellant relied upon and led him to believe that he was prevented from reregistering. Because the excluded testimony was not being introduced for the truth of the matter asserted but rather for the effect on the listener, we find that the trial court erred in excluding the statement as hearsay. The error was not harmless, and we reverse.**

**"[I]f the statement is offered for some purpose other than its truth, the statement is not hearsay and is generally admissible if relevant to a material issue in the case."); *King v. State,* 684 So.2d 1388, 1390 (Fla. 1st DCA 1996). When a statement is offered to prove what a person thought after the person heard the statement, it is being offered to prove the person's state of mind and is not hearsay. *See Alfaro v. State,* 837 So.2d 429, 432–33 (Fla. 4th DCA 2002).**

**The State claims that the verdict was not affected as Appellant's defense was ultimately presented to the jury by way of other evidence, such as comments made during both opening statements and closing arguments**

**which essentially outlined Appellant's defense and the excluded testimony. This analysis is flawed in that the statements of counsel during opening statements and closing arguments are not evidence, and the jury is told that the statements of the lawyers are not evidence pursuant to the Florida Standard Jury Instructions. *See* Fla. Std. Jury Instr. 2.1; *see also Conahan v. State,* 844 So.2d 629, 643 (Fla.2003) (Harding, J., concurring in part, dissenting in part). As such, we conclude that the error was not harmless and reverse.**

## *Pearce v. State*, 2015 WL 9584824 (Fla. 1st DCA, Dec. 31, 2015)

**Videotape of defendant's police interview should not have been excluded as hearsay when it was offered to show the state of the defendant's mind**

**Convicted of first-degree murder of one victim and of attempted first-degree murder of another, Charles Edward Pearce appeals his convictions on grounds the trial court erred in refusing to let defense counsel show the jury part of a videotaped interview the police conducted the day after his arrest. "All relevant evidence is admissible, except as provided by law." § 90.402, Fla. Stat. (2013). We reverse and remand for a new trial.**

**Before trial, defense counsel had given the requisite notice of an insanity defense, and the authenticity of the videotape—which both state and defense experts had relied on—was not in dispute.**

**In rebuttal, the state presented the testimony of Dr. William Riebsame. Before forming his opinion, Dr. Riebsame also viewed the videotape of the appellant's February 21, 2011 interview in Arizona. Dr. Riebsame agreed the**

**appellant had a delusional disorder, but concluded that he knew the consequences of his actions and knew his actions were wrong. Among other things, both Dr. Valente and Dr. Riebsame testified that the appellant believed, at the time of their evaluations, that his stepfather and others were stealing his inheritance.**

**The trial court excluded the entire videotape on multiple grounds. It ruled the appellant's statements during the interview were inadmissible as hearsay. Alternatively, the trial court ruled the videotape was irrelevant because the issue for the jury was appellant's mindset on the day of the incident, rather than some two weeks later. Finally, the trial court also noted testimony from other witnesses about his mental status in the months leading up to the incident and in the months after the incident, stating the videotape was cumulative and would be more confusing and prejudicial than probative.**

**The trial court erred in ruling the appellant's statements during the videotaped interview were hearsay.**

**"Trial judges have discretion to rule on some kinds of evidence issues, but whether a statement falls within the statutory definition of hearsay is a question of law."** *Powell v. State,* **99 So.3d 570, 573 (Fla. 1st DCA 2012). Plainly the videotape was not offered to prove the truth of the matters appellant asserted in the interview—the existence of an inheritance or the poisoning of an oleander bush—and should not have been excluded as**

**hearsay.**

**That the videotaped interview of the appellant occurred eleven days after the shooting did not make the videotape inadmissible. Not uncommonly, expert testimony regarding a defendant's sanity at the time of the commission of an offense is based in part on the defendant's mental status and conduct some time after the offense occurs.**

**The videotape plainly went to appellant's insanity defense, the main issue in the case, and should have created no confusion of or with other issues. It is not at all clear what unfair prejudice the trial judge imagined the state would suffer.**

## "BOLO"

### *Squire v. State*, 2016 WL 717128 (Fla. 4th DCA, Feb. 24, 2016)

**Contents of "BOLO" are inadmissible hearsay as being offered for the truth of the matter asserted**

**The charges against appellant, whom the State and defense both stipulated was "mentally retarded," arose out of the attempted robbery of one of the victims, Thompson, as he was handing out CDs at night in a parking lot as part of his employment. Thompson testified that someone pulled out a gun and shot. He did not see the shooter and ran away. He could not identify appellant as the shooter. At trial, he testified that when he was shown a photo lineup by police, he identified the person the detective told him to pick.**

**A detective, who happened to be in the area and heard the shots, was dispatched to the shelter to determine whether anyone was injured. The detective saw Seymore, who was frantic, bleeding, and crying. Over objection, the detective was allowed to testify that he asked Seymore who shot her and she responded, "J.R." Seymore then gave the detective a description of J.R. Based on this description, the detective sent out a BOLO.**

**Another officer testified that earlier in the evening, before the shooting, he saw a person known to him as "J.R." several blocks from where the shooting later occurred. Subsequently, when he heard that there had been a shooting, he responded to the area. Over objection, the officer was allowed to testify that he heard a BOLO describing the person and stating that his name was "J.R." He relayed to other officers, and testified at trial, that he knew appellant was J.R.**

**The detective then left appellant in the interview room and allowed him to call his grandmother, to whom he also proclaimed his innocence. Appellant was then brought down to the jail. He asked the detective if he was sure it would be a lesser charge. The detective asked appellant if he was ready to talk and tell the truth. Appellant gave a confession to the detective. Afterwards, he commented to the detective, "You told me I could get a lesser charge if I tell you the truth instead of lying to you." The detective denied that he had promised appellant anything and told him that he would not charge him with attempted murder when he didn't intend to kill anyone.**

**Nevertheless, appellant was charged with, and found guilty of, attempted felony murder and attempted robbery of Thompson, and aggravated battery of Seymore. On the attempted felony murder charge, he was sentenced to the mandatory minimum of twenty-five years in prison, followed by ten years of probation. He also received the mandatory minimum of twenty-five years in prison for aggravated battery, and twenty years for attempted robbery, with all of the prison terms to run concurrently.**

**We agree that the detective's comments created an implied promise of leniency and an agreement to lessen the charges in return for cooperation. Therefore, the confession was induced by impermissible conduct.**

**Based upon *Day,* appellant's confession was the product of promises of leniency, which negated a voluntary choice. Throughout the interview, the detective told appellant that he wanted to help him and that he was trying to figure out whether the shooting was an accident or intentional, so as to determine the proper charge. Similarly to *Day,* the detective never clarified his authority as to charging decisions. In fact, he led appellant to believe that he was the one deciding on the charges and would not charge appellant with attempted murder if the shooting was an accident.**

**Second, appellant argues that the court erred in overruling his objection to the detective's testimony that Seymore, who did not testify, told him that "J.R." shot her. We agree. This statement could qualify as an excited utterance, since it was made immediately after the shooting when Seymore**

**was bleeding and crying. However, it was inadmissible because it was a testimonial statement made to assist the detective in the investigation, and thus it was a violation of the Sixth Amendment to admit it.** ***See Crawford v. Washington,*** **541 U.S. 36, 68, 124 S.Ct. 1354, 158 L.Ed.2d 177 (2004).**

**Similarly, in the present case, Seymore's statement to the detective was made for purposes of assisting in the investigation and thus it was a violation of the Confrontation Clause to admit it. For the same reason, we also hold that it was error to admit that portion of the 911 call from the shelter in which the caller relayed Seymore's statement that the person who shot her was "J.R." That information was given after the incident was over, and for the purposes of investigation[3] and assisting the police in identifying and locating the perpetrator. Under** ***Hayward,*** **it too should not have been admitted.**

**Third, appellant argues that the court reversibly erred in allowing the officer to testify to the contents of the BOLO. The officer testified, over objection, to the contents of the BOLO that described the assailant and named him as "J.R." The officer stated upon hearing the BOLO, he knew that it was describing appellant because he had seen appellant nearby earlier in the evening and knew that he went by the name "J.R." We agree that the trial court erred in admitting the hearsay description in the BOLO, in particular the identity of the individual. Courts have held, time and time again, that the contents of a BOLO are inadmissible hearsay as being offered**

**for the truth of the matter asserted, in this case the identity of the assailant.**

## § 90.604: Lack of Personal Knowledge

### *Bryant v. State*, 124 So.3d 1012 (Fla. 4th DCA 2013)

**Detective's testimony that a recorded jailhouse telephone call originated from defendant's housing area at jail was inadmissible hearsay**

**The case detective testified that, after the arrest, one of the victims notified him about receiving a "three-way phone call" from the defendant—that is, the defendant allegedly called from the jail to a third party, who then connected the victim into the call. The detective testified that he contacted the jail to determine the phone call's origin, and the jail provided him with records identifying the phone call's origin. When the state asked the detective to identify the phone call's origin, defense counsel objected on the grounds of foundation and hearsay.**

**The trial court allowed defense counsel, outside of the jury's presence, to voir dire the detective regarding his knowledge of the phone call's origin. During the voir dire, the detective admitted that he did not know how the jail's phone system operated and that he relied on the information contained in the jail's records to identify the phone call's origin.**

**Over the defendant's renewed objections, the state introduced the recording of the phone call into evidence, and played it for the jury. Much of the phone call was unintelligible for the court reporter to transcribe. However, after the state played the phone call, the detective testified that he**

**interpreted the call as the defendant implicating himself in the charged crimes.**

**We conclude that the trial court erred in overruling the defendant's foundation and hearsay objections to the detective's testimony identifying the phone call's origin. Section 90.604, Florida Statutes (2009), in pertinent part, states: "[A] witness may not testify to a matter unless evidence is introduced which is sufficient to support a finding that the witness has personal knowledge of the matter." § 90.604, Fla. Stat. (2009). Where a witness has no personal knowledge of a matter, and the witness's knowledge is derived entirely from information given by another, the witness's testimony is incompetent and inadmissible as hearsay.**

**Here, during defense counsel's voir dire of the detective, the detective admitted that he did not know how the jail's phone system operated and that he relied on the information contained in the jail's records to identify the phone call's origin. Because the detective's knowledge regarding the phone call's origin derived entirely from the jail's records, which itself was hearsay for which the state did not attempt to meet the public records exception to the hearsay rule, the detective's testimony regarding the phone call's origin was inadmissible.**

### *Tolbert v. State*, 114 So.3d 291 (Fla. 4th DCA 2013)

**Testimony of DNA analyst from sheriff's office as to initial DNA test results of vaginal swab taken from sexual assault victim obtained by non-**

**testifying expert was inadmissible hearsay, as analyst had not conducted the initial DNA testing, nor did she have any personal knowledge of it, and she clarified that she was relying on report of analyst who had conducted the initial DNA testing.**

# II. NON-HEARSAY (§ 90.801(2))

## (b) Prior Consistent Statement

### *Howard v. State*, 152 So.3d 825 (Fla. 2d DCA 2014)

**State improperly bolstered witness' testimony with questions introducing his prior consistent statements on direct examination before defendant had opportunity to cross-examine witness**

**State improperly bolstered witness's testimony by line of questioning introducing his prior consistent statements to police showing that witness previously told police the same facts to which he testified during armed robbery trial, where State introduced witness's prior statements on direct examination before defendant had opportunity to cross-examine witness. West's F.S.A. § 90.801(2)(b).**

**On the first issue, prior consistent statements are generally inadmissible hearsay and cannot be used solely to corroborate or bolster a witness's testimony. *Tumblin v. State,* 29 So.3d 1093, 1100 (Fla.2010). Prior consistent statements are admissible nonhearsay when the declarant is available to testify at trial and is subject to cross-examination and when the statement is "offered to rebut an express or implied charge against the declarant of improper influence, motive, or recent fabrication." §**

**90.801(2)(b), Fla. Stat. (2013). However, "[t]here must be an initial attempt on cross-examination to demonstrate the improper influence, motive or recent fabrication" before prior consistent statements may be admitted under this exception. *Foburg v. State,* 744 So.2d 1175, 1179 (Fla. 2d DCA 1999) (quoting *Jenkins v. State,* 547 So.2d 1017, 1020 (Fla. 1st DCA 1989)).**

**Here, Battle testified that he was in a car with Howard and that he had committed a robbery in the motel parking lot prior to being arrested. Following this testimony, the State asked Battle whether these were facts that he had told police during his prior interview, and Battle confirmed that they were. The purpose of this line of questioning was to show that Battle had previously told police the same facts that he was testifying to at trial, which is exactly the type of evidence that is prohibited by the hearsay rule on prior consistent statements. And while the State properly argues that prior consistent statements may be used to *rehabilitate* a witness, the State in this case introduced Battle's prior statements on direct examination before Howard had the opportunity to cross-examine. Of course, the State's target strategy was to lessen the impact of Battle's prior claim that a screwdriver, instead of a gun, was used during the robbery. As a result, the State's solicitation of Battle's prior consistent statements was deliberately premature and had the unfortunate effect of impermissibly bolstering Battle's testimony.**

**Because Howard did not object to any of the State's improper**

**comments during closing argument, this court must find fundamental error to reverse. *See Kilgore v. State,* 688 So.2d 895, 898 (Fla.1996). Fundamental error is "error that reach[es] down into the validity of the trial itself to the extent that a verdict of guilty could not have been obtained without the assistance of the alleged error." *Id.* (alteration in original) (quoting *State v. Delva,* 575 So.2d 643, 644–45 (Fla.1991)) (internal quotation marks omitted). Because the State's comments during closing argument had the effect of bolstering Battle's testimony on critical facts on which the State's case relied, this improper commentary constituted fundamental error.**

## *Carter v. State*, 115 So.3d 1031 (Fla. 4th DCA 2013)

**Exception inapplicable where the alleged motive of witness to fabricate existed *prior* to their out-of-court statements to investigating office**

**Jeffery E. Carter was charged with and convicted of two counts of aggravated battery.**

**"Section 90.801(2)(b), [Florida Statutes (2010)] provides that a statement is not hearsay if the declarant testifies at trial and is subject to cross-examination concerning the statement, and the statement is consistent with his testimony and offered to rebut a charge of improper influence, motive, or recent fabrication." *Neal v. State,* 792 So.2d 613, 614 (Fla. 4th DCA 2001) (citation omitted). However, "[t]he exception [allowing a prior consistent statement as non-hearsay] involving impeachment by bias or corruption or improper motive is only applicable where the prior consistent statement was made *'prior* to the existence of a fact said to indicate bias,**

**interest, corruption, or other motive to falsify.' " *Jackson v. State,* 498 So.2d 906, 910 (Fla.1986) (quoting *McElveen v. State,* 415 So.2d 746, 748 (Fla. 1st DCA 1982)); *Kellam v. Thomas,* 287 So.2d 733 (Fla. 4th DCA 1974). Stated another way, a prior consistent statement is inadmissible under section 90.801(2)(b) if it is made *after* the witness' motive to lie arose. *Id.***

**At trial and on appeal, Carter argued that the motive for the victims and eyewitnesses to fabricate a story against him arose prior to the incident in which the victims were injured. Carter, as he contended in opening statements, testified that the victims and eyewitnesses did not like him prior to the incident, and the victims and eyewitnesses were part of a clique within the camp. There was no evidence presented about an incident occurring between the date D.B and S.W. made statements to the deputy and their testimony at trial which would support a claim of recent fabrication. Because the alleged motive to fabricate existed *prior to* the statements by witnesses to the investigating officer, the prior consistent statements were inadmissible.**

## *Goldtrap v. State*, 115 So.3d 1025 (Fla. 1st DCA 2013)

**Child victim's text messages were inadmissible where messages were sent by victim after motive to fabricate arose**

**Appellant challenges his conviction for lewd and lascivious molestation on a child between the ages of 12 and 16.**

**We find the trial court erred by allowing the State to introduce**

**evidence of the victim's prior consistent statements made in text messages she sent to two individuals after her alleged motive to fabricate arose. Because the evidence did not qualify under the hearsay exception for introducing prior consistent statements, and because the court's error cannot be considered harmless, we reverse Appellant's conviction and remand for a new trial.**

**At trial, the victim testified to three incidents in which Appellant, her uncle, molested her. The first occurred during a weekend stay at the home of Appellant and his family; the other incidents occurred after she had moved in with them. The victim testified that after each incident, she "texted" her boyfriend to tell him what happened. She also confided in a church counselor by text message following the third incident. The counselor, in turn, reported the information to the Department of Children and Families, who sent an investigator the following day to interview the victim.**

## *Rodriguez v. State*, 57 So.3d 961 (Fla. 4th DCA 2011)

**Codefendant's statement made prior to her plea agreement, which the defense implied provided a motive to falsify, was admissible non-hearsay**

**Appellant Jason Santiago Rodriguez appeals his convictions and sentences for burglary of an occupied dwelling with assault or battery, kidnapping, and robbery.**

**Appellant and Ditullio were arrested. Ditullio gave a taped statement to Deputy Michael Tramonte of the Palm Beach County Sheriff's Office, which**

**was consistent with her trial testimony. Before trial, she entered into a plea agreement with the state, which required her to serve four years in prison, followed by two years on probation, and to testify at trial.**

**During cross-examination, defense counsel questioned Ditullio about her agreement to testify against appellant in exchange for reduced sentences on lesser charges, noting particularly her avoidance of a life sentence. He also asked her about the effect of her drug usage on her ability to recall events and the fact that she was wearing the victim's jewelry at the time of her arrest. At the end of cross-examination, defense counsel asked Ditullio if she had lied about anything to the police. She replied, "I don't think I lied, I think I was quite honest."**

**Deputy Tramonte testified about his investigation at the burglary scene and his arrest and interview of Ditullio. When the state sought to introduce Ditullio's entire taped statement, defense counsel objected on the ground of hearsay. The state responded that the defense's cross-examination suggested that Ditullio had recently fabricated her testimony based on a plea deal she made with the state. Agreeing that the state offered the witness's prior statement to rebut an implied charge of improper influence or motive, the trial court admitted it under section 90.801(2)(b), Florida Statutes (2009).**

**Section 90.801(2)(b).** ***Bradley v. State,*** **787 So.2d 732, 743 (Fla.2001). Section 90.801(2)(b) provides that "[a] statement is not hearsay if the**

**declarant testifies at the trial or hearing and is subject to cross-examination concerning the statement and the statement is: ... (b) Consistent with the declarant's testimony and is offered to rebut an express or implied charge against the declarant of improper influence, motive, or recent fabrication." Both elements must be met in order to qualify as non-hearsay.** *Peterson v. State,* **874 So.2d 14, 17 (Fla. 4th DCA 2004).**

**Here, all the above conditions were met: Ditullio testified at trial and was subject to cross-examination concerning the statement; her statement was consistent with her trial testimony, and it was offered to rebut the defense's suggestion, on cross-examination, that her plea agreement to a reduced sentence improperly influenced her testimony at trial. Further, Ditullio's statement was made prior to her plea agreement, which the defense implied provided a motive to falsify.**

## *J.B.J. v. State*, 17 So.3d 312 (Fla. 1st DCA 2009)

**Officer's hearsay testimony of victim's brother's prior consistent statement was inadmissible where all conditions were not met for its admissibility**

**Prior consistent statements are generally inadmissible to corroborate or bolster a witness's trial testimony because such statements are usually hearsay.** *See Taylor v. State,* **855 So.2d 1, 22–23 (Fla.2003);** *Chandler v. State,* **702 So.2d 186, 197 (Fla.1997);** *McElveen v. State,* **415 So.2d 746, 748 (Fla. 1st DCA 1982). Section 90.801(2), Florida Statutes (2008), provides an exception to this general rule where "the declarant testifies at the trial or**

**hearing and is subject to cross-examination concerning the statement and that statement is: .... (b) Consistent with the declarant's testimony and is offered to rebut an express or implied charge against the declarant of improper influence, motive, or recent fabrication." Additionally, to be admissible under section 90.801(2)(b), the prior consistent statement must have been made "before the existence of a fact said to indicate bias, interest, corruption, or other motive to falsify."** *Taylor,* **855 So.2d at 23;** *see also Keffer v. State,* **687 So.2d 256, 258 (Fla. 2d DCA 1996) (citations omitted);** *McElveen,* **415 So.2d at 748. In** *Jenkins v. State,* **547 So.2d 1017, 1020 (Fla. 1st DCA 1989), this court explained that in order to introduce a prior consistent statement, "[t]here must be an initial attempt on cross-examination to demonstrate the improper influence, motive or recent fabrication and, once such an attempt has successfully occurred, then prior consistent statements are admissible on the redirect examination or through subsequent witnesses to show the consistency of the witness'[s] trial testimony." A prior consistent statement is not admissible under section 90.801(2)(b) "merely because the opposing lawyer has attacked the credibility of the witness or challenged the truthfulness of the statement given by the witness at trial."** *See Monday v. State,* **792 So.2d 1278, 1280 (Fla. 1st DCA 2001) (citing** *Jenkins,* **547 So.2d at 1020–21).**

**In the instant case, the first condition for admitting prior consistent statements under section 90.801(2) was met because J.E.A. testified at trial**

**and Appellant was given the opportunity to cross-examine J.E.A. regarding his prior statement. Thus, this issue turns on whether the officer's testimony was introduced to rebut an express or implied charge against J.E.A. of improper influence or motive to falsify, and, if so, whether J.E.A.'s prior consistent statement was made before the existence of such influence or motive.**

**Appellant's counsel never directly or implicitly alleged that J.E.A. had any motive to lie or that he had been subjected to any pressure from outside sources to testify in a certain way. Rather, Appellant's counsel elicited testimony from J.E.A. that M.B. told him that the victim performed fellatio on Appellant and suggested that J.E.A. was merely repeating M.B.'s allegations, not that M.B. was influencing J.E.A. to testify against Appellant. This does not constitute an "improper influence" under section 90.801(2)(b). Counsel was simply attacking the credibility of J.E.A.'s testimony that he had personally observed the criminal act.**

**Moreover, the record does not demonstrate that J.E.A. made the statement to the investigating officer prior to M.B.'s telling him about the sex act between Appellant and the victim. Rather, J.E.A.'s testimony suggests M.B. told him about the incident before J.E.A. told the Mother, who later called the police. Thus, J.E.A.'s account of the crime to the investigating officer was not made prior to M.B.'s alleged influence. We conclude that the**

**trial court erred in admitting the investigating officer's hearsay testimony of J.E.A.'s prior consistent statement under section 90.801(2)(b).**

**We further conclude that the trial court erred in admitting the investigating officer's hearsay-within-hearsay testimony as to J.E.A.'s account of Appellant's threat not to allow him to play with his toys. Section 90.805, Florida Statutes (2008), provides that "hearsay within hearsay" may be admissible "provided each part of the combined statements conforms with an exception to the hearsay rule." In the instant case, Appellant allegedly threatened J.E.A. by telling him that he would not be able to play with his toys if he told anyone what Appellant had done with the victim. This statement constituted an admission by Appellant to J.E.A., which would have been admissible as a hearsay exception under section 90.803(18)(a), Florida Statutes (2008), if J.E.A. had testified to this threat by Appellant. There is no relevant hearsay exception, however, regarding the second level of hearsay. There were no circumstances existing that would qualify J.E.A.'s words to the investigating officer as an exception to the hearsay rule. Therefore, the trial court's overruling of Appellant's objection to this testimony was error.**

## (c) Prior Identification

### When Applicable

### *Davis v. State*, 52 So.3d 52 (Fla. 1st DCA 2010)

**Prior ID inadmissible where the statements was made three months after crime**

**Lorenzo Davis appeals his conviction for armed robbery with a firearm, contending that the trial court erred by admitting hearsay testimony of a police investigator recounting the statement of a witness. We agree and reverse.**

**The victim was robbed at gunpoint by three men at night, and was easily able to identify two of the men, who were convicted and sentenced in separate proceedings, but he was unable to identify the third after being shown a number of photo arrays, and, in fact, he identified a different man. One of the perpetrators, Steven Bellamy, testified at trial and named defendant as the third man. The second perpetrator, Philip Combs, whose fingerprints had been found on the door of the victim's taxicab, said he was unable to remember anything about the incident, which occurred three years prior, except that he was one of the robbers. His lack of memory surprised the prosecutor, who sought to admit the testimony of Investigator Kyle Troop, to whom Combs had confessed and implicated defendant three months after the crime.**

**Over objection, the court admitted Investigator Troop's testimony as**

**non-hearsay under section 90.801(2)(c), Florida Statutes (2006), which provides that if the declarant testifies at trial, a statement is not hearsay if it is "[o]ne of identification of a person made after perceiving the person." This exception applies if the declarant was an eyewitness or a victim who identified the alleged perpetrator soon after the crime or soon after coming into contact with him or her.** *See Ibar v. State,* **938 So.2d 451 (Fla.2006);** *Evans v. State,* **838 So.2d 1090 (Fla.2002);** *Ross v. State,* **993 So.2d 1026 (Fla. 2d DCA 2008);** *Rutherford v. State,* **902 So.2d 211 (Fla. 4th DCA 2005);** *Liscinsky v. State,* **700 So.2d 171 (Fla. 4th DCA 1997);** *Stanford v. State,* **576 So.2d 737 (Fla. 4th DCA 1991).**

**Investigator Troop said that Combs had recounted the facts surrounding the robbery, and told him defendant and Bellamy were the two other men involved. This did not constitute an identification made shortly after perceiving defendant, but was instead an accusatory statement to the police implicating an accomplice. Section 90.801(2)(c) does not apply in this kind of situation to render it non-hearsay.** *See Smith v. State,* **880 So.2d 730 (Fla. 2d DCA 2004).**

**Nor was the officer's statement admissible to impeach the witness under sections 90.608 and 90.614(2), Florida Statutes (2006), because Combs repeatedly said he was unable to remember anything about the crime.**

## Declarant Must Testify

### *Golden v. State*, 114 So.3d 404 (Fla. 4th DCA 2013)

**Officer's testimony that defendant's children identified him as the driver was inadmissible**

**An officer of the Fort Lauderdale Police Department testified that he saw a vehicle being driven by a driver who was not wearing a seatbelt. The officer made a U-turn so that he could make a traffic stop. He turned on his lights and siren. By the time he caught up to the vehicle, it was stopped and the driver had stepped out and was walking towards the back of the vehicle.**

**There were children in the vehicle with the driver. Although the appellant filed a motion in limine and objected at trial to any testimony from the officer as to what the children said,[1] the court allowed the officer to tell the jury that the children in the vehicle were appellant's children. The officer did not have personal knowledge of their parentage but learned it from what the children told him at the scene.**

**The officer also used the DAVID (Driver and Vehicle Information Database) to identify appellant. He put in the social security number given to him by the driver, and appellant's driver's license picture appeared. The officer was able to identify appellant in court. Nevertheless, the defense challenged the officer's identification by noting that the officer had noted on his police report that appellant did not have gold teeth, when in fact he did.**

**The officer's testimony of what the children said (identifying appellant**

**as their father and the driver of the vehicle) was inadmissible hearsay, because the children did not testify. Contrary to the state's contention that the officer had other knowledge that the children were those of the appellant, it is clear that the officer was testifying based only on what the children told him. The officer was asked, "How do you know they were [appellant's] children?" To this he responded, "They told me that was [their] dad." Thus, the court erred in permitting the officer to testify to the identification of appellant made by the children.**

## *Constant v. State*, 120 So.3d 122 (Fla. 4th DCA 2013)

**Victim's out-of-court statement to officer identifying defendant as the perpetrator was inadmissible hearsay**

**The other victim, Scott, did not testify at trial. Instead, the State called a police officer to say that Scott identified Constant in a photo lineup. The defense objected, arguing that the proposed evidence was inadmissible hearsay, a violation of the Confrontation Clause, and contrary to the United States Supreme Court's decision in *Crawford v. Washington,* 541 U.S. 36, 124 S.Ct. 1354, 158 L.Ed.2d 177 (2004). The trial court overruled the defense's objection, finding that the testimony was admissible as a hearsay exception.**

**Over objection, the police officer testified that Scott identified Constant from a series of photos as the man who robbed him. According to the officer, Scott signed and dated the photo, on which he wrote: "This is the person that pull [sic] out a gun on me while I was working at the [gas**

**station]." Over the defense's renewed objection, the photo was then admitted into evidence.**

**On appeal, Constant argues that the trial court committed reversible error in admitting the officer's testimony of Scott's identification because such evidence presented inadmissible hearsay. As an issue involving the admissibility of evidence, we review this matter for an "abuse of discretion, limited by the rules of evidence."**

**In this case, Scott did not testify at trial and was not subject to cross-examination. As such, the officer's testimony regarding Scott's out-of-court identification of Constant was inadmissible hearsay, making the admission of the associated identifying photograph erroneous.**

## *Holborough v. State*, 103 So.3d 221 (Fla. 4th DCA 2013)

**Arresting officer's testimony identifying victim via Florida ID was inadmissible hearsay**

**Appellant was charged with felony battery. At trial, Andrea Berube did not testify. A neighbor said he saw appellant striking a female as she was seated on the ground. A police officer who responded to the scene saw appellant straddling a woman who was face down and covering her face; appellant was repeatedly hitting the woman. The officer arrested appellant for domestic battery.**

**At trial, the prosecutor asked the arresting officer if he was able "to find out the identity of that female that [he] saw beaten." The defense raised**

**a hearsay objection, which the court overruled. After twice "refreshing his recollection" with the police report, the officer identified the victim as "Andrea Berube." Questioning by the court revealed that the officer based his identification on "a Florida ID" that the woman displayed to him.**

**The statement of one person to another as to his identity is hearsay that does not fall under the section 90.801(2)(c) exclusion from hearsay for statements of "identification of a person made after perceiving the person."**

**In this case, without the officer's hearsay testimony, there was no proof as to the identity of the victim, an essential element of the crime of battery.**

# III. HEARSAY EXCEPTIONS (§ 90.803)

## § 90.803(1): Spontaneous Statement

### *Ruff v. State*, 115 So.3d 1023 (Fla. 4th DCA 2013)

**Statement admissible where witness was describing her perceptions of defendant as she watched him**

**Alan Ruff appeals his conviction for first-degree murder and sentence of life in prison.**

**During the trial, the State presented evidence of the details of the phone conversation between Ruff's daughter and her co-worker. The co-worker testified:**

> **A: We were on the phone and she just mentioned that her father had just gotten home and—**

**Q. Okay.**

**A. You know, she sound funny, she sound, and she told me that something was wrong and he had scratches on him and he had blood on his shirt and I asked her if everything was okay and she said, yeah, yeah, I'll call you back.**

**Section 90.803(1) provides a hearsay exception for "a spontaneous statement describing or explaining an event or condition made while the declarant was perceiving the event or condition, or immediately thereafter, except when such statement is made under circumstances that indicate its lack of trustworthiness." § 90.803(1), Fla. Stat. (2010). "A spontaneous statement must be made at the time of, or immediately following, the declarant's observation of the event or condition described ... the statement must be made without the declarant first engaging in reflective thought."** *Ibar v. State,* **938 So.2d 451, 467 (Fla.2006) (internal quotations omitted). The co-worker's testimony supports the conclusion that Ruff's daughter was describing to the co-worker her perceptions of her father as she was seeing him arrive home.**

## § 90.803(2): Excited Utterance

### Foundation for Admission

### *Smith v. State*, 2016 WL 64341 (Fla. 4th DCA, Jan. 6, 2016)

**Three requirements for a statement to qualify for the excited utterance to the hearsay rule: (1) an event startling enough to cause nervous excitement; (2) the statement must have been made before there was time to contrive or misrepresent; and (3) the statement must have been made while the person was under the stress of excitement caused by the startling event**

**The issue we address is the admissibility of two statements. The first is the daughter's statement, made during her second call to 911, on the morning of the murder. On that 911 tape, the daughter told the dispatcher that the defendant had told the aunt "it was serious this time" and he's going to "turn himself in." The second is the aunt's statement to the daughter about what the defendant had told the aunt.**

**The daughter's statement on the 911 tape was the subject of a pre-trial hearing where defense counsel sought to have the recording excluded as double hearsay. At that same hearing, the State played a tape of the aunt calling 911 immediately after the daughter called 911 for the second time. During the aunt's 911 call, she identified herself as the victim's sister-in-law. She repeated multiple times, "Could you please get somebody."**

**The defendant argues the trial court abused its discretion in admitting the daughter's statement during her second 911 call where she relayed the information from her aunt regarding the aunt's conversation with the defendant. He argues the statement was inadmissible double hearsay**

**because the aunt's statement to the daughter was not an excited utterance.**

**The State responds that because the 911 recording is not included in the record, there is an inadequate record to review the issue. We disagree.**

**Because the aunt's statement to the daughter was: (1) made under the stress and excitement of the suspected death of the victim; (2) after the defendant called the aunt admitting his involvement with the victim's death; and (3) was made close to the startling event, the trial court correctly determined it was admissible as an excited utterance. *See Barron v. State,* 990 So.2d 1098, 1101 (Fla. 3d DCA 2007). We therefore affirm.**

## *Thomas v. State*, 125 So.3d 928 (Fla. 4th DCA 2013)

**Party must lay a proper foundation for admission of hearsay statement as excited utterance**

**The testimony at issue is an eyewitness's description of an altercation between Thomas and the victim, during which the victim yelled out "he has a knife, he has a knife." The trial court allowed the eyewitness to testify regarding what she heard the victim say. Thomas asserts that the trial court erroneously admitted this testimony as an excited utterance.**

**The party seeking to qualify a statement as an excited utterance must lay a proper foundation for its admission. *Mariano,* 933 So.2d at 115. Here, the witness testified that she heard a loud noise coming from the patio late at night. She rushed outside to find a stranger fighting with the victim and she joined the struggle. During the altercation, the victim exclaimed, "He has a knife, he has a knife." This testimony establishes that all three**

**requirements were met, since a home invasion constitutes a startling event, the statement was made at the time the struggle was in progress, and the person who made the statement was being attacked by a stranger holding a knife. On the testimony presented by the eyewitness, the trial court correctly ruled that the excited utterance exception applied to the eyewitness's statement.**

## *Brandon v. State*, 138 So.3d 1150 (Fla. 1st DCA 2014)

**Transcript of 911 call inadmissible absent showing whether caller was still under the emotional stress of the incident at time of call**

**On the day of Brandon's jury trial, the state learned that the victim, the person who purportedly made the 911 call, would not testify. The defense objected to the admission of the 911 call, arguing it was inadmissible hearsay because the purported caller was not going to testify at trial. However, the state sought to admit the statement as an excited utterance, an exception to the hearsay rule under section 90.803, Florida Statutes. The state called the 911 records custodian to authenticate the audio printout of the 911 call, and Brandon objected, arguing that the state had not laid a proper predicate to admit the 911 call as an exception to the hearsay rule. For the reasons that follow, we hold that the trial court erred in admitting the transcript of the 911 call into evidence.**

**As announced by the supreme court in *Stoll v. State,* 762 So.2d 870 (Fla.2000), the excited utterance exception to the hearsay rule requires a showing that there was an event startling enough to cause nervous**

**excitement, and the statement was made under the stress or excitement caused by the event before the declarant had time to reflect or contrive. *Id.* at 873; *see also Powell v. State,* 99 So.3d 570, 573–74 (Fla. 1st DCA 2012). A proper foundation to admit a hearsay statement under the excited utterance exception may be laid by showing that the statement meets the *Stoll* test. *See Thomas v. State,* 125 So.3d 928 (Fla. 4th DCA 2013).**

**In this case, it was the state's burden to present evidence to satisfy the elements of the *Stoll* test. However, the state failed to show whether the caller was still under the emotional stress of the incident at the time of the call or whether the caller had time to reflect on the events prior to making the call. Further, the state failed to establish even the identity of the person who made the 911 call. Because the state failed to establish the necessary predicate to admit the transcript of the 911 call, the trial court erred by admitting it.**

## Length of Excited State

### *Taylor v. State*, 146 So.3d 113 (Fla. 5th DCA 2014)

**Declarant's excited state can exist for a substantial amount of time after the event occurs**

**At trial, Taylor's ex-girlfriend, Tambra Bacon, testified that shortly after their relationship ended, she was driving her new boyfriend's car to a McDonald's when she saw Taylor standing in the middle of the road. After making eye contact with Bacon, Taylor walked in front of her vehicle, yelled**

**out various insults, and threatened to kill her. As Bacon sped away, she saw a gun in Taylor's hand and heard what sounded like three gunshots. She then drove to a nearby restaurant, where she dialed 911. However, upon seeing a police officer nearby—later identified as Officer Carlos Davila—she hung up and told him what happened.**

**An excited utterance is "a statement or excited utterance relating to a startling event or condition made while the declarant was under the stress of excitement caused by the event or condition."§ 90.803(2), Fla. Stat. For a statement to constitute an excited utterance, three requirements must be met: (1) there must have been an event startling enough to cause nervous excitement; (2) the statement must have been made before the declarant had time to contrive or misrepresent; and (3) the statement must have been made while the declarant was still under the stress of excitement caused by the event. *State v. Jano,* 524 So.2d 660, 661 (Fla.1988). The excited state can exist for a substantial amount of time after the event occurs.**

## *Lucas v. State*, 67 So.3d 332 (Fla. 4th DCA 2011)

**Statements admissible when made immediately after stress or excitement of event**

**Appellant appeals his convictions for burglary of a dwelling with a battery and aggravated battery.**

**When the police arrived, they spoke with Glushko. Officer Stenger testified, over defense objection, that Glushko told the officer that she was**

**arguing with appellant when appellant started pushing and slapping her. Appellant became angry and grabbed her by the neck and said he was going to kill her. Glushko got away from appellant when Freeman let her into the apartment. Appellant pursued Glushko and started yelling and banging on the door. Freeman sustained two fractures around her eye and was hospitalized for three days.**

**The court also admitted, over the defense's objection, telephone calls between appellant and Glushko made while appellant was in the county jail. During these calls, appellant was angry with Glushko for going to the authorities and telling them "what really happened." Appellant questioned Glushko, asking how her cooperation was "gonna benefit" him. Appellant told Glushko to "plead the Fifth Amendment." Glushko later told appellant that she was already doing things for appellant with the "P" word, later understood to refer to perjury. Ultimately, Glushko declined to press charges or cooperate in the case, claiming she had no memory of the events from that date.**

**We also find that the trial court did not err in admitting Glushko's statements to the police, which were made immediately after the stress and excitement of appellant's attack on Glushko and Freeman. Glushko's statement took place within five to ten minutes of the police officer's dispatch to the scene. The officer testified to finding Glushko crying, bruised, and missing a tooth. As the supreme court has explained:**

> **In order for a statement to qualify as an excited utterance exception to the hearsay rule pursuant to section 90.803(2), Florida Statutes (2007), the statement must be made (1) regarding an event startling enough to cause nervous excitement; (2) before there was time to contrive or misrepresent; and (3) while the person was under the stress or excitement caused by the event.**

**The trial court also properly admitted the jailhouse telephone conversation between appellant and Glushko. "[E]vidence that an accused 'in any manner endeavors to evade a threatened prosecution ... is admissible against the accused where the relevance of such evidence is based on consciousness of guilt inferred from such actions.' "** *Knotts v. State,* **533 So.2d 826, 827 (Fla. 1st DCA 1988) (citation omitted).**

## *Bienaime v. State,* 45 So.3d 804 (Fla. 4th DCA 2010)

**Statements inadmissible where sufficient time passed to allow declarant to reflect on what happened**

**The defendant appeals his conviction and sentence on charges of false imprisonment, aggravated assault with a firearm, and battery involving a domestic violence incident. He argues that the trial court erred in admitting an officer's testimony as to what the victim told her, as an excited utterance and in denying the motions for mistrial. We agree and reverse.**

**At trial, the State called an officer who spoke with the victim at the police station after she was treated by the paramedics. The State attempted**

**to lay a foundation to admit what the victim had told the officer as an excited utterance. The court asked the State to proffer the evidence. Defense counsel objected on the grounds of hearsay and *Crawford v. Washington.* The trial court found that the State had laid the proper predicate and overruled the objections.**

**The officer testified that she came into contact with the victim around 3:25 p.m. on the day of the incident. The victim was upset, shaken, scared, and "wanted to tell what happened that day." The State then asked the officer what the victim told her. She repeated the sequence of events leading up to the victim's release. At that point, she testified that the victim said "finally after about three hours after him [the defendant] doing this to me he said, okay, I'm ready to go back to prison, go ahead, and he leaves and lets her out the door." Defense counsel again objected and requested a sidebar, but the trial court said it would "entertain it later."**

## 911 Tape: Declarant Not Required to Testify

### *Bryant v. State*, 98 So.3d 1252 (Fla. 4th DCA 2012)

**Admission of a recording of defendant's telephone call requesting emergency assistance is not conditioned on defendant testifying at trial**

**Appellant was charged with battery on a law enforcement officer, possession of cocaine and resisting an officer without violence for events occurring on August 22, 2006. Prior to trial, appellant requested a ruling on the admissibility of a 911 call he made during the incident. The State stipulated that the tape was authentic. The tape was played for the trial**

**court. In the tape, appellant stated his name and that he had an emergency because an officer had tried to run him over while he was riding his bike.**

**Appellant argued that the tape "speaks for itself" as an excited utterance occurring shortly after an officer tried to run him over and noted that the State stipulated to its authenticity. The prosecutor stated at the hearing:**

> **Well, I'm stipulating to authenticity, and the foundation of it, being that they don't need to call a witness to authenticate it.** *I also do believe, as far as hearsay goes, it's an excited utterance.* **My objection, however, is that it's a self serving statement of the defendant, for which he will not be subjected to cross examination. (emphasis added).**

**The trial court asked whether appellant would be testifying and appellant indicated that he would not. The trial court stated "[t]hen that tape can't come in just to play it for the jury because he's subject to cross examination as a statement." Appellant disagreed, arguing that if the trial court believed the tape fit within a hearsay exception, then it was admissible regardless of whether he testified or not. The trial court reasoned that the tape was self-serving and, thus, required appellant's testimony.**

**Appellant indicated that the 911 operator was the only witness available to him, and the trial court responded that the operator would not be an appropriate witness since the operator did not observe the incident**

**preceding the 911 call.**

**Here, the trial court indicated that it had "no problem" admitting the tape as an excited utterance, so long as someone who observed the events testified. The trial court commented on the self-serving nature of the 911 tape, as well as the need for cross-examination. However, 911 tapes are non-testimonial in nature and are admissible without the declarant testifying and being subjected to cross-examination.**

**The trial court's error was not harmless. The error infringed upon appellant's right not to testify.** *See United States v. Hung Thien Ly,* **646 F.3d 1307, 1313 (11th Cir.2011) (explaining that the right to testify "is more properly framed as a right to choose whether to testify" and reflects "competing considerations" of the right to remain silent or to "break" that silence). In arguing for the pretrial ruling, appellant indicated that he would not be testifying. Because appellant testified, evidence of his seven prior felony convictions was admitted, and appellant made statements that opened the door to previously inadmissible evidence. It cannot be said that this error did not contribute to appellant's convictions.**

## § 90.803(3): State of Mind

## Relevancy Consideration

### *Combs v. State*, 133 So.3d 564 (Fla. 2d DCA 2014)

**Relevancy is a consideration in determining admissibility under the state of mind exception**

**The masked robbery with which Combs was charged was committed by two men. It appears undisputed, based upon police officers' testimony, that one of the men was Dennis Kauffman. Two days after the robbery, Kauffman committed suicide.**

**Combs' defense was that Kauffman and Anthony Foreman were responsible for the crime. Foreman had previously confessed to robbing the bank, detailing how he used items belonging to Combs as a disguise in the commission of the crime. Combs sought to introduce several out-of-court statements of Foreman and Kauffman made just before the robbery to support his defense that Foreman and Kauffman planned and committed the robbery together.**

**At a bench conference following the State's repeated hearsay objections to Combs' testimony, defense counsel argued that section 90.803(3), Florida Statutes (2011), permitted the statements to be introduced. He contended that Combs would testify as to conversations he had with Foreman and Kauffman prior to the robbery in which both men stated their intention to rob the bank. The court sustained the hearsay**

**objections without elaboration.**

**Section 90.803(3)(a) is the then-existing state of mind hearsay exception. "A statement of the declarant's then-existing state of mind ... including a statement of intent, plan, motive, [or] design ... when such evidence is offered to .... [p]rove or explain acts of subsequent conduct of the declarant," is admissible. § 90.803(3)(a)(2). Relevancy is also a consideration in determining admissibility under the state of mind exception. Charles W. Ehrhardt, *Ehrhardt's Florida Evidence* § 803.3b (2011 ed.). That is, "[t]he conduct that the declaration is offered to prove must be relevant to the issues in the case." *Id.* And there must be "evidence demonstrating that the declarant acted in accord with the state of mind or intent." *Penalver v. State,* 926 So.2d 1118, 1128 (Fla.2006).**

**With regard to Kauffman's hearsay statements, "[t]he rule is quite generally recognized that the statements of a deceased person as to the purpose and destination of a trip or journey he is about to take are admissible." *See Bowen v. Keen,* 154 Fla. 161, 17 So.2d 706, 711 (1944). Clearly, Kauffman's alleged statements were relevant and supported by the fact that the robbery occurred. Foreman's alleged statements were also admissible. Foreman's inculpatory statements were relevant to Combs' defense; Foreman's confession was admitted into evidence. And again, the fact that the robbery occurred is sufficient evidence demonstrating that Foreman acted in accord with his stated intent. *See Penalver,* 926 So.2d at**

**1118. Further, although Foreman's confession was admitted, so was his recantation. His credibility, as well as Combs', was an issue before the jury. Foreman's alleged statements would have been valuable to the defense.** *See Morris v. State,* **487 So.2d 291, 292 (Fla.1986).**

## Murder Victim's State of Mind

### *Wolfe v. State*, 34 So.3d 227 (Fla. 4th DCA 2010)

**Letter written by victim five days before his disappearance was admissible under state of mind exception as it was relevant to prove his murder**

**Wolfe contends that the trial court erred in permitting the State to admit at trial, over objection, the letter written by Jackson five days before his disappearance because it was hearsay. In the letter, Jackson stated his son and ex-wife were coming to visit him, and he hoped things would go well and that they would move in with him. "[O]rdinarily, a victim's state of mind is not a material issue, nor is it probative of a material issue in a murder case. However, there are some exceptions to this general rule."** *Brooks v. State,* **787 So.2d 765, 771 (Fla.2001) (citation omitted). For example, the "victim's state of mind may be relevant to an element of the crime."** *Id.* **(citing** *Stoll v. State,* **762 So.2d 870 (Fla.2000)). Here, Jackson's bones did not show any sign of pre-mortem injury, and as discussed above, the State bore the burden of demonstrating that Jackson's death was the result of the criminal agency of another.** *See Barrow,* **27 So.3d at 220. Thus, the State, in its case in chief, needed to demonstrate Jackson had been murdered, as**

**opposed to, for example, having run away or committed suicide. The instant letter falls within the state-of-mind hearsay exception, *see* § 90.803(3)(a) 1., Fla. Stat. (2007), because it demonstrates that Jackson wanted to reconcile with Barbara and wanted to be a father to his son. The letter would also explain Jackson's subsequent conduct in clandestinely meeting Barbara at a motel room, corroborative of the testimony that it was there that he was ambushed by Wolfe.**

## *Dorbad v. State*, 12 So.3d 255 (Fla. 1st DCA 2009)

**Victim's statements inadmissible under state of mind exception where there was no issue as to who instigated the confrontation**

**Section 90.702, Florida Statutes (2006), governs the admissibility of expert testimony and provides in pertinent part:**

**If scientific, technical, or other specialized knowledge will assist the trier of fact in understanding the evidence or in determining a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education may testify about it in the form of an opinion; however, the opinion is admissible only if it can be applied to evidence at trial.**

**Here, the trial court inexplicably reasoned that Dr. Greer's use of words such as "calm" and "shock" would confuse the jury based on their divergent clinical and lay definitions. Based on section 90.702, the evidence should have been admitted unless it would not assist the trier of fact in understanding the evidence or determining a fact in issue.**

**In *Boyer v. State,* 825 So.2d 418, 419-20 (Fla. 1st DCA 2002) (citations omitted), this court considered a trial court's exclusion of a psychiatrist's testimony regarding the phenomena of false confessions, stating in pertinent part:**

> **Expert testimony should be excluded when the facts testified to are of such nature as not to require any special knowledge or experience in order for the jury to form its conclusions. However, the trial court is not compelled to exclude the expert just because the testimony may cover matters within the average juror's comprehension. Even though the jury may have beliefs about the subject, the question is whether those beliefs are correct.**
>
> **.... Had Dr. Ofshe's testimony been admitted, it would have let the jury know that a phenomenon known as false confessions exists, how to recognize it, and how to decide whether it fit the facts of the case being tried. It is for the jury to determine the weight to give to Dr. Ofshe's testimony, and to decide whether they believed his theory or the more commonplace explanation that the confession was true.**

**In determining whether evidence will assist the trier of fact in a meaningful way, the first step is considering what the evidence, if admitted, would have tended to explain or prove.**

**It is clear the State opined that appellant's calm demeanor was highly unusual and indicative of his cold-blooded nature. It is likewise clear that**

**appellant was attempting to rebut this contention with Dr. Greer's expert opinion by suggesting that appellant's calm demeanor was a result of his shock and stress, not his callousness. Dr. Greer's expert testimony on demeanor in stressful situations would allow the jury to consider two opposing views of the evidence and assist the jury in determining what weight to place on evidence of appellant's calm demeanor. Thus, it would clearly aid in the jury's understanding of the evidence. Furthermore, whether appellant's calm demeanor was indicative of a cold-blooded nature or stress is probative of appellant's guilt because the jury would be more likely to believe appellant committed the crime in anger and hate if it believed the State's version of the evidence. If the jury accepted Dr. Greer's opinion that appellant was in shock and under stress in the hours after the shooting, the jury would be more likely to believe appellant's accidental shooting defense. As such, it appears the trial court erred in excluding the evidence as it (1) aided the jury in understanding two possible motivations for appellant's behavior and (2) was probative of appellant's guilt.**

**We next address the hearsay statements made by the victim in this case. Appellee asserts the disputed hearsay statements were admissible pursuant to the state of mind exception to the hearsay rule. Section 90.803(3)(a), Florida Statutes (2006), governs the state of mind exception to the hearsay rule and provides in pertinent part:**

**(a) A statement of the declarant's then-existing state of mind, emotion, or physical sensation, including a statement of intent, plan, motive, design, mental feeling, pain, or bodily health, when such evidence is offered to:**

**1. Prove the declarant's state of mind, emotion, or physical sensation at that time or at any other time when such state is an issue in the action.**

**2. Prove or explain acts of subsequent conduct of the declarant.**

**The state of mind exception authorizes the use of hearsay to establish the declarant's state of mind when his or her state of mind is material to the action. *Stoll v. State,* 762 So.2d 870, 875 (Fla.2000). When applied to murder prosecutions, the state of mind exception does not typically authorize the use of a victim's hearsay statements as establishing the victim's state of mind because the victim's state of mind is not generally a material issue in a case. *Id.***

**In some homicide cases involving claims of accident or self-defense, the victim's state of mind may be pertinent, such as where there is an issue of who instigated the confrontation. *See Peterka v. State,* 640 So.2d 59, 64 (Fla.1994) (Florida Supreme Court allowed hearsay statements of victim to rebut defendant's theory that victim instigated the fight); *see also Huggins v. State,* 889 So.2d 743, 757 (Fla.2004) (allowing hearsay statements establishing victim's state of mind to rebut appellant's theory that victim**

**willingly left a local shopping area with him);** *Kingery v. State,* **523 So.2d 1199, 1202 (Fla. 1st DCA 1988) (holding that a claim of self-defense will open the door to hearsay statements establishing the victim feared the accused). In the instant case, however, there was no doubt that the initial instigator of the confrontation was appellant. The main relevance of the admission of these statements was to demonstrate the bad character of appellant. Under these circumstances, the admission of the statements constituted reversible error.**

**We reverse and remand for a new trial.**

## § 90.803(4): Statement for Purposes of Medical Diagnosis or Treatment

### *Harris v. State*, 37 So.3d 285 (Fla. 2d DCA 2010)

**Victim's testimony as to what he was told at hospital concerning the extent of his injuries was inadmissible hearsay**

**It is true that a statement for purposes of medical diagnosis or treatment is an exception to the general rule prohibiting the admissibility of hearsay.** *See* **§ 90.803(4), Fla. Stat. (2008). That exception, however, applies to statements made by "a person seeking the diagnosis or treatment."** *Id.* **"A statement is not admissible under section 90.803(4) unless there is a foundation showing that the statement was made for the purpose of diagnosis or treatment and that the person making the statement knew it was being made for that purpose." Charles W. Ehrhardt,** *Florida Evidence* **§ 803.4, at 861 (2009). In other words, it applies when a doctor, or perhaps a**

**nurse or paramedic, explains what a victim of a crime told them when seeking treatment. *See* Glen Weissenberger & A.J. Stephani, *Florida Evidence-2009 Courtroom Manual* Chapter 803(4), at 500-02 (2009). It does not apply to allow the victim to state in court what the doctor explained to the victim about the reason or the necessity for treatment.**

## § 90.803(5): Recorded Recollection

## Requirements for Admission

### *Polite v. State*, 116 So.3d 270 (Fla. 2014)

**Witness must testify that the recorded statement accurately reflects the witness's knowledge**

**Before Levine testified at trial, the prosecutor informed the judge that she was afraid something would happen to her if she testified. She reluctantly took the stand. When asked to recount what happened the morning of the crime, she initially claimed she did not remember but then admitted that when law enforcement arrived she told them what happened. She claimed, however, that she did not identify any of the perpetrators to the officers. The prosecutor showed her the sworn statement she gave police shortly after the crime, and Levine identified the statement as hers. When asked if it was "true and correct," however, she claimed not to have read it. At that point, the court overruled the defendant's "improper predicate" objection. Then Levine refused to read her statement and refused to testify to the events of July 14. The court sent the jury out and instructed Levine**

**that she was under subpoena and could not refuse to answer questions.**

**When the jury returned, Levine testified that three men came to her house and kicked the door open. One man put a gun in her daughter's face, and another picked up Levine's purse. She spoke to the intruders but could not remember what she said. After she claimed lack of memory in response to further questions, the prosecutor again asked about her sworn statement. She again admitted that the statement was hers and said that she gave the statement about an hour after the crime. However, she claimed that the events were "not really" fresh in her mind at the time because the "police and everybody was pressuring [her]." Before she could answer the prosecutor's question of whether her statement was "true and correct," defense counsel objected and immediately withdrew the objection.**

**After a bench conference, Levine resumed her testimony and stated that she did not give the three men permission to enter her house. The court then permitted the prosecutor to read the text of her sworn statement into the record.**

**On cross-examination, defense counsel asked whether she could have made a mistake in her statement. Levine responded, "Yes. They was pressuring me. I don't even know if I got the right person."**

**On appeal, Polite argued that because the proper foundation for admitting the content of Levine's written statement as past recollection recorded under section 90.803(5) was not established, the statement was**

**not admissible.**

**We reject the Fifth District's embrace of a totality of the circumstances test and affirm that in Florida the admission of past recollection recorded under section 90.803(5) requires the witness to indicate that the statement was made at a time when the events were fresh in his or her mind and also attest to the accuracy of the memorandum or record. We have previously explained that recording the statement while the matter is fresh in the witness's mind is important because the statement *is* the record of the event or matter.**

**Thus, when statements of past recollection recorded are admitted under this hearsay exception, "the facts are being offered from the record or memorandum," not from the witness's testimony. *See Ehrhardt,* § 803.5 at 891. That is, the contents of the record substitute for the witness's testimony. *Id.* at 894. This means that "the reliability of the assertions rests upon the veracity of a witness who is present and testifying." ("The witness must be able *now* to assert that the record accurately represented his knowledge and recollection at the time."). Accordingly, a witness must testify that the recorded statement accurately reflects the witness's knowledge. If the witness is unable to adequately recall making the record, the witness may nevertheless verify the record or memorandum by testimony that: (1) although the witness does not recall the statement, the witness has a habit of recording such matters correctly or (2) the witness**

**believes the statement is correct because the witness would have been truthful in providing the statement. *See McCormick,* § 283, at 298–99; *Wigmore,* § 747, at 98–9. Thus, we reiterate our previous statement from *Garrett* that a writing is admissible when identified by a witness to have been made contemporaneously with the events in question and about which a witness testifies was accurate at the time written. 336 So.2d at 570 n. 6.**

**In this case, a proper foundation for admission of the witness's statement of past recollection recorded was not established. As we have explained above, the hearsay statement was inadmissible because the witness did not vouch for its accuracy or correctness. Accordingly, we quash the Fifth District's decision in this case and remand for further proceedings in accordance with this opinion.**

## *Bartholomew v. State*, 101 So.3d 888 (Fla. 4th DCA 2012)

**Recorded statement inadmissible where witness' testimony implied that statement was false and witness testified that he could not remember what was said**

**Kino Bartholomew appeals his convictions and sentences for first-degree murder, two counts of attempted second-degree murder, robbery with a firearm, and attempted robbery with a firearm. We reverse because the trial court erred in admitting a taped statement of a State witness into evidence as past recollection recorded over appellant's objection that the State failed to lay the proper foundation for its admission.**

**Prior to calling one of the State's key witnesses, Derek Stephens, the**

**prosecutor proffered Stephens's testimony. During the proffer, Stephens refused to take the oath and said he had a bad memory. He said he did not remember anything about the case or talking to an assisting detective, to whom he had previously made a taped statement regarding the robbery/murder.**

**The prosecutor suggested admitting Stephens's taped statement as recorded recollection. The defense argued that it had previously moved to exclude Stephens as a witness in the trial, which the trial court had not ruled upon. The defense noted that it had a letter from Stephens expressly repudiating the taped statement. The defense made objections that not only had the State failed to lay the proper foundation for past recollection recorded, but also that the State was calling Stephens for the primary purpose of impeaching him with his prior statement to the police. After extensive argument and further defense objections, the trial court found the statement was admissible as past recollection recorded pursuant to *Polite v. State,* 41 So.3d 935 (Fla. 5th DCA 2010).**

**The next day Stephens took an oath. He testified that he had been facing seventeen years in prison in an unrelated case so he made a taped statement for the assisting detective in exchange for help in his own case. He said he received only fifteen months in return for the statement. However, he could not remember what he said in that statement. He stated that hearing his voice on the tape would not help refresh his memory. After the trial court**

**declared him a hostile witness, and in response to the prosecutor's specific questions regarding the statement, he denied that the events it described ever occurred. The prosecutor showed Stephens the repudiation letter he wrote the previous week, which Stephens acknowledged. He said he wrote it because he was changing his life for the better. The prosecutor read the letter, wherein Stephens wrote that the detectives came up with the story, and he rephrased it in the statement he gave in exchange for help in his own case.**

**The assisting detective was recalled, and over defense hearsay objections, the trial court admitted Stephens's taped statement as "past recollection recorded." In the taped statement, Stephens told the detectives that he ran into appellant and another guy in front of a barbershop about five or six days after the First Step fatal robbery.**

**We agree with appellant that the trial court reversibly erred by admitting the repudiated, taped statement of Stephens as past recollection recorded because the State failed to lay the proper foundation for its admission.**

**Florida Statutes (2010), provides an exception to the hearsay rule for past recollection recorded as follows:**

> **A memorandum or record concerning a matter about which a witness once had knowledge, but now has insufficient recollection to enable the witness to testify fully and**

> **accurately, shown to have been made by the witness when the matter was fresh in the witness's memory and to reflect that knowledge correctly. A party may read into evidence a memorandum or record when it is admitted....**

**For it to qualify and be admitted into evidence, the past recollection recorded must be offered by the witness who either lacks a present recollection or has an imperfect present recollection and desires to use a memorandum of a past recollection.** ***Kimbrough v. State,*** **846 So.2d 540, 543 (Fla. 4th DCA 2003). "The witness must be able to assert now that the record correctly represented his knowledge and recollection at the time of the making."**

**Here, Stephens repudiated the taped statement in writing before trial, which he acknowledged, and the State read that repudiation into the record during his testimony at trial. The record also reflects that he repudiated the statement on the witness stand. Thus, even under** ***Polite,*** **the trial court was not at liberty to consider the "totality of the circumstances" as it did here.**

**In our view, Stephens's statement was not past recollection recorded; rather, it was an improper attempted impeachment by the State of its own witness. "Generally ... if a party knowingly calls a witness for the primary purpose of introducing a prior statement which otherwise would be inadmissible, impeachment should ordinarily be excluded."**

**In** ***Morton,*** **the supreme court recognized the danger for abuse where a**

**prosecutor calls a witness who previously gave a statement implicating the defendant but who, like Stephens did in this case, has since repudiated that statement.**

## *Hernandez v. State*, 31 So.3d 873 (Fla. 4th DCA 2010)

**Recorded statement inadmissible where was unable, or unwilling, to attest to the accuracy of the taped conversation**

**Appellant, John Hernandez, appeals his convictions and sentences for two counts of lewd or lascivious molestation and one count of lewd or lascivious exhibition. First, he contends that the trial court erroneously permitted the State to call witness Sherill Hernandez for the sole purpose of introducing otherwise inadmissible impeachment evidence, which highly prejudiced appellant.**

**The standard of review on the admission of evidence is abuse of discretion as limited by the rules of evidence. *Hudson v. State,* 992 So.2d 96, 107 (Fla.2008). Unless it falls within a statutory exception, hearsay evidence is inadmissible. *See* § 90.802, Fla. Stat. (2008).**

**Section 90.803(5), Florida Statutes (2008), provides an exception to the hearsay rule when a witness cannot recall matters of which he or she previously had knowledge.[2] If the proper foundation is laid, a tape-recorded statement may qualify as a recorded recollection. *See Montano v. State,* 846 So.2d 677, 680-81 (Fla. 4th DCA 2003). To be admitted into evidence, the past recollection recorded must be offered by the witness who is either devoid of a present recollection, or possessed of an imperfect present**

**recollection and desires to use a memorandum of a past recollection.** *See Kimbrough v. State,* **846 So.2d 540, 543 (Fla. 4th DCA 2003); § 90.803(5). "***The witness must be able to assert now that the record correctly represented his knowledge and recollection at the time of making.***"** *Kimbrough,* **846 So.2d at 543 (citing J. Wigmore, Evidence §§ 734, 746(2) (Chadbourne rev. 1970));** *see also Montano,* **846 So.2d at 681-82 (witness's tape-recorded statement given to police shortly after criminal incident was improperly admitted under recorded recollection exception to hearsay rule where witness did not acknowledge its accuracy at trial).**

**Here, Sherill Hernandez was unable, or unwilling, to attest to the accuracy of the taped conversation. As such, the State was not able to show it could introduce the document as a "past recollection recorded." Sherill testified definitively that appellant denied abusing P.M. This directly conflicts with the conversation on the tape. Sherill also denied that appellant had offered an explanation to her for abusing P.M., i.e., that he was not mentally or psychologically well. She testified that the tape did not refresh her recollection.**

**Section 90.608(1), Florida Statutes, states that "[a]ny party, including the party calling the witness, may attack the credibility of a witness by ... [i]ntroducing statements of the witness which are inconsistent with the witness's present testimony." However, the supreme court in** *Morton v. State,* **689 So.2d 259 (Fla.1997),** *receded from on other grounds,*

*v. State,* **753 So.2d 29 (Fla.2000), has recognized the risk of abuse where a prosecutor calls a witness who has previously given a statement implicating the defendant but who has since repudiated that statement.** *Bateson v. State,* **761 So.2d 1165, 1169 (Fla. 4th DCA 2000). "[W]here a prosecutor** *knows* **that the witness' testimony at trial will be favorable to the defendant but, nonetheless, calls the witness for the purpose of impeaching [her] with [her] prior statement, the practice may be considered abusive because 'there is no legitimate forensic purpose in calling a witness solely to impeach him.' "** *Id.* **(emphasis added.) Recognizing that a single rule could not be created to encompass all of the circumstances in which a party will seek to impeach her own witness, the court stated: "Generally ... if a party knowingly calls a witness for the primary purpose of introducing a prior statement which otherwise would be inadmissible, impeachment should ordinarily be excluded."** *Morton,* **689 So.2d at 264.**

**In determining whether a party calls a witness for the primary purpose of impeachment, courts may consider "(1) whether the witness's testimony surprised the calling party, (2) whether the witness's testimony affirmatively harmed the calling party, and (3) whether the impeachment of the witness was of** *de minimis* **substantive value."** *Senterfitt v. State,* **837 So.2d 599, 600 (Fla. 1st DCA 2003).**

**Recently, this court adopted the Third District's expanded explanation of the "primary purpose" analysis in** *State v. Richards,* **843 So.2d 962 (Fla. 3d**

**DCA 2003), which noted that the witness's other testimony must be useful to prove a significant fact in the litigation:**

> **Application of the "mere subterfuge" or "primary purpose" doctrine focuses on the content of the witness's testimony as a whole. If the witness's testimony is useful to establish any fact of consequence significant in the contest of the litigation, the witness may be impeached by means of a prior inconsistent statement as to any other matter testified to. In the words of one commentator, the pivotal question is whether the "party [is] calling a witness with the reasonable expectation that the witness will testify [to] something helpful to the party's case aside from the prior inconsistent statement."**

***Ruff v. State,* 31 So.3d 833, 837 (Fla. 4th DCA 2010) (quoting *Richards,* 843 So.2d at 965 (emphasis omitted) (quoting 1 *McCormick on Evidence* § 38, at 142-43 (John W. Strong ed., 5th ed. 1999)).**

## § 90.803(6): Business Records

## Foundation for Admissibility

### *Osagie v. State*, 58 So.3d 307 (Fla. 3d DCA 2011)

**Business records were inadmissible without a custodian of the records or other qualified person testifying as to the accuracy of the records**

**Defendant, the owner of a pharmacy, appeals his conviction for one count of grand theft and one count of medicaid fraud.**

**At trial, over objection, the State proved its case in critical part by using business records from defendant's wholesaler admitted through the testimony of a fraud investigator assigned to defendant's pharmacy, without a custodian of the records or other qualified person testifying as to the accuracy of the records.** ***See Brooks v. State,*** **918 So.2d 181, 193 (Fla.2005) ("To be admissible as a business record, it must be shown that the record was (1) made at or near the time of the event recorded; (2) by or from information transmitted by a person with knowledge; (3) kept in the course of a regularly conducted business activity; and (4) that it was the regular practice of that business to make such a record."); *see also* § 90.803(6)(a), Fla. Stat. (2007) ("A memorandum, report, record, or data compilation, in any form, of acts, events, conditions, opinion, or diagnosis, made at or near the time by, or from information transmitted by, a person with knowledge, if kept in the course of a regularly conducted business activity and if it was the regular practice of that business activity to make such memorandum, report, record, or data compilation, all as shown by the testimony of the custodian or other qualified witness, or as shown by a certification or declaration that complies with paragraph (c) and s. 90.902(11), unless the sources of information or other circumstances show lack of trustworthiness."). The comparison of these records to the payments made by the State being the chief mechanism by which the charges at issue were proven, we cannot conclude the admission of this evidence was harmless.**

## *Lassonde v. State*, 112 So.3d 660 (Fla. 4th DCA 2013)

**Testimony of store clerk regarding how store receipt showing value of goods allegedly stolen by defendant was generated was inadmissible**

**During the trial of appellant for third-degree grand theft, the court permitted a part-time store clerk to testify regarding how a store receipt showing the value of the goods stolen was generated. The defendant objected based upon the clerk's lack of personal knowledge, but the trial court admitted the receipt as a business record. Because the clerk was not qualified to testify concerning the receipt, the court erred in admitting the receipt as a business record. We reverse.**

**The prosecutor presented the clerk with a receipt and asked the clerk to identify it. Over the objection that the clerk lacked knowledge both as to the generation of that particular receipt as well as the business practices of Publix, the clerk was allowed to testify that when a theft occurs, the stolen goods are re-rung on a closed register. This generates a normal sales receipt. Each employee who is operating a register has a number which is recorded on the receipt, so the clerk was able to identify the number of the employee on the receipt as being a person named Travis, not himself. The receipt indicates that it was generated around the time Lassonde was in the store. The testifying clerk did not himself scan the items taken from Lassonde's cart, and he did not testify that he observed the items being scanned. The court nevertheless admitted the store receipt as a business record. That receipt provided the evidence of the value of the goods taken by Lassonde.**

**Accordingly, "[t]o secure admissibility under this exception, the proponent must show that (1) the record was made at or near the time of the event; (2) was made by or from information transmitted by a person with knowledge; (3) was kept in the ordinary course of a regularly conducted business activity; and (4) that it was a regular practice of that business to make such a record." *Yisrael v. State,* 993 So.2d 952, 956 (Fla.2008). Additionally, the proponent is required to present this information in one of three formats: having a records custodian testify to the predicate requirements; by stipulation of the parties to the admissibility of the document as a business record; or, by a statutory certification that complies with sections 90.803(6)(c) and 90.902(11), Florida Statutes (2011). *Id.***

**The customer service clerk's testimony does not meet the requirements of *Yisrael.* While the clerk was able to testify as to how the store re-rings merchandise stolen from the store, this was not his duty nor within his responsibilities. He did not operate the register on that date and did not observe that this receipt was a record of the merchandise in Lassonde's cart.**

## *Armstrong v. State*, 42 So.3d 315 (Fla. 2d DCA 2010)

**Printouts of victim's bank account transactions were inadmissible absent testimony of bank records custodian or provision of a self-authenticating affidavit**

**Cederic Lovell Armstrong appeals his conviction and sentence for fraudulent use of a credit card.**

**The fraudulently used credit card belonged to Dana Lewis. She testified**

**that on the day after Labor Day 2007, she received a telephone call from her bank alerting her to unusual activity in her home equity credit line account.**

**During Lewis' testimony at trial, the State offered as evidence printouts of her account transactions for the relevant time period. Lewis had downloaded and printed this evidence of the transactions in her account from her bank's website. The State sought to present these transactions to her for identification and to establish which were unauthorized. Armstrong's defense counsel objected on hearsay grounds because the State had not produced a records custodian to testify to the authenticity of these records as required by section 90.803(6)(a), Florida Statutes (2007), nor had the State provided an affidavit to self-authenticate them as permitted by section 90.902(11). The trial court overruled the hearsay objection and allowed the printouts into evidence. The State presented no other evidence of the unauthorized transactions for which amounts the bank had reimbursed Lewis. The jury convicted Armstrong as charged. The trial court sentenced him to ten years' incarceration as a habitual offender and ordered restitution to the bank for the amount of the unauthorized withdrawals.**

## Specific Types of Records

### 1. Electronic Record-Keeping System

### *Morrill v. State*, 184 So.3d 541 (Fla. 1st DCA 2015)

**Records from electronic record-keeping system that tracked purchases of ephedrine were admissible under the business records exception to hearsay**

**As a matter of first impression, records from electronic record-keeping system that tracked purchases of ephedrine were admissible.**

**On October 1, 2013, while investigating an unrelated matter, law enforcement officers discovered plastic bottles containing methamphetamine and related paraphernalia in a barn on Appellant's property. Appellant was charged with trafficking in 200 grams or more of methamphetamine. Prior to the jury trial, the State filed a notice of intent to offer evidence of Appellant's purchases and attempted purchases of ephedrine or related compounds, as compiled by the NPLEx, pursuant to the business records exception to the hearsay rule.**

**The State also filed a motion in limine, seeking to introduce the NPLEx report pursuant to the business records exception and section 893.1495, Florida Statutes. In its motion, the State explained that section 893.1495 requires retailers to limit the amount of ephedrine and related compounds sold to an individual, requires purchasers of such products to present a valid identification, and requires retailers to report purchases and attempted purchases of such products to an electronic record-keeping system that is**

**approved by the Florida Department of Law Enforcement ("FDLE"); that the FDLE has contracted with an electronic record-keeping system known as the NPLEx, which is administered by Appriss, Inc.; and that the records custodian of the NPLEx provided a report detailing Appellant's purchases and attempted purchases of such products, which was accompanied by an affidavit that satisfied sections 90.803(6) and 90.902(11), Florida Statutes, and thus qualified as a self-authenticating business record.**

**Appellant objected to the admissibility of the NPLEx report on the ground that it was hearsay and did not fall within the business records exception because Mr. Acquisto could not certify that the businesses that collected the information did so pursuant to, and in compliance with, the business records exception.**

**The NPLEx report was admitted into evidence at trial through the testimony of Captain Raley, a law enforcement officer. Captain Raley testified that state and federal laws require retailers to report to the NPLEx all sales of products containing ephedrine or pseudoephedrine, which are essential ingredients in manufacturing methamphetamine; require purchasers of such products to be over the age of eighteen, to present a valid identification, and to sign for the purchase; and limit the amount of such products one may purchase in a given time-frame. Captain Raley further testified about how he accessed and retrieved from the NPLEx the report of Appellant's purchases and attempted purchases of ephedrine or**

**pseudoephedrine products, testified that the printed report was a fair and accurate depiction of the information he viewed on the NPLEx website, and described what the report reflected. Appellant was ultimately convicted of the charged offense, and this appeal followed.**

**Therefore, we reject Appellant's argument that the NPLEx report was not admissible as a business record because Mr. Acquisto lacked personal knowledge and find that the report is characterized by an independent indicia of trustworthiness. We agree with the State and the trial court that it would be impractical to require the testimony of each employee who made a transaction entry into the NPLEx, or even every retailer.**

> **[T]he NPLEx report is imbued with an independent indicia of trustworthiness, and, as such, qualifies as a business record. The information contained in the NPLEx report was submitted to the NPLEx database in the course of the retailers' regular business activity at the time of the purchase or attempted purchase by employees of the retailers who had firsthand knowledge of the transactions. These submissions were made by individuals who, in the routine course of their employment, had a duty to accurately report the information and could be held criminally liable for a knowing or intentional failure to make an accurate report. In addition, these individuals relied on the information contained in the database as part of the regular course of their employment as it was**

> **unlawful for them to complete the transaction if the database generated a "stop sale" alert.**
>
> **Because the individuals submitting the information had both firsthand knowledge of the purchases or attempted purchases as well as a duty to accurately report the purchases or attempted purchases, we conclude that Acquisto, as custodian of the records, was not required to have firsthand knowledge of the purchases or attempted purchases.... Acquisto averred that the information contained in the NPLEx report was submitted by individuals with firsthand knowledge of the transactions in the regular course of their business, and that the report was an exact representation of the sales logs maintained by Appriss. The trial court acted within its discretion in determining that a proper foundation was laid, and the NPLEx report was admissible under the business records exception to the hearsay rule.**

**_United States v. Mashek,_ 606 F.3d 922, 930 (8th Cir.2010) (holding that the admission of the pseudoephedrine purchase logs did not violate the defendant's confrontation rights because "[t]he pseudoephedrine logs were kept in the ordinary course of business pursuant to Iowa law and are business records under Federal Rule of Evidence 803(6)"); _United States v. Schmitt,_ 12–CR–4076–DEO, 2013 WL 3177885, at *5–6 (N.D.Iowa June 21, 2013) (finding that the custodian of the central state database was the**

**proper person to lay the business records foundation for the NPLEx reports and noting that it would be a practical impossibility to require each retailer employee who made an entry into the database to testify).**

## 2. Police Records

### *Caldwell v. State*, 137 So.3d 590 (Fla. 4th DCA 2014)

**Booking report was inadmissible absent proper foundation**

**Appellant was charged with armed robbery. Appellant's defense was misidentification.**

**To combat the defense theory, the State questioned the arresting officer about the physical description of appellant contained in a "rough arrest" report derived from appellant's booking information. The defense raised a hearsay objection. The trial court deferred ruling to allow the State to "lay a predicate" as to where "the booking information [came] from." The arresting officer explained:**

> **There is a series of questions on a piece of paper called the Rough Arrest form. When somebody is arrested, they are brought to the station. At that point, those questions are asked and the questions are filled in from the answers received by the defendant.**

**Immediately after this testimony, the trial court overruled the hearsay objection. Reading from the booking report, the officer said that appellant**

**was listed at 5′9″ and 180 pounds.**

**Even though it was hearsay, the booking report might have been admissible as a record of a regularly conducted business activity under section 90.803(6), Florida Statutes (2012).** *See Johnson v. Renico,* **314 F.Supp.2d 700, 707 (E.D.Mich.2004) (finding booking records to be properly admitted under the business records exception);** *United States v. Abell,* **586 F.Supp. 1414, 1425 (D.Me.1984) (same). However, the State failed to adequately demonstrate that the report was made at or near the time that the height and weight information was received, that the record was kept in the ordinary course of a regularly conducted business activity, and that it was a regular practice of the booking agency to make such a record.** *See* **§ 90.803(6)(a), Fla. Stat. (2012);** *Yisrael v. State,* **993 So.2d 952, 956 (Fla.2008) ("[T]he evidentiary proponent ... ha[s] the burden of supplying a proper predicate to admit this evidence under an exception to the rule against hearsay.").**

## 3. Medical Records

### *Johnson v. State*, 117 So.3d 1238 (Fla. 3d DCA 2013)

**Doctor's report admissible as business record where assisting nurse satisfied requirements for admission**

**Testimony by nurse who assisted nontestifying doctor in examination and collection of DNA samples from victim at rape treatment center authenticated the evidence and supported introduction of doctor's report as**

**business record under exception to hearsay rule.**

**Admission of nontestifying doctor's report concerning collection of DNA samples from victim did not violate defendant's Sixth Amendment confrontation rights.**

**Testimony, in sexual battery prosecution, by nurse who assisted nontestifying doctor in examination and collection of DNA samples from victim at rape treatment center authenticated the evidence and supported introduction of doctor's report as business record under exception to hearsay rule; nurse verified doctor's signature on report and explained that her own initials on report evidenced that she had been present, she described standard procedures at center, and any chain of custody issues were eliminated by detective's testimony that he accompanied victim to center, waited during examination, received sealed evidence directly from doctor, and submitted it to police department for testing. West's F.S.A. §§ 90.803(6), 90.901.**

## *Linic v. State*, 80 So.3d 382 (Fla. 4th DCA 2012)

**Testimony regarding medical records was inadmissible where witness was not a "person with knowledge"**

**The defendant appeals a conviction and sentence for "culpable negligence" child neglect causing serious bodily injury, as a lesser included offense of aggravated manslaughter of a child.**

**Overruling defendant's hearsay objection to doctor's receptionist's testimony that she searched doctor's medical records and found a record for**

**older sister of baby who was alleged to have been neglected, but not for baby was not an abuse of discretion in prosecution for child neglect; State failed to show that receptionist was a "person with knowledge" under business records hearsay exception. West's F.S.A. § 90.803(6).**

## 4. Business Ledgers

### *Yang v. Sebastian Lakes Condominium Ass'n, Inc.*
### 123 So.3d 617 (Fla. 4th DCA 2013)

**Testimony of company's records custodian was insufficient to establish a foundation for the admission of company's account ledgers**

**Two condominium owners [condo owners] each appeal a final judgment of foreclosure on the condominium association's [Association] liens for assessed maintenance fees. They argue the court erred in admitting testimony concerning the amount of fees owed because the Association could not verify the amounts due before the new management company took over. We agree and reverse.**

**The Association's witness testified that, "[w]hen the accounting records came to us from the prior company, they had listed Frank [Romeo] Senior and Lena as the owners. Until recently, it did not come to light that the actual certificate of title was Frank Romeo [Junior]." When asked whether "[s]ome of the records you received ... were incorrect?" She responded: "But we had no way of knowing that." The husband testified that the records were incorrect as to the amount of the balance.**

**Here, the condo owners objected only on the grounds of lack of**

**foundation and authenticity. There was no objection to trustworthiness or accuracy. It is well-settled in Florida that an objection must specify the legal ground upon which a claim is based, and a claim different than that cannot be heard on appeal. *Chamberlain v. State,* 881 So.2d 1087, 1100 (Fla.2004). Because the condo owners' attorney did not object to the ledgers on the ground that they were untrustworthy, this issue is not preserved. The lack of foundation, however, was argued and preserved.**

> **To secure admissibility under this [business records] exception, the proponent must show that (1) the record was made at or near the time of the event; (2) was made by or from information transmitted by a person with knowledge; (3) was kept in the ordinary course of a regularly conducted business activity; and (4) that it was a regular practice of that business to make such a record.**

***Yisrael,* 993 So.2d at 956. Here, the Association chose to establish the foundation though a records custodian.**

**Here, the management company's employee indicated that she could not testify as to the starting balance. She never worked with the prior accountant, and was unfamiliar with how the records were kept. She could not confirm that the prior accountant used acceptable accounting practices, and she was unable to authenticate the data obtained from the prior accountant as accurate. She could not testify that the condo's lien was valid**

**and the husband's claim of having pre-paid the assessments prior to the takeover was untrue.**

**In short, the Association failed to lay the proper foundation for admitting the ledgers into evidence. And, without the ledgers, the Association failed to prove that the husband and wife owed $29,282.89 and $42,909.45, respectively.**

## 5. Estimates

### *B.J.M., a Child v. State*, 2016 WL 542841 (Fla. 5th DCA, Feb. 12, 2016)

**Testimony regarding the value of damage caused was inadmissible hearsay where emails containing estimates upon which testimony was based were ruled inadmissible**

**B.J.M. (the defendant) appeals his adjudication and disposition orders, entered by the trial court after he was found guilty of committing criminal mischief, in violation of section 806.13(1)(b) 2, Florida Statutes (2013).[1] Determining that the evidence was sufficient to prove criminal mischief, but not sufficient to prove that the amount of damages caused by the defendant's conduct was greater than $200, we reverse and remand for reduction of the defendant's conviction from a first-degree to a second-degree misdemeanor.**

**Here, although the trial court properly ruled that the estimates and emails were not admissible as business records, the victim was nevertheless permitted to testify that the damage caused by the defendant was valued**

**between $1,400 and $1,500. Because no proper foundation was laid for the valuation testimony, it was insufficient to support any valuation finding by the trial court.** *See S.P. v. State,* **884 So.2d 136, 137 (Fla. 2d DCA 2004).**

**The State asserts that the improper admission of the victim's hearsay testimony was harmless because "[c]ommon sense would dictate that the cost to repair a window, dry wall, paint, and a baby crib would exceed the $200 threshold for a first-degree criminal mischief charge." As such, the State appears to be relying on the so-called "life experience" theory of admissibility.** *See Jackson v. State,* **413 So.2d 112, 112 (Fla. 2d DCA 1982) (holding that, in the context of a theft prosecution, the fact-finder may rely on its life experiences in determining the value of stolen property "absent any specific proof of value by the state."),** *disapproved of by Marrero,* **71 So.3d at 890–91. However, the Florida Supreme Court rejected the use of the life experience theory in a case involving the criminal mischief statute, ruling that the exception does not apply to criminal mischief cases.** *Marrero,* **71 So.3d at 890.** *See also Perez v. State,* **162 So.3d 1139, 1141 (Fla. 2d DCA 2015) ("A jury may not consider its life experiences in determining the amount of damage for criminal mischief charges which require proof of the amount of damage.").**

## *A.S. v. State*, 91 So.3d 270 (Fla. 4th DCA 2012)

**Testimony explaining the contents of the estimate of damage to the car was inadmissible where the actual estimate was not admitted into evidence**

**Estimate made by auto body shop's employee in the regular course of**

**business, as to amount of damage that juvenile caused to car, qualified as a business record under business records hearsay exception, but the testimony explaining the contents of the estimate did not fall within this exception, and, because the actual estimate was not admitted into evidence, the testimony concerning its contents should have been stricken; without this evidence, the record did not provide competent, substantial evidence demonstrating the essential element of value, as required for offense of felony criminal mischief valued at $1000 or more. West's F.S.A. § 90.803(6).**

## §90.803(7): Absence of Entry from Business Records
## § 90.803(10): Absence of Public Record / Entry

### *Riggins v. State*, 67 So.3d 244 (Fla. 2d DCA 2010)

**Testimony inadmissible under exception for absence of public record or entry without certification or testimony from someone with knowledge that diligent search failed to disclose any record, report, statement, or data compilation or entry**

**Riggins was charged with the second-degree misdemeanor of operating an unregistered vehicle, amongst other charges. The State was required to prove that the vehicle Riggins was driving was not, in fact, registered in this state.**

**At trial, the only evidence offered to prove this element of the offense was Burgess's testimony that he had run Riggins' car's VIN through the FCIC/NCIC database on his in-car computer and had determined from the information provided by that database that Riggins' car "wasn't registered**

**properly." Riggins objected to this testimony on hearsay grounds, arguing that Burgess's testimony as to what the FCIC/NCIC database "said" was hearsay. In response, the State argued that this testimony fell within the hearsay exception for either absence of an entry in public records or absence of an entry from business records. The State did not offer any evidence in the form of a certified printout from FCIC/NCIC to support Burgess's testimony.**

**Here, the State did not offer into evidence either a certification in accord with section 90.902 or testimony from someone with knowledge that a diligent search failed to disclose any record, report, statement, or data compilation or entry.**

**We note that the State could have obtained a certification from the Department of Highway Safety and Motor Vehicles to establish that there was no record of a proper registration of Riggins' car on the date in question. The State could also have called a witness to testify as to how the FCIC/NCIC records were maintained and to testify that a diligent search of its database did not turn up any registration for Riggins' car. However, Burgess's testimony that he accessed the FCIC/NCIC database and did not find any registration for Riggins' car, standing alone, is hearsay when offered to prove that the car was not actually registered, and the testimony does not fall into any exception to the hearsay rule. Therefore, the trial court should have sustained Riggins' hearsay objection. Moreover, since this legally insufficient evidence was the only evidence offered to prove that Riggins was operating**

**an unregistered vehicle, the trial court should have granted Riggins' motion for judgment of acquittal on this charge. Accordingly, we must reverse this conviction and sentence.**

## § 90.803(17): Market Reports/Commercial Publications Publication Requirement

### *Hardy v. State*, 140 So.3d 1016 (Fla. 1st DCA 2014)

**Computer database testimony did not qualify as "market report" or "commercial publication" because database was not "published," *i.e.*, unavailable to the public**

**The defendant appeals his conviction for unlawful possession of Methadone. We conclude that the trial court erred in admitting information from a computer database offered by the state to show that there was no record of a medical prescription for the drug. For the reasons that follow, we reject the state's argument that the database qualified for admission under the hearsay exception for market reports and commercial publications.**

**We conclude that the E–FORCSE database does not qualify as a "market report" or "commercial publication" under section 90.803(17) for several reasons, not the least of which is that it does not fall within the definition in the text of the statute. Section 90.803(17) includes "market quotations, tabulations, lists, directories, or other published compilations." This language plainly requires that the evidence be *published* to qualify under the exception. Black's Law Dictionary defines "publish" as "[t]o distribute copies (of a work) to the public." Black's Law Dictionary 1268 (8th**

**ed. 2004). The E–FORCSE database is not "published" in the ordinary sense of the term because it is not available to the public. Access to the database is limited to authorized employees of the Department of Health and certain law enforcement officers who have been expressly authorized by the Department to use it.**

## § 90.803(18): Admissions

## (a) Admission by Defendant

### *Henderson v. State*, 135 So.3d 472 (Fla. 2d DCA 2014)

**Witness's testimony that defendant told his former girlfriend that he was going to "kill that MF'er" was inadmissible double hearsay**

**Henderson contends that the trial court committed reversible error when it allowed, over a defense objection, double hearsay testimony that Loren Spaugh told Jessica Hicks that Henderson stated "I'll kill that MF'er," referring to the victim, Corey Burdette, a month before the charged incident. He argues that the statement was inadmissible hearsay and was highly prejudicial to his defense.**

**Henderson's statement to Loren Spaugh was an admission by the defendant and was admissible under the hearsay exception in section 90.803(18).** *See Love v. State,* **971 So.2d 280, 286 (Fla. 4th DCA 2008). But Spaugh's statement to Hicks does not fall within a hearsay exception.**

**The State argued (incorrectly), and the trial court concluded, that Hicks's testimony was admissible because it went to "state of mind."**

**Henderson's statement to Spaugh may have proven Henderson's state of mind or may have explained subsequent acts by Henderson, but in Spaugh's statement to Hicks, Spaugh was the declarant and this portion of the statement was not offered to prove Spaugh's state of mind or to explain subsequent acts by Spaugh. *Cf.* § 90.803(3)(a)(1)-(2) (allowing admission of "[a] statement of the declarant's then-existing state of mind ... when such evidence is offered to ... [p]rove the declarant's state of mind, emotion, or physical sensation at that time or at any other time when such state is an issue in the action" or "[p]rove or explain acts of subsequent conduct of the declarant").**

## Adoptive Admission

### *Jones v. State*, 127 So.3d 622 (Fla. 4th DCA 2014)

**Date of birth on defendant's driver's license, which police obtained from defendant's possession upon his arrest, was admissible as an adoptive admission**

**Date of birth on defendant's driver's license, which police obtained from defendant's possession upon his arrest, was admissible under hearsay exception as an adoptive admission, in trial for unlawful sexual activity by a person 24 years of age or older with a minor, and thus arresting officer could testify concerning defendant's date of birth as it appeared on his driver's license, even if defendant did not voluntarily hand over his license to the officer; driver's license was not passively carried, but was instead carried for identification purposes and to prove authorization to operate a motor**

**vehicle. West's F.S.A. § 90.803(18)(b)**

**A statement is admissible as an adoptive admission if it is offered against a party and if that party "has manifested an adoption or belief in its truth." § 90.803(18)(b), Fla. Stat. (2011). Stated another way, "[w]hen an adverse party manifests a belief in or adopts the statement of another person as his or her own, the statement is treated as an adoptive admission under section 90.803(18)(b)." 1 Charles W. Ehrhardt, Florida Evidence § 803.18b (2012 ed.). An adoptive admission occurs either when there is a direct expression by the adverse party assenting to the statement of another or when the conduct of the adverse party circumstantially indicates the party's assent to the truth of the statement.**

**Recently, the Court of Appeals of Maryland held that a trial court did not err in finding that a defendant, who presented his driver's license to a detective, manifested an adoption or belief in the truth of the information listed on the license, including the defendant's date of birth.** *See Gordon v. State,* **431 Md. 527, 66 A.3d 647 (2013). Similarly, the trial court in the instant case did not err in admitting the testimony of the police officer, who had the opportunity to examine the defendant's driver's license and saw the defendant's date of birth.**

**Nonetheless, even if the defendant did not voluntarily hand over his license to the officer, the information on the license may still be considered an adoptive admission. A driver's license is not passively carried; it is carried**

**for identification purposes and to prove authorization to operate a motor vehicle. Thus, a defendant's possession of his driver's license should constitute an adoption of what its contents reveal.**

**MAY, J., dissenting.**

**I respectfully dissent. The defendant's age was an element of the crime charged. The State proved that element by having a law enforcement officer testify to the date of birth shown on the defendant's driver's license at the time of arrest. I agree with the defendant that the trial court erred in allowing the State to rely on this hearsay testimony to establish his age as an element of the crime.**

## Admission by Agent

### *Osorio v. State*, 2016 WL 803515 (Fla. 4th DCA, Mar. 2, 2016)

**A confidential informant working under the supervision and direction of an investigating law enforcement agency is an agent of the State, whose statements in the scope of that agency are admissible as statements of a party opponent**

**Kevin Osorio appeals his convictions for possession of cannabis under twenty (20) grams, possession of drug paraphernalia, and trafficking in gamma-butyrolactone ("GBL").[1] We write to address three of the issues Osorio has raised on appeal.**

**The police recorded a series of phone calls wherein Osorio and the co-worker arranged a transaction to sell the GBL. When Osorio arrived at the location**

**designated for the sale, he was arrested and found with two cell phones, marijuana, a scale, and several vials of GBL in his vehicle. Before Osorio's trial, the co-worker was sentenced to probation due to his substantial assistance to law enforcement, despite facing up to thirty years in prison and a minimum mandatory sentence for his charges.**

**During cross-examination, the trial court refused to allow one of the detectives to testify as to whether the co-worker told him that he had received a vial of liquid from Osorio in order to identify the substance. When Osorio testified, the trial court prevented him from recounting conversations with the co-worker, which included the co-worker's statements about what to do with the vials he gave to Osorio, and details concerning the potential drug transaction.**

**"[W]hether evidence falls within the statutory definition of hearsay is a matter of law, subject to *de novo* review."** ***Id.*** **(alteration in original) (quoting *Burkey v. State,* 922 So.2d 1033, 1035 (Fla. 4th DCA 2006)).**

**This case provides an opportunity to explain the relationship that exists between the State and those informants acting under substantial cooperation agreements.**

**Generally, an agent is one who consents to act on behalf of some person, with that person's acknowledgment, and is subject to that person's control.** ***Goldschmidt v. Holman,*** **571 So.2d 422, 424 n. 5 (Fla.1990) ( "Essential to the existence of an actual agency relationship is (1)**

**acknowledgment by the principal that the agent will act for him, (2) the agent's acceptance of the undertaking, and (3) control by the principal over the actions of the agent."). When determining whether private citizen confidential informants have acted in a manner that makes them agents of the government, the court must apply a similar test when asking "whether [the informant], in light of all the circumstances of the case, must be regarded as having acted as an 'instrument' or agent of the state...."**

**The test for determining whether private individuals are agents of the government is whether, in consideration of the circumstances, the individuals acted as instruments of the state. To determine whether a private individual acts as an instrument of the state, courts look to (1) whether the government was aware of and acquiesced in the conduct; and (2) whether the individual intended to assist the police or further his own ends.**

**Here, the police encouraged the co-worker's involvement in the investigation, which involved setting up a controlled buy with Osorio as a target offender.[4] He agreed to arrange a drug purchase from Osorio in hopes of securing a favorable report from detectives and obtaining substantial assistance credit in his prosecution for cocaine trafficking. In so doing, he was working under the supervision and direction of the detectives working the case.**

**The co-worker's statements to both Osorio and the detectives were made in furtherance of that objective. He engaged in these interactions with**

**Osorio at the behest of the detectives with the hope of obtaining a possible future benefit.**

**A confidential informant working under the supervision and direction of an investigating law enforcement agency is an agent of the State; therefore, we agree with Osorio that the co-worker acted on behalf of the State and within the scope of his agency. As such, the hearsay exception provided by section 90.803(18) applies to the co-worker's out-of-court statements, which under the evidence code are not inadmissible if they are offered against a party and are: "[t]he party's own statement[s] in either an individual or a representative capacity," or "statement[s] by the party's agent or servant concerning a matter within the scope of the agency or employment thereof, made during the existence of the relationship." § 90.803(18)(a), (d), Fla. Stat. (2011).**

**We have previously stated that "it is permissible in argument to comment on a party's failure to call a witness where it is shown 'that the witness is peculiarly within the party's power to produce and the testimony of the witness would elucidate the transaction.' "** *Jean–Marie v. State,* **993 So.2d 1160, 1161 (Fla. 4th DCA 2008) (quoting** *Haliburton,* **561 So.2d at 250). A witness is "peculiarly within the party's power to produce" when "the witness was an informer associated with the government in developing the case against the defendant and there was no indication at trial of any break in the association."** *Datilus v. State,* **128 So.3d 122, 125 (Fla. 4th DCA**

**2013) (quoting *Martinez v. State,* 478 So.2d 871, 872 (Fla. 3d DCA 1985)). By virtue of his status as an agent of the State, the State had the ability to produce the co-worker as a witness for trial, thus making him peculiarly within the State's control and susceptible to comment by defense counsel when not called to testify for the prosecution.**

**Finally, we address the trial court's declaration to the jury that the State's testifying forensic chemist was "an expert in the field, and [could] give opinion testimony, and hypotheticals in the field of being a forensic chemist."**

**Such an offer and finding by the Court might influence the jury in its evaluation of the expert and the better procedure is to avoid an acknowledgment of the witnesses' expertise by the Court"); *Luttrell v. Commonwealth,* 952 S.W.2d 216, 218 (Ky.1997) (stating that "[g]reat care should be exercised by a trial judge when the determination has been made that a witness is an expert. If the jury is so informed such a conclusion obviously enhances the credibility of that witness in the eyes of the jury. All such rulings should be made outside the hearing of the jury and there should be no declaration that the witness is an expert"); *State v. McKinney,* 185 Ariz. 567, 917 P.2d 1214, 1232–33 (1996) (remarking that "[b]y submitting the witness as an expert in the presence of the jury, counsel may make it appear that he or she is seeking the judge's endorsement that the witness is to be considered an expert.... In our view, the trial judge should discourage**

**procedures that may make it appear that the court endorses the expert status of the witness. The strategic value of the process is quite apparent but entirely improper.").**

**When a court declares that a witness is an "expert" in his or her field, it confers an imprimatur of authority and credibility, thereby inordinately augmenting the witness's stature while simultaneously detracting from the court's position of neutrality.** *See* **§ 90.106, Fla. Stat. (2011) ("A judge may not sum up the evidence or** *comment to the jury upon the weight of the evidence, the credibility of the witnesses,* **or the guilt of the accused." (emphasis added));** *see also Tengbergen,* **9 So.3d at 737 (noting that a trial court should not characterize witness testimony as expert testimony because it effects the witness' credibility in the eyes of the jury).**

*The use of the term "expert" in the Rule does not, however, mean that a jury should actually be informed that a qualified witness is testifying as an "expert."* **Indeed, there is much to be said for a practice that prohibits the use of the term "expert" by both the parties and the court at trial.** *Such a practice "ensures that trial courts do not inadvertently put their stamp of authority" on a witness's opinion, and protects against the jury's being "overwhelmed by the so-called 'experts.'"*

**While this court and others have repeated the recommendation that trial courts ought to refrain from directly declaring the expert status of a witness in front of the jury, we recognize this has been interpreted by some**

**as merely a suggestion of judicial practice, and not a hard-and-fast rule.** ***Tengbergen,*** **9 So.3d at 737;** ***see also Alexander,*** **931 So.2d at 951. Today we clarify that such practice is impermissible. Judges must not use their position of authority to establish or bolster the credibility of certain trial witnesses.**

## *McClam v. State*, 2016 WL 313972 (Fla. 4th DCA, Jan. 27, 2016)

**DCF report falls within exception for admissions by a party opponent**

**Terrel McClam appeals a final judgment entered after a jury trial determining him to be a sexually violent predator and indefinitely committing him to the custody of the Department of Children and Families ("DCF"). We reverse because the trial court erroneously sustained the state's hearsay objection to a DCF-commissioned report critical of the accuracy of a test used to predict his likelihood of reoffending.**

**The state petitioned for a probable cause determination that McClam was a sexually violent predator pursuant to sections 394.910–394.932, Florida Statutes (2014), also known as the Jimmy Ryce Act or Sexually Violent Predator Act ("the Act").**

**The trial was largely a battle of qualified experts.**

**The state expert testified that the Test has been deemed reliable in the past and there is ongoing research to verify which relevant factors should be used. Additionally, on cross-examination, the state expert agreed that a recent study concluded that the test overpredicted recidivism rates, based on**

**a sample of approximately seven hundred individuals who were deemed high risk and were subsequently released from prison. However, as the state pointed out on redirect, obviously not all sexual offenses are detected and this would skew the numbers as well.**

**Based on this score, the expert put McClam in the class for "treatment needs" and she found that the associated risk of recidivism after five years was predicted to be 31.4%. In ten years, the risk of recidivism went up to 39.6%. McClam's score placed him in the 99.1 percentile, meaning "98.5% of sex offenders in the sample for which the instrument is based scored below [McClam's] score of eight," 1.2% obtained the same score, and only .3% scored higher. The state expert estimated that, based on the Test, McClam was 7.3 times higher than what "they" considered a typical score on the Test.**

**According to the defense expert, DCF began to question the Test's predicted recidivism rates and conducted a study comparing predicted rates with actual rates once offenders were released. The studied group was limited to individuals recommended for involuntary civil commitment. When the experts compared the Test's predicted rates to the actual recidivism rates of individuals like McClam, who went to the civil commitment center but had not received treatment, they determined that the rates were "significantly overpredicted," finding the Test predicted 2530% and the actual rate was closer to 5–7%. The defense expert placed McClam's likely recidivism rate between 7–10%.**

**McClam's attorney offered the DCF-commissioned report arising from this study into evidence. The state objected based on hearsay and bolstering. The objection was sustained based on hearsay. The defense expert was not permitted to testify to the report's ultimate conclusion and the court precluded questioning her about the validity of the report.**

**The DCF-commissioned report was admissible in evidence for two reasons. First, a provision of the Sexually Violent Predator Act permits hearsay evidence in "all civil commitment proceedings for sexually violent predators." § 394.9155(5), Fla. Stat. (2014). Second, the report fell under an exception to the hearsay rule as an admission by an agent of a party opponent. See § 90.803(18), Fla. Stat. (2014).**

**Section 394.9155(5) allows hearsay under specific circumstances:**

> **Hearsay evidence, including reports of a member of the multidisciplinary team or reports produced on behalf of the multidisciplinary team, is admissible in proceedings under this part unless the court finds that such evidence is not reliable. In a trial, however, hearsay evidence may not be used as the sole basis for committing a person under this part.**

**Nothing in the statute precludes a respondent in a commitment hearing from offering hearsay evidence. The trial court made no finding that the DCF-commissioned report was unreliable, which would preclude its admissibility.**

**Aside from this statutory provision, the report was also admissible because it qualifies as an exception to the hearsay rule as an admission by an agent of a party opponent. *See* § 90.803(18).**

**The DCF report concerned the viability of the Test's application to recidivism rates of sexual predators; it was a statement by an agent of DCF "concerning a matter within the scope of the agency or employment thereof, made during the existence of the relationship." § 90.803(18)(d).**

**We applied the party opponent exception to the hearsay rule against the state in the criminal case of *Garland v. State,* 834 So.2d 265 (Fla. 4th DCA 2002). That case examined a report by a Florida Department of Law Enforcement technician who tested gunshot residue swabs. *Id.* at 266. We held that when the defendant offered the report in evidence, it was an admission of an agent of the government admissible as an exception to the hearsay rule. *Id.* at 267.**

## § 90.803(23): Child Hearsay Statements

## Foundation for Admission

### *J.G. v. E.B., o/b/o J.G.*, 2016 WL 742322 (Fla. 5th DCA, Feb. 26, 2016)

**J.G. appeals a final judgment of injunction for protection against domestic violence. The injunction was based on allegations of sexual misconduct against a minor child by J.G., who is the child's paternal**

**grandfather. The conduct allegedly occurred in J.G.'s home and, other than the child, there were no witnesses to corroborate the allegations.**

**Section 90.803(23), Florida Statutes (2015), specifically addresses the admission of out-of-court statements by a child victim:**

> **(23) Hearsay exception; statement of child victim.—**
>
> **(a) Unless the source of information or the method or circumstances by which the statement is reported indicates a lack of trustworthiness, an out-of-court statement made by a child victim [describing the abuse,] not otherwise admissible, is admissible in evidence in any civil or criminal proceeding if:**
>
> **1. The court finds in a hearing conducted outside the presence of the jury that the time, content, and circumstances of the statement provide sufficient safeguards of reliability. In making its determination, the court may consider the mental and physical age and maturity of the child, the nature and duration of the abuse or offense, the relationship of the child to the offender, the reliability of the assertion, the reliability of the child victim, and any other factor deemed appropriate; and**
>
> **2. The child either:**
>
> **a. Testifies; or**
>
> **b. Is unavailable as a witness, provided that there is other corroborative**

**evidence of the abuse or offense.**

**REVERSED.**

## Specific Findings of Reliability

### *Rodriguez v. State*, 77 So.3d 649 (Fla. 3d DCA 2011)

**Child hearsay statements admissible where trial court made detailed findings of fact regarding the time, content, and other relevant circumstances in which the child-victim's statements were made, so as to establish reliability**

**The defendant was charged by information with six counts of sexual battery on a person less than twelve years of age by a person eighteen years of age or older.**

**Prior to trial, a bifurcated hearing was held to address the State's intent to rely on child hearsay statements pursuant to section 90.803(23). At the conclusion of the hearing, the trial court entered a written order finding that the statements made by the child to all three witnesses—Detective Nelson Andreu, Jr., Mercy Restani, and Officer Michael Parmenter—were reliable under the totality of the circumstances, pursuant to the non-exclusive list set forth in *State v. Townsend,* 635 So.2d 949 (Fla.1994). The trial court's order made specific findings in support of its ruling that the proffered hearsay statements were reliable.**

**The Florida Supreme Court also established a non-exclusive list of factors for the trial court to consider in evaluating, under the totality of the circumstances, the reliability of the child's out-of-court statement under the statute, and specified that once the trial court reviews the trustworthiness**

**and reliability of the statement, section 90.803(23)(c) expressly requires that the court "make specific findings of fact, on the record, as to the basis for its ruling." *Id.* at 957–58.**

**The defendant argues that under *Townsend,* a trial court may not rely on corroborating evidence, such as medical evidence of injuries, as a factor in the court's reliability determination. We agree. The reliability of the statements must be determined independent of any corroborating evidence. *Id.* at 956. To the extent that the trial court may have relied on any corroborating evidence, we find the error harmless beyond a reasonable doubt. *See State v. DiGuilio,* 491 So.2d 1129 (Fla.1986); *Pedrosa v. State,* 781 So.2d 470, 473 (Fla. 3d DCA 2001) (finding that the improper admission of hearsay identification statements was harmless error given all of the other evidence). Here, because the trial court made detailed findings of fact regarding the time, content, and other relevant circumstances in which the child-victim's statements were made, so as to establish reliability, we conclude that the trial court did not abuse its discretion in admitting the hearsay statements.**

## *Small v. State*, 179 So.3d 421 (Fla. 1st DCA 2015)

**<u>Child hearsay statements admissible where trial court made specific findings concerning the reliability of the statements</u>**

**Held that trial court acted within its discretion in finding alleged victim's hearsay statements to be sufficiently reliable to be admitted.**

**Appellant was charged with two counts of sexual battery on a victim**

**under twelve, one count of lewd or lascivious molestation of a victim under twelve, and one count of lewd or lascivious exhibition in the presence of a victim under sixteen. In addition to calling the child to testify at trial, the prosecution intended to rely on statements the child made during a forensic interview with a member of the county's Child Protection Team (CPT).**

**The trial court announced its detailed ruling from the bench, finding that the statements and the interview recording in its entirety were admissible because the "time, content and circumstances of the statements" provided "sufficient safeguards of reliability, and it [met] the statutory criteria and the criteria in *State v. Townsend.*" In making this finding, the trial court considered the child's mental and physical age; the nature and duration of the abuse; the relationship of the child to the offender; the reliability of the child's assertion; the reliability of the victim; the spontaneity of the statements; whether the statements were in response to questions asked from adults and the environment, context, and methodology used by the interviewer; whether the statements were made at the first opportunity following the alleged incident; whether the statements included a child-like description of the act; whether there was evidence of any motive or lack thereof to fabricate the allegations; the ability of the child to distinguish fantasy and reality; the vagueness of the accusations; the possibility of any improper influence on the child; and whether there were any inconsistencies in the accusations. The trial court made case-specific findings by considering**

**the language and gestures of the child and relating them to factors suggested by statute and case law.**

**At trial, the child, a Department of Children and Families caseworker, a detective, the CPT interviewer, and Appellant testified. The recorded interview between the child and the CPT interviewer was played for the jury. Appellant was subsequently convicted of all of the charges. This appeal followed.**

## *Miranda v. State*, 50 So.3d 707 (Fla. 4th DCA 2011)

**Child hearsay statements inadmissible where trial court failed to make specific findings of fact as to reliability**

**Defendant, an adult, was charged with sexual battery on his niece (by marriage), then under 12.**

**The victim's pretrial, hearsay, statements to police were admitted in the State's case. The victim's trial testimony varied from those statements as to the number of times she was violated, the nature of some violations, and the temporal span.**

**We agree that the admission of child hearsay statements was error and reverse for a new trial.**

**As required by § 90.803(23), the order admitting the child hearsay statements failed to make specific findings of fact as to reliability. Instead the order merely recited boilerplate language as to the ultimate finding of admissibility. In *Hopkins v. State,* 632 So.2d 1372 (Fla.1994), the Florida**

**Supreme Court held:**

> **"Mere recitation of the boilerplate language of [section 90.803(23) ] ... is not sufficient.** *Absent the specific findings of reliability mandated by the statute, a reviewing court cannot determine whether the statements were in fact reliable. Failure to make specific findings not only ignores the clear directive of the statute, but also implicates the defendant's constitutional right to confrontation.*" **[e.s., c.o.]**

*Hopkins,* **632 So.2d at 1377;** *see also Lacue v. State,* **562 So.2d 388 (Fla. 4th DCA 1990) (reversing because trial court made no specific findings of fact on the record as required by § 90.803; boilerplate language does not suffice).**

**We find that the order admitting the child's hearsay merely tracked the statutory language of § 90.803(23) and was therefore insufficient to support the admission of such statements at trial.** *Heuss v. State,* **660 So.2d 1052 (Fla. 4th DCA 1995). Without the detailed findings of fact as to reliability and trustworthiness required by statute, we are unable to conclude that her hearsay statements were admissible.**

## "Life Experience" Theory of Admissibility

## *B.J.M., a Child v. State*, 2016 WL 542841 (Fla. 5th DCA, Feb. 12, 2016)

**The life experience theory of admissibility, in determining the value of stolen property, does not apply to criminal mischief cases**

*See infra* **at page 76.**

## “First Complaint” Rule

## *Browne v. State*, 132 So.3d 312 (Fla. 4th DCA 2014)

**First complaint exception allows only the fact of the report of the sexual battery, but not the details**

**Appellant was convicted of attempted sexual battery. Over appellant’s objection, the state introduced testimony from the victim’s friend consisting of what the victim told her regarding the details of the attempted sexual battery.**

**Over defense objection, the friend testified that the victim was upset because appellant was chasing her. She asked the friend what to do, and the friend told the victim to meet her at the hospital where the friend worked. Instead the victim went to the friend’s home, where she met the friend’s boyfriend upon arriving.**

**Later that night, the friend arrived home and found the victim lying on the couch. The friend noticed a “hickey” on the victim’s neck but did not notice the victim’s clothes to be torn or ripped. In their second conversation, the friend testified that the victim said she was “very nervous” due to the “events that taken place” and because of “being followed and what had happened with [appellant] that night.”**

**The trial court denied appellant’s objection to the state asking the friend what details the victim had relayed to her about the events of that night. The friend testified:**

> **She stated to me that he had, she was in the passenger side of**

**the vehicle, of his vehicle and he had moved on over to pin her down and force her to kiss, you know, to kiss her and stuff and, and later, you know, as that was happening he, what she told me was that he ejaculated on her, that's what she told me.**

**Appellant again raised an objection, which the trial court overruled finding the friend's testimony admissible as an excited utterance or as the first recounting of a sexual battery crime.**

**Even if the "first complaint" rule remains a valid exception, the testimony of the victim's friend in this case would still be inadmissible. In *Irvin,* in response to the question of "[w]hat did she tell you?," the husband was allowed to testify that his wife, the victim, told him that she was raped. 66 So.2d at 294. The Florida Supreme Court further elucidated that "[n]one of the information amounted to narration of the criminal assault save only the single statement" that the victim had been raped, and the court determined that the husband's testimony of his wife's statement "was quite proper." *Id.***

**In the present case, unlike *Irvin,* the friend's testimony went far beyond the "single statement" of the attempted sexual battery, and amounted to a "narration of the criminal assault." Thus, even under *Irvin,* the testimony of the friend would be improper and beyond the parameters of the "first complaint" exception. *See also Burgess v. State,* 644 So.2d 589, 591**

**(Fla. 4th DCA 1994) (holding that the "first complaint exception allows only the fact of the report of the sexual battery but not the details").**

**For all the reasons stated above, we find the admission of the friend's statement was inadmissible hearsay, and not admissible under the "first complaint" rule.**

**Here, the defense accused the victim of having a motive to fabricate that the incident was non-consensual once she discovered the hickey on her neck. The defense proffered that the victim wanted to rekindle a relationship with an ex-boyfriend whom she knew would see the hickey. The testimony of the friend's boyfriend revealed that the victim was aware of the hickey *before* the friend came home and *before* the victim spoke with the friend revealing details of the assault. In other words, the victim's second conversation with the friend—during which she revealed details of the assault—occurred *after* the point in time at which the defense argued that she had a motive to fabricate. Thus, the victim's hearsay statement to the friend was inadmissible as a prior consistent statement.**

## "Verbal Acts" Exception

### *McElroy v. State*, 100 So.3d 63 (Fla. 2d DCA 2011)

**Codefendant's statements to CI were not admissible as verbal acts because the statements did not serve to explain the nature of the transaction or defendant's actions**

**In this appeal of his conviction of possession of cocaine pursuant to a plea, Safari McElroy argues that the trial court erred in denying his**

**dispositive motion in limine to exclude the alleged hearsay statements of his codefendant, Marquita Kendrick, to a confidential informant (CI). We agree and reverse.**

**At the hearing on the motion in limine, the CI testified that Kendrick advised him, " 'Look, I got it, but I'm not coming alone because Chuck, he don't want me to make the whole deal. He wants to make a hundred of it, too.' " The CI stated that Kendrick also said, " 'Look I want to make sure you got this right. There ain't going to be no games or nothing, right? Chuck here says if anything goes wrong, he got his gun right here in the car. He ain't going down like that.' "**

**The trial court ruled that the statements by Kendrick were verbal acts and not hearsay, referring to *Arguelles v. State,* 842 So.2d 939 (Fla. 4th DCA 2003), and its reliance on *Banks v. State,* 790 So.2d 1094, 1098 (Fla.2001). Consequently, it denied McElroy's motion in limine.**

**In *Banks,* the supreme court explained verbal act evidence as follows:**

> **A verbal act is an utterance of an operative fact that gives rise to legal consequences. Verbal acts, also known as statements of legal consequence, are not hearsay, because the statement is admitted merely to show that it was actually made, not to prove the truth of what was asserted in it.**
>
> **For utterances to be admissible as verbal acts, (1) the conduct to be characterized by the words must be independently material to the issue; (2) the conduct must be equivocal; (3) the words must aid in giving legal**

**significance to the conduct; and (4) the words must accompany the conduct.**

**The State argues that the statements are also admissible under the coconspirator exception to the hearsay rule. But at the hearing on the motion in limine, the State asserted that the statements at issue were not hearsay, they were verbal acts. The only argument it presented for admissibility of the statements was as verbal acts. Because the State did not assert the coconspirator exception to the hearsay rule in the trial court, it may not assert that exception in this court.** *See Norris v. State,* **554 So.2d 1219 (Fla. 2d DCA 1990).**

## "Opening the Door" Exception

### *Redd v. State*, 49 So.3d 329 (Fla. 1st DCA 2010)

**Sergeant's incomplete answer on cross-examination did not open the door to double hearsay on redirect examination**

**Samuel Dennis Redd, Appellant, seeks review of his judgment and sentence for trafficking in cocaine. At trial, the State elicited double hearsay and relied on it heavily to prove the truth of the matter asserted therein, which was that Appellant was in possession of some of the cocaine at issue. We conclude that this double hearsay was not admissible under any exception to the hearsay rule and, contrary to the State's arguments.**

**On re-direct, in response to this line of questioning, the prosecutor had Sergeant Byrd testify regarding the nature of Thomas' cooperation. Over**

**defense counsel's hearsay objection, Sergeant Byrd testified that he had learned from Officer Larry Shallar that Thomas reported the location of the cocaine in the artificial plant. Also over defense counsel's hearsay objection, Sergeant Byrd testified that Thomas told Shallar that the cocaine belonged to Appellant and Ratliff. The trial court allowed the testimony based on the State's argument that defense counsel had "opened the door" to it. Sergeant Byrd explained that officers would not have known about this cocaine without Thomas' cooperation and that the information provided by Officer Shallar had affected the charging decision.**

**Here, the State argued that the double hearsay elicited from Sergeant Byrd on re-direct was proper because his answer to the question concerning why Thomas was not charged was incomplete. While it may be true that there were additional reasons that Thomas was not charged and that Sergeant Byrd did not reveal the full extent of Thomas' cooperation on cross-examination, his answer was not misleading or so incomplete as to be unfair. Therefore, the door was not opened to the admission of hearsay to explain, qualify, or limit his answers.**

**In fact, on his own, Sergeant Byrd commendably limited his answers to stay within appropriate bounds. The additional information that Thomas pointed the finger at Appellant as the owner of the cocaine did not serve any proper purpose. Rather than leveling the playing field of any unfairness created by the defense's cross-examination of Sergeant Byrd, this testimony**

**shifted the scales unfairly in the State's favor by encouraging the jury to rely on inadmissible evidence that the judicial system has deemed inherently unreliable. Because defense counsel did not open the door to this testimony, the trial court should have sustained his hearsay objections.**

## "Forfeiture by Wrongdoing" Exception

## *Chavez v. State*, 25 So.3d 49 (Fla. 1st DCA 2010)

**Evidentiary doctrine of forfeiture by wrongdoing did not allow admission of hearsay testimony regarding defendant's threats to harm his wife if she left marriage**

**In this appeal, Daniel Chavez, Appellant, challenges his conviction for the first-degree murder of his wife, Kathy Chavez. He asserts that the trial court committed reversible error by admitting hearsay statements regarding his threats to harm his wife if she left the marriage. We reverse and remand for a new trial.**

**Seven months after their marriage, Mrs. Chavez moved out of the marital residence, leaving behind her wedding ring. Mrs. Chavez told her mother, Teresa Hemanes, that Appellant told her that if he could not have her as his wife, then nobody else could; she told a friend that Appellant told her that he was going to stab her; and three weeks before her death, she told another friend that she and Appellant had argued and Appellant said that if she left him, he would stab her to death and no one would have her. Mrs. Chavez moved in with Patsy Haley, a friend to whom she also relayed Appellant's threat that if he could not have her as his wife, then nobody**

**would.**

**The hearsay statements at issue occurred during the testimony of several witnesses and related to Appellant's purported threats. The trial court admitted these double hearsay statements on the grounds that, although the alleged threats were not admissible under the state of mind exception, they were admissible under the common-law hearsay exception of forfeiture by wrongdoing.**

**Unlike in Florida, the doctrine of forfeiture by wrongdoing was codified in the federal courts as a hearsay exception in 1997. Federal Rule of Evidence 804(b)(6) makes admissible "[a] statement offered against a party that has engaged or acquiesced in wrongdoing that was *intended to, and did, procure the unavailability* of the declarant as a witness." (emphasis added). The only relevant provision in Florida's Evidence Code states in section 90.804(1), Florida Statutes, that a declarant is *not* unavailable for purposes of the unavailable witness hearsay exception, when the declarant's unavailability is "due to the procurement or wrongdoing of the party who is the *proponent* of his or her statement in preventing the witness from attending or testifying." (emphasis added). Thus, the legislature precluded a hearsay exception where the proponent's wrongdoing produced the witness's absence; by contrast, the legislature has not provided a hearsay exception based on such wrongdoing.**

**The State argues that the doctrine of forfeiture by wrongdoing is**

**applicable in Florida as a common-law hearsay exception under section 90.102, Florida Statutes, which provides that the Florida Evidence Code replaces or supersedes only conflicting statutory or common law. We reject this argument.**

**Even if section 90.802 did not prohibit application of the doctrine of forfeiture by wrongdoing as a hearsay exception, that common-law doctrine would not give us authority to affirm the admission of the hearsay threats. There is no evidence that Appellant killed his wife with the intent to make her unavailable as a witness. Despite this fact, the State urges this court to adopt a broad view of the doctrine of forfeiture by wrongdoing, and points to the United States Supreme Court case of *Giles v. California,* 554U.S. 353, ––– –, 128 S.Ct. 2678, 2687, 171 L.Ed.2d 488 (2008), as support for its argument that the common-law doctrine applies, even without evidence of Appellant's specific intent to make his wife unavailable as a witness.**

**The Supreme Court's decision in *Giles* provides a comprehensive overview of forfeiture by wrongdoing, although it is not directly on point, because it addresses the doctrine's application in the context of the Confrontation Clause rather than hearsay. *Id.* at 2681. The statements at issue in *Giles* were treated as testimonial statements subject to the Sixth Amendment. *Id.* at 2682. The Supreme Court held that an unavailable witness's out-of-court *testimonial* statements were not admissible under the doctrine of forfeiture by wrongdoing *unless the defendant specifically***

**intended to prevent that witness from testifying. Id. at 2683–84, 2686–87, 2693. In light of *Giles,* the State argues that a broader version of the doctrine applies here to permit admissibility of the hearsay statements because they are *non-testimonial,* and thus not subject to the requirement that the defendant intended to prevent the declarant from testifying.**

**Even though there is a distinction between testimonial statements subject to the Sixth Amendment and non-testimonial statements subject to the evidentiary rules involving hearsay, a close reading of *Giles* indicates that the common-law doctrine of forfeiture by wrongdoing would apply similarly to non-testimonial statements. Specifically, in *Giles,* the Supreme Court examined the roots and application of the common law doctrine, noting, "[t]he terms used to define the scope of the forfeiture rule suggest that the exception applied only when the defendant engaged in conduct *designed* to prevent the witness from testifying,"**

**Accordingly, even if the common-law exception of forfeiture by wrongdoing was applicable in Florida as a hearsay exception, it would not apply in the present case where there was no evidence presented that Appellant acted with the intent to prevent his wife from testifying.**

# IV. HEARSAY EXCEPTION – DECLARANT UNAVAILABLE (§90.804)

## § 90.804(1): "Unavailable" Defined

### (b): Refusing to Testify

### *Roberts v. State*, 2014 WL 1696279 (Fla. 3d DCA Apr. 30, 2014)

**Witness's persistent refusal to testify was sufficient to find that witness was unavailable to testify**

**The defendant has litigated numerous postconviction motions and habeas corpus petitions in Florida state and federal courts. Ultimately, the defendant was granted a new sentencing proceeding. *Roberts v. State,* 840 So.2d 962, 973 (Fla.2002). Just prior to the commencement of the new sentencing proceeding, the State filed a motion seeking to introduce Ms. Rimondi's former sworn trial testimony based on her "unavailability as a witness" under section 90.804(1)(b) because Ms. Rimondi refuses to testify. The trial court's denial of the State's motion to declare Ms. Rimondi unavailable and to admit her former sworn trial testimony is the subject of this petition.**

**Ms. Rimondi, who was sixteen years old when she was raped and kidnapped by the defendant and when she witnessed the defendant murder Napoles, was eighteen years old when she initially testified at the defendant's trial. She is now approximately forty-five years old, and she has refused to testify yet again at the new sentencing proceeding. Based on her**

**refusal to testify, the State filed a motion to have Ms. Rimondi declared "unavailable" pursuant to section 90.804(1)(b) and to permit her former trial testimony to be read to the jury in lieu of her live testimony at the new sentencing proceeding. When Ms. Rimondi appeared before the trial court for a hearing just prior to the defendant's new sentencing proceeding, she testified that, although she understood that the trial court could order her to testify, hold her in contempt of court for refusing to testify, and fine and incarcerate her if she refused to testify, she would continue to refuse to testify.**

**Ms. Rimondi explained that she simply could not and would not testify due to the mental and emotional stress and effect of the proceedings. She explained the emotional toll the events of that evening have had on her, how difficult it has been for her to put the events of that evening behind her, and how she could not subject herself to reliving those events again after so many years. Ms. Rimondi informed the trial court she was so emotionally distraught that she was going to seek medical treatment, and, regardless of what the trial court did to her, she would not put herself through it again and therefore would not testify. Despite Ms. Rimondi's refusal to testify, the trial court denied the State's motion to find Ms. Rimondi unavailable under section 90.804(1)(b) and to permit the State to read Ms. Rimondi's former trial testimony to the new sentencing jury at the defendant's new sentencing proceeding. This was clear error.**

**Ms. Rimondi's trial testimony clearly qualifies as "former testimony" of a witness under section 90.804(2)(a), as this testimony was "given as a witness at another hearing of the same ... proceeding."/*d.* Whether Ms. Rimondi is "unavailable" under section 90.804(1)(b) is determined by whether she *will* testify, not whether she *can* testify. Thus, the determination of her unavailability under section 90.804(1)(b) is not dependent on whether Ms. Rimondi is "able" to testify, as the trial court found, but rather on whether she will continue to refuse to testify despite the trial court's order and the possibility of sanctions being imposed.**

**This evidence is sufficient to find Ms. Rimondi unavailable under section 90.804(1)(b) and to admit her former trial testimony under section 90.804(2)(a). The trial court, however, did not consider this evidence or make a credibility determination because it incorrectly focused on whether Ms. Rimondi was able to testify rather than on whether she would persist in refusing to testify despite the potential penalties that could be imposed. This was clear error.**

**The trial court compounded its error when it applied the incorrect test by balancing the emotional toll on Ms. Rimondi against the defendant's right to confront and cross-examine witnesses against him. The defendant's counsel for the new sentencing, however, concedes that the admission of Ms. Rimondi's former trial testimony, which was subject to vigorous cross-examination, does not violate the Confrontation Clause or**

*Washington,* **541 U.S. 36, 124 S.Ct. 1354, 158 L.Ed.2d 177 (2004). Additionally, section 90.804(2)(a) specifically permits the introduction of the testimony of an "unavailable" witness given at another proceeding or in a deposition if the party against whom the testimony is being offered had an opportunity and similar motive to develop the testimony by direct, cross, or redirect examination. § 90.804(2)(a). No balancing test is required; section 90.804(2)(a) creates a per se rule of admissibility.**

## (d): Illness or Infirmity

### *Partin v. State*, 82 So.3d 31 (Fla. 2012)

**Whether a witness is unavailable due to an illness or infirmity is a question of preliminary fact proven by a preponderance of the evidence**

**Partin argues that the trial court erred in admitting the testimony of DNA analyst Suzanna Ulery from Partin's first trial. More specifically, Partin argues that Ulery was not "unavailable" for purposes of the former testimony hearsay exception. *See* § 90.804(2), Fla. Stat. (2002). For the reasons that follow, we affirm admission of the former testimony.**

**The Florida Evidence Code allows for the admission of former testimony against a defendant in a criminal trial when the witness is "unavailable" and the defendant "had an opportunity and similar motive to develop the testimony by direct, cross, or redirect examination." *Id.; see Muehleman.***

**One circumstance rendering a witness "unavailable" for purposes of**

**the hearsay exception is one in which (1) the witness is unable to testify "because of then-existing physical or mental illness or infirmity"; and (2) the inability to testify is not "due to the procurement or wrongdoing of the party who is the proponent of his or her statement in preventing the witness from attending or testifying." § 90.804(1), Fla. Stat. (2002).**

**Whether an illness or infirmity exists is a question of preliminary fact for the trial court, proven by a preponderance of the evidence. *See* § 90.105(1), Fla. Stat. (2002); Charles W. Ehrhardt, *Florida Evidence* §§ 105.1, 804.1 (2010 ed.). The trial court's decision to admit prior testimony is reviewed for abuse of discretion. *Muehleman,* 3 So.3d at 1162.**

**Here, the trial court did not abuse its discretion in admitting the former testimony. The prosecution presented evidence that Ulery was living in California, would be approximately four months pregnant at the time of the trial in March, and was advised by her doctor not to travel by airplane until late August. Though there was no specific evidence of complications attending Ulery's pregnancy, the trial court relied on advice from her obstetrician and determined that the limitation on her travel was attributable to the pregnancy. The trial court further observed that flying would be the easiest and most effective means of travel from California to Florida, and it found that even those means were unavailable to Ulery.**

**Furthermore, because the trial court determined that Ulery was unavailable under section 90.804 and that Partin had an opportunity to**

**cross-examine her in a prior trial on the same subject matter, Partin was not deprived of his Sixth Amendment right to confrontation.** *See Crawford v. Washington.*

## § 90.804(2): Hearsay Exceptions

### (a) Former Testimony

### *Jones v. State*, 2015 WL 7566683 (Fla. 4th DCA Nov. 25, 2015)

**Even when a potential witness dies after providing deposition testimony, the deposition will not be admissible as substantive evidence under section 90.804(2) unless the party attempting to enter it has moved to perpetuate the testimony**

**Held that unperpetuated exculpatory deposition testimony of deceased witness was inadmissible as substantive evidence.**

**Latrail Onrillious Jones ("appellant") appeals his convictions for burglary of a dwelling, criminal mischief, and petit theft. He argues that the trial court abused its discretion by refusing to admit the deposition testimony of a deceased witness as substantive evidence in light of her unanticipated death prior to trial. Appellant never moved to perpetuate this testimony pursuant to Florida Rule of Criminal Procedure 3.190(i) ("rule 3. 190(i)"), but argues the deposition could have been properly admitted under section 90.804, Florida Statutes, because the witness was unavailable.**

**We are presented with the question of whether a deposition is admissible as substantive evidence, under section 90.804(2)(a) of the evidence code, when, at the time of its taking, opposing counsel is not**

**alerted by compliance with Rule of Criminal Procedure 3.190(j)[1] that the deposition may be used at trial. We hold that it is not.**

**It is generally accepted that when an exception to the rule excluding depositions as hearsay is not found in the Rules of Civil Procedure, the evidence code may provide such an exception in a civil proceeding.**

**However, a similar result is not warranted in a criminal case. This is so because greater latitude for the use of depositions in civil cases exists by virtue of Rule of Civil Procedure 1.330 which is much broader than the Rules of Criminal Procedure that provide for the use of deposition testimony.**

*The holding in* **[***James***]** *that discovery depositions are not admissible as substantive evidence absent compliance with Rule 3. 190(j) was in no way modified by the adoption of section 90.804(2)(a). In fact, the necessity of meeting the procedural requirements for perpetuating testimony before a deposition is admissible as substantive evidence is recognized in section 90.804(2)(a) by the express requirement that the deposition must be "taken in compliance with law." Accord Terrell v. State, 407 So.2d at 1041. Accordingly, the deposition testimony was properly excluded in this case.*

**Depositions taken pursuant to rule 3.190 are specifically taken for the purpose of introducing those depositions at trial as substantive evidence.**

**Depositions taken pursuant to rule 3.220, on the other hand, are for discovery purposes only and, for a number of reasons, assist in shortening the length of trials. How a lawyer prepares for and asks questions of a**

**deposition witness whose testimony may be admissible at trial as substantive evidence under rule 3.190 is entirely different from how a lawyer prepares for and asks questions of a witness being deposed for discovery purposes under rule 3.220. In effect, the knowledge that a deposition witness's testimony can be used substantively at trial may have a chilling effect on a lawyer's questioning of such a witness.**

**Finally, a deposition that is taken pursuant to rule 3.220 is only admissible for purposes of impeachment and not as substantive evidence.**

## *Wyatt v. State*, 183 So.3d 1081 (Fla. 4th DCA 2015)

**Former girlfriend's testimony was admissible under the former testimony exception where girlfriend was unavailable to testify, the assistant state attorney had an opportunity to cross-examine her at a forfeiture hearing, and the state's attorney's office had a similar motive**

**Risto Jovan Wyatt appeals his judgment of conviction and sentence for trafficking in 28 grams or more of cocaine and for perjury. Because the trial court erred in excluding prior exculpatory testimony from a witness at a civil forfeiture hearing, we reverse and remand for a new trial. We affirm as to appellant's other points on appeal without discussion.**

**Appellant and his co-defendant, Christopher Brown, were under investigation for drug trafficking. Police monitored their phone calls over a three-month period via an authorized wiretap. A surveillance team also followed appellant and Brown on trips to Orlando, where police believed they were purchasing cocaine to distribute in Indian River County. During the surveillance, law enforcement officers never saw appellant or Brown in**

**physical possession of cocaine.**

**At trial, appellant sought to introduce a transcript of Ms. James's testimony at the forfeiture hearing, as former testimony of an unavailable witness under section 90.804(2)(a), Florida Statutes. The state and appellant stipulated that Ms. James was an unavailable witness because, if called to testify, she intended to exercise her Fifth Amendment right against self-incrimination. The trial court, however, sustained the state's objection to admission of Ms. James' former testimony and excluded it.**

**On appeal, appellant argues that the trial court abused its discretion in excluding Ms. James's former testimony at his criminal trial. He asserts that her testimony was admissible under section 90.804(2)(a), because the sheriff's office, through the assistant state attorney's cross-examination, had an opportunity and similar motive to show that Ms. James's testimony was not trustworthy and to establish that the seized money belonged to appellant and was intended for the purchase of narcotics. We agree.**

**Similarly, in this case, the assistant state attorney, acting on behalf of the sheriff's office, had an opportunity to cross-examine Ms. James at the forfeiture hearing. The state attorney's office had a "similar motive" at both the trial and the forfeiture hearing, specifically "to discredit the witness's testimony and show it to be not worthy of belief," given the exculpatory nature of Ms. James's testimony, i.e., the currency did not belong to the defendant and was not to be used to purchase drugs. Accordingly, based on**

**these facts and circumstances, the trial court erred in excluding Ms. James's former testimony.**

**We conclude that the exclusion of Ms. James's testimony was not harmless. The state, as the beneficiary of the error, has not proven beyond a reasonable doubt that the error in excluding exculpatory testimony about the ownership and intended use of money did not contribute to the verdict.** *See State v. DiGuilio,* **491 So.2d 1129, 1135 (Fla.1986). No drugs were found in the car, and the state relied heavily upon the $16,000 in currency seized from the car to support its theory that appellant and codefendant Brown intended to purchase cocaine from Leakes. At the forfeiture hearing, Ms. James claimed ownership of the currency and provided an explanation for its presence in the car. Failure to allow the jury to hear this testimony deprived the jury of critical evidence in determining appellant's guilt.**

*Reversed and Remanded for a new trial.*

## *Roussonicolos v. State*, 59 So.3d 238 (Fla. 4th DCA 2011)

**Codefedant's testimony at bond hearing was admissible under former testimony exception where state had opportunity and similar motive to cross-examine codefendant at bond hearing and codefendant became unavailable at trial by invoking his Fifth Amendment privilege against self-incrimination**

**Appellant, Peter Roussonicolos, appeals his judgment and sentence for organized scheme to defraud.**

**Roussonicolos and his co-defendant, Seamus Limato, worked together in Roussonicolos' business. At some point during their business relationship,**

**Roussonicolos and Limato were charged with organized scheme to defraud over $20,000. The essence of the State's case was that Roussonicolos and Limato were writing bad checks to themselves and each other, depositing them, and then withdrawing the funds before the payee bank discovered that the checks had been drawn on accounts that had insufficient funds. The trial was severed, and Roussonicolos' theory of defense was that Limato acted alone, and without Roussonicolos' knowledge or consent.**

**In support of his defense, Roussonicolos attempted to introduce a transcript of his bond hearing containing Limato's sworn testimony.**

**Limato admitted that he was solely responsible for the bad checks and that Roussonicolos was unaware that the checks were drawn on accounts with insufficient funds.**

**By the time Roussonicolos went to trial, Limato had invoked his Fifth Amendment right against self-incrimination and was unavailable to testify. When Roussonicolos attempted to introduce the transcript of Limato's testimony, the State objected on hearsay grounds.**

**The State argues that Limato's former testimony should be inadmissible because the scope of inquiry conducted at the bond hearing bore little resemblance to scope of the examination at trial.**

**We do not read Section 90.804(2)(a) to require that, in order for prior testimony to be admitted as an exception to the hearsay rule, the opponent of the evidence must have the same motivation to examine the witness in**

**both the prior proceeding and the one in which the prior testimony was being introduced. Nor, as the State suggests, must the scope of inquiry conducted at the bond hearing be the same as the scope of the examination at trial.** ***Garcia,*** **816 So.2d 554. To require such a high standard would render this hearsay exception useless.**

**In the instant case, the purpose of the hearing was for the court to consider whether Roussonicolos should be released and, if so, what conditions should be imposed pending his final VOP trial. Therefore, the trial court necessarily would have been concerned with whether the State had a prima facie case in order to determine whether Roussonicolos was a flight risk. § 903.046(2)(b), Fla. Stat. (2007);** ***Good v. Wille,*** **382 So.2d 408, 410 (Fla. 4th DCA 1980) (holding that one of the factors to be considered in setting bail is "the character and strength of the evidence or probability of guilt"). Within this context, the State, in opposing Roussonicolos' release, would have been motivated to proffer sufficient evidence to establish a prima facie case that Roussonicolos was guilty of the charge. The State had an opportunity to cross-examine Limato at the bond hearing. It also had a "similar motive" at both the trial and the bond hearing, specifically "to discredit [the witness'] testimony and show it to be not worthy of belief" given the exculpatory nature of Limato's testimony.** ***See Garcia,*** **816 So.2d at 565;** ***O'Neal,*** **54 F.Supp.2d at 698–99.**

**Under the circumstances of this case, we hold that the trial court erred**

**in concluding that Limato's testimony did not fall within section 90.804(2)(a).**

## *Wilson v. State*, 45 So.3d 514 (Fla. 4th DCA 2010)

**Defense witness was not "unavailable" at second trial under former testimony exception where witness had proven himself demonstrably unreliable as a witness in the first trial, and second trial was continued because witness traveled out of state**

**The state charged Edgar Wilson with two counts of aggravated battery with a deadly weapon, alleging that he stabbed two people with a knife. After a jury trial, he was convicted of one count as charged and of misdemeanor battery. This court reversed the convictions and remanded for a new trial.**

***Wilson v. State,* 975 So.2d 566 (Fla. 4th DCA 2008). At the second trial, Wilson was convicted of battery and aggravated battery and sentenced as a prison release reoffender. Wilson has now appealed from the sentence imposed after the second trial.**

**Wilson told his lawyer that Culligan was "not a problem" and that he did not need to use a subpoena to secure his attendance at trial. Wilson spoke to Culligan just before trial and made him aware of when the trial would start. However, several days into the second trial, defense counsel told the judge that Culligan was a missing witness. He tried to subpoena Culligan that same day.**

**The next day, defense counsel informed the judge that he could not**

**find Culligan. During trial the defense tried to find Culligan. Wilson went to Culligan's home, where someone told him that Culligan had lost his job and had taken off several days earlier. Wilson and his friends called around and tried to locate Culligan; they checked jails in several counties, but were unable to find him.**

**Defense counsel moved to admit the transcript of Culligan's testimony given at Wilson's first trial, arguing Culligan was unavailable, so the former testimony exception to the rule against hearsay applied. The state's opposition to the motion focused on Wilson's failure to subpoena the witness until the middle of the second trial.**

**The trial judge refused to admit Culligan's former testimony, finding that "the defense has not made a sufficient showing that the defendant has been [unable] to procure the witness's testimony, by process or other means." The judge based the decision "on the totality of the circumstances and the evidence that has been presented, the credibility of the witnesses, [and] the timing of efforts that have been advanced here."**

**Wilson argues that the trial judge erred in excluding Culligan's former testimony under section 90.804(2)(a). All of the hearsay exceptions contained in section 90.804(2) require that the declarant be "unavailable as a witness."**

**Culligan was demonstrably unreliable as a witness. The second trial was continued because Culligan went to Tennessee. Thereafter, Wilson was**

**on notice as to Culligan's unreliability. Nonetheless, Wilson relied on the same oral promise that Culligan had broken before. Because such informal means had earlier failed to secure Culligan's appearance, due diligence required Wilson to do something more than tell Culligan when the second trial would occur. Like the situation with the reluctant witness in *McClain,* due diligence in this case required that an unreliable Culligan be under subpoena for the second trial. We find no abuse of discretion in the trial judge's ruling that Wilson failed to establish Culligan's unavailability under section 90.804.**

*Affirmed.*

## (b) Dying Declaration

### *Cardenas v. State*, 49 So.3d 322 (Fla. 1st DCA 2010)

**Statements made by witness prior to his death did not qualify as dying declarations where there was no evidence to suggest that the witness believed his death was imminent when he made the statements**

**In October 1995, while fishing on his boat with his son Lucas Cardenas, his father Ronald Cardenas, Sr., and family friend, Frank Parrish, Appellant was intoxicated beyond the legal limit while operating the vessel. An accident occurred wherein Appellant's vessel collided with a barge. As a result, Parrish was killed, Appellant's father was initially seriously injured but later died, and Appellant's son was seriously injured but subsequently recovered.**

**Here, the trial court found that the testimony presented at the**

**evidentiary hearing failed to establish the necessary predicate for admission of any of the statements allegedly made by Appellant's father under the dying declaration hearsay exception. None of the witnesses who testified at the evidentiary hearing specifically testified as to statements made by Appellant's father at a time when he believed his death was imminent. For example, none of the allegedly exculpatory statements were made on the night of the accident or immediately before Appellant's father died; rather, the statements were made at different points during Appellant's father's 14-week hospital stay during which time he was "gravely ill" but often in a regular hospital room and capable of carrying on at least minimal conversations. Additionally, the trial court explained that its assessment of the testimony at the evidentiary hearing was consistent with trial counsel's recollection that there were "some 'hazy' statements" that could not be corroborated. It is the function of the trial court to make these types of credibility determinations.** ***See Blanco v. State*****, 702 So.2d 1250, 1252 (Fla.1997) (explaining that the appellate court reviewing the denial of a rule 3.850 motion after an evidentiary hearing will not substitute its judgment for that of the trial court on the credibility of witnesses or the weight to be given to evidence).**

## (c) Declaration Against Penal Interest

## Requirements for Admission:

### *Masaka v. State*, 4 So.3d 1274 (Fla. 2d DCA 2009)

**Statements to detective regarding shooting of cab driver were admissible under the hearsay exception for statements that were against a declarant's penal interest where the statements met the admissibility requirements**

**Oreneile Masaka appeals his convictions for attempted voluntary manslaughter and attempted robbery with a firearm, raising two issues for review. Because the trial court erred by excluding admissible evidence that was relevant to Masaka's defense, we reverse and remand for a new trial.**

**Masaka was charged with attempted voluntary manslaughter and attempted robbery with a firearm after a cab driver was shot in Tampa. The facts presented at trial showed that Masaka and his cousin, Andrew Panzo, found themselves on the far end of town from their residence after the city buses had stopped running. They decided to flag down a cab and get a ride to their apartment complex.**

**Panzo was interviewed by Detective Bryan Custer several days after the shooting. During that interview, Panzo told Detective Custer that he had had a chrome .25 caliber gun in his pocket earlier in the day and was telling people, "I'm fixin' to rob somebody." Panzo also told Detective Custer that he had possession of the gun used in the shooting after the incident and that he sold it to a stranger two days later. Panzo admitted to changing clothes immediately after the shooting because he knew the police would be looking**

**for the shooter. However, he asserted that Masaka was the shooter and that he (Panzo) was the one who had fled from the cab before the shooting occurred. He also told Detective Custer that he did not talk to the cab driver at any time during the ride because that would have blown Masaka's cover. Despite these statements, Panzo was never charged with any crimes relating to the shooting of Loy.**

**Masaka's primary argument on appeal is that the trial court improperly excluded the proffered portions of the statement Panzo made to Detective Custer.**

**Here, Panzo did not appear at trial, and Masaka sought to admit certain portions of Panzo's statement through the testimony of Detective Custer. Masaka agreed with the State that the proffered statements were hearsay; however, he contended that the statements were nevertheless admissible under the exception to the hearsay rule for statements that are against a declarant's penal interest. Specifically, section 90.804(2)(c), Florida Statutes (2005), provides,**

> **(c)** ***Statement against interest.*****—A statement which, at the time of its making, was so far contrary to the declarant's pecuniary or proprietary interest or tended to subject the declarant to liability or to render invalid a claim by the declarant against another, so that a person in the declarant's position would not have made the statement unless he or she believed it to be true. A statement**

**tending to expose the declarant to criminal liability and offered to exculpate the accused is inadmissible, unless corroborating circumstances show the trustworthiness of the statement.**

**The Florida Supreme Court has held that the test for admissibility under this section is (1) whether the declarant is unavailable, and if so (2) whether the statements are relevant, (3) whether the statements tend to inculpate the declarant and exculpate the defendant, and (4) whether the statements are corroborated.** *See Voorhees v. State,* **699 So.2d 602, 613 (Fla.1997). If the proffered statements meet these admissibility requirements, the weight to be given the statements is for the jury to determine.** *Id.* **Thus, we must consider whether the proffered portions of Panzo's statements meet these admissibility requirements.**

**Turning to the issue of whether the statements were exculpatory, we note that when ruling on the admissibility of these statements before trial, the trial court found that Panzo's statements were not admissible because they did not fully exonerate Masaka. However, this is not the proper test under this requirement. For statements against interest to satisfy this statutory requirement, they do not need to fully exonerate the defendant; instead, they must only "tend to exculpate" the defendant.** *Carpenter v. State,* **785 So.2d 1182, 1203 (Fla.2001) (holding that it was improper to exclude a codefendant's self-inculpatory hearsay statement on the grounds that the statement did not exonerate the defendant because the statement**

**"could bolster Carpenter's theory regarding his reduced degree of culpability"); *Voorhees,* 699 So.2d at 613.**

**Here, the proffered portions of Panzo's statement did "tend to exculpate" Masaka. The statements tend to show that Panzo had possession of a gun before the shooting and that he was discussing robbing someone in the hours prior to the attempted robbery. The statements also tend to show that Panzo disposed of the gun used in the shooting. In addition, the statements concerning Panzo's immediate change of clothes after the cab ride tend to show a consciousness of guilt. Because the proffered portions of Panzo's statement tended to exculpate Masaka, the trial court erred in finding otherwise and excluding the statements on that basis.**

**In finding Panzo's statements inadmissible, the trial court found that they were not sufficiently corroborated because there was no independent evidence that Panzo was actually the shooter. However, this conclusion misses the mark. The question for the trial court was whether Panzo's statements were sufficiently corroborated to be reliable evidence—not whether Panzo's statements were so credible as to prove Masaka's defense. All in all, Panzo exhibited a knowledge of facts that only someone connected with the crime itself would know. These facts were corroborated, at least in part, by other evidence presented at trial. Thus, his statements were sufficiently reliable to have been admitted. Once that admissibility threshold was met, the credibility of Panzo's statements and Masaka's defense was for**

**the jury, not the trial court, to assess.**

## *Dort v. State*, 175 So.3d 836 (Fla. 4th DCA 2015)

**Attempt by declarant to minimize criminal liability removes the sole justification for admitting statement under hearsay exception for statements against interest**

**For purposes of a hearsay exception for statements against interest, the term "statement" is used in a narrow sense to refer to a specific declaration or remark incriminating the speaker, and not more broadly to refer to the entire narrative portion of the speaker's confession. West's F.S.A. § 90.804(2)(c).**

**An attempt by declarant to minimize criminal liability removes the sole justification for allowing the declarant's statement in evidence under hearsay exception for statements against interest; likewise, a statement against penal interest may not be truly self-inculpatory if the declarant has implicated a third party in the process of making his own admission. West's F.S.A. § 90.804(2)(c).**

**A non-testifying accomplice's statement against penal interest is admissible as a hearsay exception if corroborating circumstances show the statement has particularized guarantees of trustworthiness. West's F.S.A. § 90.804(2)(c).**

**When determining whether an accomplice's statement contains particularized guarantees of trustworthiness, as would support admission under hearsay exception for statements against interest, courts should look**

**to the surrounding circumstances, including the language used by the accomplice and the setting in which the statements were made; for example, a statement admitting guilt and implicating another person, made while in custody, may well be motivated by a desire to curry favor with the authorities and hence fail to qualify as against interest. West's F.S.A. § 90.804(2)(c).**

**Alleged accomplice's statement to prosecutors following his arrest, "I did not tell [defendant] about none of this," was not sufficiently reliable to be admissible under hearsay exception for statements against interest in conspiracy prosecution against defendant; statement was made after accomplice had already been charged and appeared to be an attempt to made a deal with prosecutor and to minimize both his and defendant's involvement in the crime, and accomplice's statement was not consistent with other witness testimony regarding defendant's involvement. West's F.S.A. § 90.804(2)(c).**

**Lucien Dort was charged by indictment with murder in the first degree with a firearm and conspiracy to commit murder. A jury found him guilty as charged on both counts. He appeals his convictions, raising two grounds for reversal: (1) exclusion of a co-defendant's statement to the prosecutor concerning events surrounding the murder, and (2) admission of testimony regarding appellant's ownership of a gun. We affirm as to both issues, but write to address exclusion of the co-defendant's statements. We find no**

**abuse of discretion in the trial court's ruling that these statements were not admissible under the statement-against-interest hearsay exception.**

**Before trial, appellant filed a motion in limine to allow admission of a statement given by co-defendant Marciano to prosecutors after his arrest. Appellant sought to introduce the statement as an exception to the hearsay rule for statements against a declarant's penal interest, under section 90.804(2)(c), Florida Statutes. Marciano was expected to exercise his Fifth Amendment right against self-incrimination and refuse to testify in appellant's trial.**

**The record on appeal does not contain the entire proffer. Appellant presented the following statements from his motion in limine, in which he summarized Marciano's statements:**

**a. Referring to meeting with Brian Smith, Marciano Dort, and Daniel Duffy at Duffy's house, Lucien was there, but he was basically flirting with the girls: Megan and Nikki.**

**b. Lucien was basically doing the driving I didn't have a license and Brian Smith had a warrant out for his arrest.**

**c. I asked Lucien to drive Brian around a couple of times and he did.**

**d. I didn't tell Lucien about none of this.**

**e. Brian knew some stripper where John Torres lived and Lucien thought they were goin (sic) there to visit the girls but I (sic) reality Brian was going there to do the job. Brian made up stories to my brother about why**

**they were there (selling pills).**

**f. On day of murder: Waited in the back for 15 minutes then went to the front and my brother wasn't feeling well, he had taken some Benadryl for his nose, and wanted to leave. Brian said to wait a bit more.**

**g. We didn't hear the shots because we were parked a few buildings down and we was playing music in the car and the windows were rolled up.**

**h. Brian never admitted he shot John Torres when he got back in the car he hopped back in the car and said lets go.**

**i. Marciano did not even know Brian was going to shoot him that day, we just went down there to check things out.**

**After reviewing defense counsel's proffer, the trial court determined that Marciano's statements to the prosecutors about events leading up to and during the murder were not sufficiently self-incriminating to qualify as statements against interest. Further, the court found that there were no corroborating circumstances indicating their trustworthiness. The court therefore denied appellant's motion to admit the statements into evidence.**

**Essentially, the test for admissibility of statements against interest under section 90.804(2)(c) is whether (1) the declarant is unavailable, (2) the statements are relevant, (3) the statements tend to inculpate the declarant and exculpate the defendant, and (4) the statements are corroborated.** ***Voorhees v. State,*** **699 So.2d 602, 613 (Fla.1997).**

**The state, however, argues that the requirements for self-inculpatory**

**statements and corroboration were not met. According to the state, while the statements tended to exculpate appellant, they were not inculpatory as to Marciano [the declarant]. The state contends that Marciano never inculpated himself; instead, his statements implied that neither he nor his brother knew a murder was going to take place. To illustrate this, the state points to portions of his statement such as, "*we* didn't hear the shots because *we* were parked a few buildings away," "Marciano [the declarant] did not even know Brian was going to shoot him that day, *we just went down there to check things out,*" and "Brian never admitted he shot John Torres."**

**The state argues that Marciano's statements did not specifically implicate himself as an accomplice, but mainly denied any knowledge and shifted the blame to a third party, Brian Smith. As such, his statements did not qualify as a statement against interest. *See Perez v. State,* 980 So.2d 1126, 1133 (Fla. 3d DCA 2008) (concluding that the portion of a statement by defendant's accomplice, in which accomplice indicated that a third party had been involved in the robbery, was not admissible under hearsay exception for statements against penal interest, as the statement implicating the third party was not inculpatory as to the accomplice/declarant).**

**Further, appellant failed to meet the requirement that Marciano's statements be sufficiently corroborated to demonstrate "particularized guarantees of trustworthiness." *See Machado v. State,* 787 So.2d 112, 113 (Fla. 4th DCA 2001).**

**Here, the trial court noted that Marciano made the statements to prosecutors after he had already been charged; it determined that Marciano was motivated by a desire to make a deal with the prosecutor. Overall, the statement appeared to be an attempt to minimize his and his brother's involvement. The court concluded that the circumstances were such as to render the statements unreliable and untrustworthy.**

## Corroboration of Trustworthiness

### *DeWolfe v. State*, 62 So.3d 1142 (Fla. 1st DCA 2011)

**Corroborating circumstances of trustworthiness include those that surround the making of the statement and those that render the declarant worthy of belief**

**The defense sought to put on the testimony of Donald Gibson (Mr. Ahlgren's friend of 25 years) and Maegen DeWolfe (the defendant's daughter), that Mr. Ahlgren had confessed to stealing the air conditioners from the empty house. Conceding the confession was hearsay, appellant relies, here as below, on section 90.804(2)(c), the declaration-against-penal-interest exception to the rule excluding hearsay:**

**(2) The following are not excluded under s. 90.802, provided that the declarant is unavailable as a witness:**

**....**

**(c) Statement against interest. A statement which, at the time of its making, was so far contrary to the declarant's pecuniary or proprietary interest or tended to subject the declarant to liability or to render invalid**

> **a claim by the declarant against another, so that a person in the declarant's position would not have made the statement unless he or she believed it to be true. A statement tending to expose the declarant to criminal liability and offered to exculpate the accused is inadmissible, unless corroborating circumstances show the trustworthiness of the statement.**
>
> **§ 90.804(2)(c), Fla. Stat. (2010). Mr. Ahlgren's unavailability was not at issue: He had died by the time of trial. His confession to theft was, moreover, plainly against his penal interest. But the trial court ruled the hearsay statements did not meet the criteria of section 90.804(2)(c), in that corroborating circumstances did not show the statements to be trustworthy.**

**It is for the jury, not the judge, to decide whether a declaration against penal interest should be credited. The trial judge exercises only a gatekeeping function, by deciding whether corroborating circumstances show the declaration's "trustworthiness." "In determining what constitutes ... a showing [of particularized guarantees of trustworthiness], ... the relevant circumstances only include those that surround the making of the statement and those that render the declarant worthy of belief."** *Franqui v. State,* **699 So.2d 1312, 1318–19 (Fla.1997) (citing** *Idaho v. Wright,* **497 U.S. 805, 819, 110 S.Ct. 3139, 111 L.Ed.2d 638 (1990)).**

**Under the cases, the issue is whether Mr. Ahlgren's statements were**

**sufficiently corroborated. "Once that admissibility threshold was met, the credibility of [Mr. Ahlgren's] statements and [Ms. DeWolfe's] defense was for the jury, not the trial court, to assess."**

### *Dort v. State*, 175 So.3d 836 (Fla. 4th DCA 2015)

**Surrounding circumstances include the language used by the accomplice and the setting in which the statements were made**

*See infra* **at page 130.**

# V. OTHERWISE ADMISSIBLE HEARSAY

## Relevancy

### *Dortch v. State*, 63 So.3d 904 (Fla. 1st DCA 2011)

**State introduction of collateral crime testimony under pretext of establishing context**

**At trial, the manager of a Jacksonville Avis Rent–A–Car testified that a red Chevy Cobalt was stolen from the lot on June 29, 2009. On September 16, 2009, police advised Avis that the car had been recovered. That afternoon, Officer Andres (Jacksonville Sheriff's Office) observed a red Chevrolet Cobalt approaching him on University Boulevard. Officer Andres testified that he made a U-turn to follow the car and ran the vehicle's license plate number, learning that the vehicle had been stolen.**

**Officer Andres further testified that he followed the car until it stopped abruptly in the middle of the street. The officer exited his patrol car, drew his service revolver, and told the suspect, Dortch, to turn off the engine. Instead,**

**the appellant sped off and Officer Andres pursued with lights and sirens activated. Officer Andres terminated the chase after only a minute. Almost immediately after the chase ended, Dortch's vehicle was involved in multiple collisions. Officer Haire and his K–9 assistant tracked the appellant into an open field, where he located the suspect in some tall weeds and bushes.**

**We reject the State's argument that evidence that the car was stolen is relevant for the purpose of establishing the context of the initial pursuit of the vehicle. In light of the charges leveled against the appellant—which do not include grand theft auto—we believe this explanation proves little more than a pretext for the admission of evidence of a collateral crime.**

**We do not find that the justification for Officer Andres' pursuit was relevant to a material fact in dispute.** ***See Conley v. State,*** **620 So.2d 180, 183 (Fla.1993) (holding inadmissible a police dispatch report because the reason why officers arrived at the scene was not a material issue in the case, notwithstanding the State's argument that the testimony was offered to establish a logical sequence of events).**

## Admissibility of Out of Court Confession: *Chambers*[1] Four-Pronged Test

## *Bearden v. State*, 161 So.3d 1257 (Fla. 2015)

**Statements attributed by witness to declarant, who said that he was present in the victim's car when the victim was murdered, were sufficiently corroborated so as to satisfy the *Chambers'* test for determining admissibility of hearsay evidence of an out-of-court confession, *i.e.*, (1) the confession or statement was made spontaneously to a close acquaintance after the crime occurred; (2) the confession or statement is corroborated by other evidence in the case; (3) the confession or statement is self-incriminating and unquestionably against interest; and (4) if there is any question about the truthfulness of the confession or statement, the declarant must be available for cross-examination**

**Bearden's trial began in February 2009. On the second day, a witness named Angela Tyler (Tyler) contacted the prosecutor's office and a Sheriff's Office detective was sent to take her statement. Tyler was not previously identified as a witness during the investigation. Tyler told the detective that a few days after the murder Ray Allen Brown admitted to her that he was with William Brown in the car when Skipper was stabbed. After receiving a copy of Tyler's statement, the defense planned to call her as a defense witness to impeach Ray Allen Brown's anticipated testimony that he was not present at the time of the murder. Although the State planned to call Ray Allen Brown as a witness, his testimony was not presented in order to prevent the defense from impeaching him. Therefore, the defense called Ray**

[1] *Chambers v. Mississippi,* **410 U.S. 284, 93 S.Ct. 1038, 35 L.Ed.2d 297 (1973)**.

**Allen Brown as a defense witness, but did so prior to the proffer of Tyler's testimony. Following Ray Allen Brown's testimony, which was cumulative to that of J.T. Brown and Kirchoff, the defense announced that Ray Allen Brown was subject to recall.**

**The defense proffered the testimony of Tyler, who knew both Bearden and the Brown family and had a dating relationship with Ray Allen Brown's cousin on and off for about three years. According to Tyler, she encountered Ray Allen Brown at her mother's house on March 18, 2007. She said he seemed upset and she asked him what was wrong. Ray Allen Brown then proceeded to tell Tyler that his cousin, William Brown, "had gotten into a confrontation with a gay guy, and they had an argument, and he had stabbed the guy. And he was with his cousin when he did it."** ***Id.*** **at 659. When Tyler asked him if he was involved in the stabbing, Ray Allen Brown "said no, that he didn't involve [sic] in the murder ... he had to help his cousin, though, was his exact words, because they was family [sic]."** ***Id.*** **Tyler acknowledged that she believed Ray Allen Brown's admission that he was with William Brown when Skipper was killed, inculpating him in Skipper's murder and exonerating Bearden in any direct involvement in the murder.**

**Following the proffer, the defense requested to recall Ray Allen Brown to ask him whether he had made these statements to Tyler and requested to present Tyler's testimony about the purported statements to the jury. However, the trial court found Tyler's testimony about Ray Allen Brown's**

**alleged out-of-court statement inadmissible on its face and concluded that it would only be admissible if it met the four factors in *Chambers v. Mississippi,* 410 U.S. 284, 93 S.Ct. 1038, 35 L.Ed.2d 297 (1973): (1) the confession or statement was made spontaneously to a close acquaintance shortly after the crime occurred; (2) the confession or statement is corroborated by some other evidence in the case; (3) the confession or statement was self-incriminatory and unquestionably against interest; and (4) if there is any question about the truthfulness of the out-of-court confession or statement, the declarant must be available for cross-examination. *Id.* at 300–01, 93 S.Ct. 1038. The trial court concluded that Tyler's testimony only satisfied two of the four *Chambers* factors: the first one (spontaneity of declarant's statement to a close acquaintance) and the fourth one (declarant's availability for cross-examination). Consequently, the trial court excluded Tyler's testimony from the jury's consideration. The trial court also ruled that the defense could not recall Ray Allen Brown to question him about his statements to Tyler.**

**The First District concluded that "[t]he excluded evidence was central to Ms. DeWolfe's defense" and that she was entitled to a new trial. *Id.* at 1147. The district court also stated that the determination of a hearsay witness' credibility was to be made by the jury, not the judge, and it noted a distinction between its position and that in *Bearden. Id.* at 1146. Accordingly, the conflict presented for this Court's resolution is whether the**

**judge or the jury should consider the credibility of a witness testifying with regard to out-of-court statements against penal interest of a third party.**

**However, in *Bearden,* the trial court infringed upon the jury's role and evaluated Tyler's credibility. The trial court stated:**

> **Now, was there any unique facts given to us? Sort of. He said that there was an argument, may have been involved over a sexual advance, and Bill–Bill stabbed him. Any person in Polk County in the last year and a half could have surmised that information by reading the extensive press coverage on this case, and certainly could have picked it up from listening to television coverage of this case.**
>
> **And in fact, that's another concern about mine. Why in the world when this woman, that being Ms. Tyler, who admitted in her proffer that she knew everyone involved in this case—she knew the defendant, she knew Ray Ray Brown, she knew Bill Brown, she knew their uncles, or their fathers. She knew all these people, and she claims, in spite of the fact that none of these people can even tell you what time of day it was, she claims to specifically remember that this occurred on the 17th.**
>
> **That's three days or less after this crime was committed, and she didn't tell anybody until two years later, when she's watching this on television.**

**In *Carpenter,* this Court concluded that the trial court erred when it questioned the credibility of in-court witnesses. We explained that under Florida law, the credibility of an in-court witness who is testifying as to an out-of-court declaration against penal interest is not a matter for the trial court's consideration in determining whether to admit the testimony. 785 So.2d at 1203. Instead, the jury has the duty to assess the credibility of an in-court witness who is testifying about the out-of-court statement against penal interest. *Id.* Indeed, the jury does not usurp the judge's role by determining admissibility of evidence; therefore, the judge should not usurp the jury's role by assessing the credibility of an in-court witness. Thus, we agree with the First District in *DeWolfe.***

**The concerns about Tyler's credibility could easily have been addressed by the State on cross-examination. Because of the importance of Tyler's testimony to Bearden's defense, we conclude that the trial court erred in considering Tyler's credibility. As the district court observed in *Bearden,* if the jury believed Tyler's testimony, it would have exonerated Bearden. *Bearden,* 62 So.3d at 659. Therefore, there is a reasonable probability that this error affected the verdict. *See State v. DiGuilio,* 491 So.2d 1129, 1139 (Fla.1986).**

**Because Ray Allen Brown's alleged statement to Tyler was an out-of-court statement that was offered for the truth of the matter asserted—that Ray Allen Brown was present in Skipper's car when Skipper was murdered—**

**the statement constituted inadmissible hearsay under section 90.802, Florida Statutes. Under that section, hearsay is inadmissible as evidence at trial or a hearing except as provided by statute. A possible hearsay exception for Tyler's testimony regarding the statement might have been the exception for a statement against penal interest under section 90.804(2)(c), Florida Statutes. However, section 90.804(2)(c) provides that hearsay that constitutes a statement against penal interest is admissible if the declarant is *unavailable* to testify, and in the present case, Ray Allen Brown was available to and did testify at trial. Thus, Tyler's testimony would not have been admissible under section 90.804(2)(c).**

**However, in *Chambers,* the United States Supreme Court concluded that the exclusion of hearsay regarding a third party's confessions to a crime violated the defendant's constitutional right to due process—the state's rules of evidence notwithstanding. In *Chambers,* the defendant was convicted of the murder of a police officer. *Chambers,* 410 U.S. at 285, 93 S.Ct. 1038. During his trial, Chambers sought to introduce evidence that another individual orally confessed three separate times and also offered a sworn, albeit later recanted, confession. *Id.* at 289, 93 S.Ct. 1038. However, because Mississippi law would not allow the defense to impeach its own witness, Chambers was precluded from introducing evidence relating to the alleged confessions. *Id.* at 289, 294, 93 S.Ct. 1038.**

**Bearden was unable to avail himself of the statement against penal**

**interest exception. Thus, the trial court properly considered Tyler's statement under the *Chambers* analysis, but concluded that only two of the factors were satisfied (spontaneous statement and declarant's availability for cross-examination). The district court further concluded that Ray Allen Brown's alleged confession was also a statement against penal interest for purposes of meeting the third factor of the *Chambers* analysis. However, the Second District agreed with the trial court that the alleged confession was not adequately corroborated and lacked reliability. The district court twice discounted Bearden's statement: "First, the purported statements were not corroborated by any evidence in the case *except for* Bearden's pretrial statement." *Bearden,* 62 So.3d at 663 (emphasis added). The district court also stated that "there is nothing *other than* Bearden's self-serving statements to the detectives before his arrest." *Id.* at 664 (emphasis added).**

**Agreeing with the trial court, which prohibited Bearden from impeaching Ray Allen Brown on recall regarding his alleged confession to Tyler, the district court concluded that because Tyler's testimony about the out-of-court statement was inadmissible, it was likewise improper to allow Bearden to confront Ray Allen Brown about the confession. Under section 90.608(5), Florida Statutes, "[a]ny party, including the party calling the witness, may attack the credibility of a witness by ... [p]roof by other witnesses that material facts are not as testified to by the witness being impeached." Because Tyler's proffered testimony placed Ray Allen Brown in**

**Skipper's car at the time of the murder, he could have been impeached as to his whereabouts at the time of and his involvement in the murder. However, this Court's decision in *Morton v. State,* 689 So.2d 259 (Fla.1997), *receded from on other grounds by Rodriguez v. State,* 753 So.2d 29 (Fla.2000), provides that a party may not call a witness for the primary purpose of developing impeachment evidence. In light of this rule, Ray Allen Brown could not have been recalled to the stand solely for the purpose of impeachment.**

**Nevertheless, according to the United States Supreme Court, the due process right of a defendant in a criminal trial "is, in essence, the right to a fair opportunity to defend against the State's accusations." *Chambers,* 410 U.S. at 294, 93 S.Ct. 1038. "The rights to confront and cross-examine witnesses and to call witnesses in one's own behalf have long been recognized as essential to due process." *Id.* Indeed, the right of an accused to present witnesses in his own defense is one of the most fundamental rights. *Id.* at 302, 93 S.Ct. 1038.**

**Bearden should have had the opportunity to impeach Ray Allen Brown. The State "lost interest" in Ray Allen Brown as a witness only after Tyler surfaced with his alleged confession. *Bearden,* 62 So.3d at 660. The State's strategic decision not to call Ray Allen Brown left Bearden in the position of having to call him as a witness and this deprived Bearden of the opportunity to impeach Ray Allen Brown based on Tyler's testimony. The subject upon**

**which Ray Allen Brown could have been impeached was central to the defense theory that he, not Bearden, was in Skipper's car at the time of the murder. Consequently, the exclusion of the examination of Ray Allen Brown on recall deprived Bearden of due process. Under these circumstances, we conclude it was error for the trial court to prohibit Bearden from calling Ray Allen Brown.**

# VI. MISCELLANEOUS

## (a) Double Hearsay

## *Hunter v. State*, 174 So.3d 1011 (Fla. 1st DCA 2015)

**Recorded statement of eyewitness, relaying information fed to him by his companion, constituted hearsay within hearsay and were inadmissible without predicate showing that companion's statements independently satisfied hearsay exception**

**Hunter next argues that the trial court abused its discretion in admitting the recording of a 9–1–1 call which, although redacted in part before being played for the jury, was tainted by double hearsay. State's witness Alex Taylor testified he made the call immediately upon seeing two men chasing a third knife-wielding man, yelling they had just been robbed, and telling Taylor to call 9–1–1. On the stand, Taylor described who and what he saw the night in question, and stated that he had been accompanied at the time by a Mr. Thompson.**

**The trial court admitted the recording under the excited utterance hearsay exception, see section 90.803(2), Florida Statutes-a ruling Hunter**

**does not challenge in whole. Rather, Hunter argues that certain of Mr. Taylor's statements to the 9–1–1 operator were based on information fed to him by Mr. Thompson, who was unavailable for trial and whose statements could not be established as excited utterances.**

**In the unredacted recording of Mr. Taylor's 9–1–1 call, Mr. Thompson is the unidentified speaker:**

**Q. Police department, where is your emergency?**

**A. I'm here at Fort Walton Temple Mound.**

**Q. The Indian Temple Mound?**

**A. Yeah.**

**Q. Okay. What's going on there?**

**A. I just witnessed a robbery (inaudible).**

**Q. Okay. What does the guy look like?**

**A. Okay. The guy was kind of heavy set, short dude. He was about 5'6, 5'7, 5'8.**

**UNIDENTIFIED SPEAKER: Long hair.**

**Q. Was he black or white?**

**A. He was white. What color was his hair?**

**UNIDENTIFIED SPEAKER: Black hair.**

**A. He had dark hair.**

**UNIDENTIFIED SPEAKER: Black backpack.**

**A. Black backpack. He had a tattoo on his arm, and he's wearing a green**

**shirt and shorts.**

**Q. A green shirt and shorts?**

**A. Yeah. His shorts weren't green, sorry.**

**Q. What color were the shorts?**

**A. His shorts were black.**

**Q. And he had a tattoo on what arm?**

**A. He had a tattoo on his right arm (inaudible).**

**UNIDENTIFIED SPEAKER: (Inaudible.)**

**The call continued to conclusion with only Taylor and the 9–1–1 operator speaking. At trial, the court permitted the State to play the recording for the jury with only the statements of the unidentified speaker redacted.**

**Hunter correctly characterizes those of Mr. Taylor's statements conveying information from the unidentified speaker as inadmissible hearsay within hearsay.**

**<u>Comment</u>: The admission error was deemed harmless since the information was introduced through a separate witness.**

## (b) <u>Hearsay by "Inescapable Inference"</u>

## *Almond v. State*, 1 So.3d 1274 (Fla. 1st DCA 2009)

**<u>Out-of-court statement of a non-testifying witness that furnishes evidence of defendant's guilt is inadmissible hearsay</u>**

**Deputy McGill testified that he verified that Appellant did not reside at**

**his registered address after speaking to a resident of that address, that he located Appellant after speaking to Appellant's girlfriend, that Appellant was residing at a different address in violation of the sexual offender registration requirements based on information he had gathered, and that he knew that Appellant was required to register as a sexual offender because he received notification to that effect from FDLE. The trial court abused its discretion when it allowed the above testimony because it was hearsay by inescapable inference.** *See Zuluaga v. State,* **915 So.2d 1251, 1252–53 (Fla. 3d DCA 2005) (holding that when an out-of-court statement of a non-testifying witness furnishes evidence of the defendant's guilt, the testimony is hearsay and cannot be admitted to show the sequence of events in an investigation because its probative value is out-weighed by its prejudicial effect);** *see also Keen v. State,* **775 So.2d 263, 273 (Fla.2000);** *Cedillo v. State,* **949 So.2d 339, 340 (Fla. 4th DCA 2007). The trial court also erred in admitting Appellant's written statement before the State had established the corpus delicti of the charged crime.** *Bassett v. State,* **449 So.2d 803, 807 (Fla.1984).**

## (c) Hearsay & Confrontation Clause

### *Rosario v. State*, 175 So.3d 843 (Fla. 5th DCA 2015)

**Autopsy report prepared pursuant to chapter 406 is testimonial hearsay under the Confrontation Clause**

**The primary issue we address in this case is whether an autopsy report prepared pursuant to chapter 406, Florida Statutes (2001), is testimonial**

**hearsay under the Confrontation Clause of the Sixth Amendment to the United States Constitution. Following a jury trial, Appellant, Luis Rosario, was convicted of aggravated child abuse and first-degree murder of A.S., a four-year-old boy. He argues that his Sixth Amendment right to confront witnesses against him was violated at trial for two reasons. First, the trial court allowed the admission of the autopsy report of A.S. into evidence without requiring the testimony of the medical examiner who prepared the autopsy report. Second, the trial court allowed a surrogate medical examiner, who did not perform or participate during the autopsy, to testify as to the cause of death listed within the report.**

**In the early morning hours of April 16, 2001, A.S. was pronounced dead at the hospital. Doctor Shashi Gore, the then-Chief Medical Examiner for the district, conducted the autopsy of A.S.'s body. As described in the autopsy report, there are five possible manners of death: (1) accident; (2) suicide; (3) homicide; (4) natural; and (5) undetermined. In his original autopsy report dated April 16, 2001, Dr. Gore could not conclude the manner in which A.S. had died; he listed the cause of death as "undetermined."**

**On November 15, 2001, Dr. Gore filed an addendum to his autopsy report, mentioning contusions in A.S.'s mouth and an abrasion on the back of his ear, but he did not change his original conclusion as to the cause of death. However, in mid-February of 2002, Dr. Gore met with members of law enforcement and with doctors from Child Protective Services ("CPS"). The**

**next day, Dr. Gore changed his conclusion as to the cause of death to "homicide," finding that the death was caused by asphyxiation based on "[n]ew evidence." However, Dr. Gore did not identify the "new evidence" in the autopsy report.**

**At some point after the autopsy of A.S., Dr. Gore was removed as the Chief Medical Examiner for the district and was replaced by Dr. Jan C. Garavaglia. The State listed Dr. Garavaglia as its medical expert for trial and did not include Dr. Gore as one of its witnesses. During her pretrial deposition, Dr. Garavaglia testified that she did not participate in any way during the autopsy of A.S. Based upon this testimony and Appellant's belief that the State did not intend to call Dr. Gore as a trial witness, Appellant filed a motion in limine to preclude the State from introducing the testimony of Dr. Garavaglia. Appellant raised no issue with the qualifications of Dr. Garavaglia. However, citing to *Crawford v. Washington,* 541 U.S. 36, 124 S.Ct. 1354, 158 L.Ed.2d 177 (2004), he argued that Dr. Garavaglia's testimony would violate his constitutional right to confront witnesses against him because her testimony would be "based upon a review of an autopsy report by someone not physically present at the autopsy."**

**At trial, the State's theory of the case was that Appellant suffocated A.S. to get him to stop crying. Dr. Gore did not testify at trial. However, notwithstanding the State's prior representation at the motion in limine hearing, Dr. Gore's autopsy report was offered and allowed into evidence**

**over Appellant's Confrontation Clause objection.[3] Additionally, Dr. Garavaglia testified that A.S.'s death was due to a homicide and that A.S. was asphyxiated based upon the "compression of [his] neck face down into something."**

**Appellant's defense was that there was no reliable evidence that A.S.'s death was a homicide. Appellant did not testify at trial. His only witness was Dr. Stephen Nelson, the Chief Medical Examiner for another district in Florida. Dr. Nelson was the prior chairman of the State of Florida's Medical Examiners Commission and was involved in Dr. Gore's removal from office. Based upon his review of Dr. Gore's original and amended autopsy report, he concluded that A.S.'s cause of death was undetermined, as Dr. Gore had initially reported. Dr. Nelson noted other potential causes of death, including signs of an infectious process present in A.S.'s lungs and that A.S.'s spleen was three to four times larger than the normal size.**

**Both Dr. Garavaglia and Dr. Nelson testified that they considered Dr. Gore to be generally unreliable. According to Dr. Garavaglia, "He's had trouble as a medical examiner."[4] Both doctors also testified that the autopsy report of A.S. contained errors and inconsistencies. For those reasons, Dr. Garavaglia did not form her opinion based on the autopsy report. Rather, she testified that her conclusion was formed from her "independent evaluation of the photographs" and her personal review of a preserved section of A.S.'s brain that was removed by a neuropathologist near the time of A.S.'s death.**

**In *United States v. De La Cruz,* 514 F.3d 121 (1st Cir.2008), the First Circuit held that an autopsy report is "in the nature of a business record, and business records are expressly excluded from the reach of *Crawford*." *Id.* at 133.**

**In contrast, the Eleventh and District of Columbia Circuit Courts of Appeals have concluded that an autopsy report is testimonial. In *United States v. Ignasiak,* 667 F.3d 1217 (11th Cir.2012), the Eleventh Circuit held that due to the statutory framework under Florida law, in which the Medical Examiners Commission was created and exists within the Department of Law Enforcement, the autopsy reports in that case were testimonial because they were "made under circumstances which would lead an objective witness reasonably to believe that the statement would be available for use at a later trial." *Id.* at 1231–32 (quoting *United States v. Baker,* 432 F.3d 1189, 1203 (11th Cir.2005)). Additionally, the court also stated that medical examiners are not mere scriveners, but rather, their reports include observational data and conclusions that are "the product of skill, methodology, and judgment." *Id.* at 1232–33. The District of Columbia Circuit utilized the same rationale in *United States v. Moore,* 651 F.3d 30, 73 (D.C.Cir.2011).**

**State courts are also split on this issue.[7] However, in Florida, the only case to address the issue is *Banmah v. State,* 87 So.3d 101 (Fla. 3d DCA 2012). In *Banmah,* the Third District Court of Appeal held that an autopsy report is nontestimonial and that the surrogate medical examiner's**

**testimony at trial did not violate the Confrontation Clause. *See id.* at 103–04. Three rationales can be gleaned from the opinion.**

**We next determine whether Dr. Gore's autopsy report was testimonial. Since there is no precise definition of "testimonial" within the meaning of the Sixth Amendment, we first begin our analysis by attempting to ascertain the intent of the framers of the Constitution. *See Lawnwood Med. Ctr., Inc. v. Seeger,* 990 So.2d 503, 510 (Fla.2008) ("Our goal in construing a constitutional provision is to ascertain and effectuate the intent of the framers and voters." (citing *Caribbean Conservation Corp. v. Fla. Fish & Wildlife Conservation Comm'n,* 838 So.2d 492, 501 (Fla.2003))).**

**Under Florida law, the Medical Examiners Commission was created and exists within the Department of Law Enforcement. Fla. Stat. § 406.02. Further, the Medical Examiners Commission itself must include one member who is a state attorney, one member who is a public defender, one member who is sheriff, and one member who is the attorney general or his designee, in addition to five other non-criminal justice members. *Id.* The medical examiner for each district "shall determine the cause of death" in a variety of circumstances and "shall, for that purpose, make or have performed such examinations, investigations, and autopsies as he or she shall deem necessary or as shall be requested by the state attorney." Fla. Stat. § 406.11(1). Further, any person who becomes aware of a person dying under circumstances described in section § 406.11 has a duty to report the death to**

**the medical examiner. *Id.* at § 406.12. Failure to do so is a first degree misdemeanor. *Id.***

**Due to this statutory relationship with law enforcement and the "suspicious" circumstances that give rise to, and in fact require, the creation of an autopsy report in Florida, we conclude that an autopsy report prepared pursuant to chapter 406 is presumptively testimonial in nature. Not unlike a witness's written recitation of facts to a police officer following a suspected crime, such autopsy reports are "made under circumstances which would lead an objective witness reasonably to believe that the statement would be available for use at a later trial."**

**In sum, we conclude that an autopsy report prepared pursuant to chapter 406 is testimonial hearsay under the Confrontation Clause. With respect to the broad statement in *Banmah* that "autopsy reports are non-testimonial because they are prepared pursuant to a statutory duty, and not solely for use in prosecution," we respectfully disagree.**

**However, based on the totality of the circumstances in this case, we are persuaded beyond a reasonable doubt that the admission of Dr. Gore's autopsy report did not affect the jury's verdict. Accordingly, although it was a violation of the Confrontation Clause to admit Dr. Gore's autopsy report into evidence, such error was harmless. *See State v. Carey,* No. M2013–02483–CCA–R3–CD, 2015 WL 1119454, at *16 (Tenn.Crim.App.2015) (slip opinion) (Woodall, J., concurring) ("Error in the admission into evidence of the**

**autopsy report as an exhibit was rendered harmless beyond a reasonable doubt by [the surrogate medical examiner's] testimony.").**

**We also hold that notwithstanding section 90.704, Florida Statutes, the Confrontation Clause is violated by a surrogate medical examiner's testimony that reveals testimonial hearsay contained within an otherwise inadmissible autopsy report.**

## *Squire v. State*, 2016 WL 717128 (Fla. 4th DCA, Feb. 24, 2016)

**Testimonial statement made for the purposes of assisting the detective in the investigation, where the victim did not testify, violated defendant's Confrontation Clause rights**

*See infra* **at page 11.**

## *Corona v. State*, 64 So.3d 1232 (Fla. 2011)

**A discovery deposition does not satisfy mandate in *Crawford v. Washington* that a defendant be given a prior opportunity to cross-examine a declarant of a testimonial statement**

**Sergio Corona, was convicted of the capital sexual battery of his eleven-year old daughter, A.C.**

**The family included Corona, his daughter, A.C., his wife, Victoria Corona (hereinafter Victoria), and Victoria's relatives.**

**The State initially anticipated that Victoria and A.C. would testify at the trial. However, Victoria later became uncooperative, and the State was unsuccessful in its attempts to procure her or A.C.'s attendance for trial. At a subsequent hearing on the admissibility of A.C.'s hearsay statements that were made to police officers immediately after the incident, the trial court**

**ruled, over Corona's arguments to the contrary, that A.C.'s statements were admissible.**

**With regard to Corona's prior opportunity for cross-examination, the district court noted that Corona took a pretrial deposition of both A.C. and Victoria, questioning them at length under oath. Corona argued that he had a right to a face-to-face confrontation and his confrontation rights could not be satisfied by deposition because he did not have an absolute right to be present at the deposition.**

**The trial court granted the request, but Victoria evaded subsequent attempts by investigators to contact her. Therefore, the extradition could not be completed. In light of the above, it is clear that the unavailability was not because of any unreasonable delay on the part of the State, but was because of Victoria's last minute unwillingness to cooperate, which prevented any involvement of A.C. at trial.**

**However, in light of this Court's recent precedent, the district court erred in holding that the pretrial deposition of A.C. afforded Corona an adequate opportunity to cross-examine the victim/declarant. In *State v. Lopez,* 974 So.2d 340 (Fla.2008), and *Blanton v. State,* 978 So.2d 149 (Fla.2008), this Court provided several reasons why such depositions do not meet *Crawford's* cross-examination requirement.**

## (d) Hearsay & Pretrial Detention

### *Johnson v. Guevara*, 156 So.3d 557 (Fla. 3d DCA 2015)

**Final order of pretrial detention shall not be based *solely* on hearsay**

**Elijah Johnson petitions for a writ of habeas corpus following the entry of a circuit court order granting the State's motions to revoke bond and for pretrial detention.**

**Initially, the petitioner was arrested on August 8, 2014, for lewd and lascivious molestation of a victim twelve years of age or younger, under section 800.04(5)(b), Florida Statutes (2014). The State did not file formal charges against the petitioner by the 33rd day after arrest, and the petitioner was then released on his own recognizance pursuant to Florida Rule of Criminal Procedure 3.134(2) when such charges had not been filed by the 40th day.**

**On October 7, 2014, the State filed an information charging the petitioner with the statutory molestation offense, a "motion to revoke bond," and a "notice of intent to seek enhanced penalty pursuant to § 775.084, Fla. Stat.," alleging that the petitioner had a history of failing to appear as ordered in other felony cases, that he had "an extensive history of both theft and violent crimes," and that he was a flight risk.**

**The petitioner alleges that further pretrial detention of the petitioner is impermissible because the State failed to introduce competent evidence to prove beyond a reasonable doubt the need for such detention, as provided in**

**Rule 3.132(c)(1). The petitioner relies on the trial court's consideration of a videotaped interview of the child victim by a forensic examiner. Although the interview may be admissible in evidence pursuant to section 90.803(23) of the Florida Evidence Code, the petitioner maintains that it is hearsay. Under Rule 3.132(c)(1), "[a] final order of pretrial detention shall not be based exclusively on hearsay evidence."**

**The primary case relied upon by the petitioner, *Azadi v. Spears,* 826 So.2d 1020 (Fla. 3d DCA 2001), is inapposite. In *Azadi,* the State's sole evidence submitted in support of pretrial detention was the arrest affidavit, and that affidavit was hearsay. In that case, the State offered no exception to the Florida Evidence Code that might have allowed the admission of the affidavit into evidence at trial.**

## (e) Hearsay & Sentencing

### *State v. Davis*, 133 So.3d 1101 (Fla. 3d DCA 2014)

**State's prior stipulation to use of doctors' reports for purposes of determining defendant's competency did not serve as basis to admit or rely upon reports in imposing downward departure sentence**

**Dexter Davis was charged with four felonies. The case proceeded to trial, and the jury found Davis guilty as charged of attempted first-degree murder, burglary and two counts of child abuse. Davis' criminal punishment code scoresheet reflected 383.325 months (31.94 years) as a minimum prison sentence, and life imprisonment as the maximum sentence. At sentencing, and over the State's objection, the trial court imposed a**

**downward departure sentence on Davis.**

**The State appeals the downward departure sentence. Davis cross-appeals the judgments of conviction. We affirm without further discussion the judgments of conviction for the four felony counts. For the reasons that follow, however, we reverse the sentences imposed and remand for a new sentencing proceeding.**

**The court held a sentencing hearing on July 6, 2012. At that time, the defense requested that the court depart below the minimum guidelines sentence of 31.94 years by imposing a lengthy term of imprisonment followed by a lengthy term of probation. The defense argued that the statutory basis for the downward departure was section 921.0026(2)(d), Florida Statutes (2009), which provides that a downward departure may be granted if "[t]he defendant requires specialized treatment for a mental disorder that is unrelated to substance abuse or addiction or for a physical disability, and the defendant is amenable to treatment." The defense relied on the reports prepared by the doctors who performed the competency evaluations of Davis.**

**The State, however, objected to the reports as hearsay and objected to the use of these reports at sentencing. Although the State had previously stipulated to the admission and use of these reports, that stipulation was for the limited purpose of determining Davis' competency to proceed. The State argued that it had not stipulated to the use of the reports for any other**

**purpose and that the information contained in the reports was hearsay and inadmissible for sentencing purposes.**

**Here, the State contends that the court improperly relied upon inadmissible hearsay—the doctors' reports—as the basis to depart downward from the minimum guidelines sentence. The defense contends, however, that the doctor's reports were not inadmissible hearsay because they had been stipulated to by the State on a prior occasion. We need not reach the more general issue of the extent to which hearsay may be admissible at a sentencing proceeding, though we do acknowledge the law in this area is not altogether clear. The precise issue in this case, however, is governed by the express language of Florida Rule of Criminal Procedure 3.211, which provides in pertinent part:**

*Rule 3.211. Competence to Proceed: Scope of Examination and Report*

**(d) Limited Use of Competency Evidence.**

**(1) The** *information contained* **in any motion by the defendant for determination of competency to proceed or** *in any report of experts filed under this rule* **insofar as the report relates solely to the issues of competency to proceed and commitment, and any information elicited during a hearing on competency to proceed or commitment held pursuant to this rule,** *shall be used only in determining the mental competency to proceed or the commitment or other treatment of the defendant.*

**(2) The defendant** *waives this provision by using the report, or portions*

*thereof, in any proceeding for any other purpose, in which case disclosure and use of the report,* **or any portion thereof,** *shall be governed by applicable rules of evidence and rules of criminal procedure.* **If a part of the report is used by the defendant, the state may request the production of any other portion of that report that, in fairness, ought to be considered.**

**(Emphasis added).**

**The rule makes clear that the doctors' reports, and the information contained therein, "shall be used only in determining the mental competency to proceed or the commitment or other treatment of the defendant." By its terms, the rule does not permit the use of such a report for any other purpose. Therefore, the trial court erred in its determination that, by having previously stipulated to the contents of these reports for purposes of a competency determination, the State was precluded from objecting to the admission of these reports in support of a downward departure. Although the State did not specifically cite to this portion of the rule, it did properly preserve its objection and noted correctly that its prior "stipulation" was limited to the use of these reports for competency purposes only, and was not a stipulation to their admissibility for any and all purposes.**

**The defense counters that this rule was created for the benefit of the defendant and that, pursuant to rule 3.211(d)(2), the defendant can (and in this case, did) waive this restriction by seeking admission of the reports in**

**support of a downward departure. While it is true that subdivision (d)(2) does permit the defendant to waive application of the rule by using the report for another purpose, that same subdivision provides that upon such waiver, the "use of the report ... shall be governed by applicable rules of evidence and rules of criminal procedure." There is no rule of evidence or rule of criminal procedure which permits the admission of these competency reports at sentencing over the hearsay objection of the State.**

**Given the hearsay nature of this evidence, the clear and unambiguous language of rule 3.211(d), and the absence of any rule of evidence or rule of criminal procedure permitting admission of these reports at sentencing, the State's prior stipulation to the use of these reports for competency purposes did not serve as a basis for the trial court, over the State's objection, to admit or rely upon these reports as a basis for a downward departure sentence.**

**Because the trial court imposed a downward departure sentence based upon the erroneous admission of these reports, we vacate all four felony sentences and remand for a new sentencing proceeding, at which time the defense may again seek a downward departure sentence.** ***Jackson v. State,*** **64 So.3d 90 (Fla.2011).**

**Convictions affirmed. Sentences vacated and cause remanded for a new sentencing proceeding.**

## (f) Hearsay & The "Fellow Officer Rule"

## *Bowers v. State*, 23 So.3d 767 (Fla. 2d DCA 2009)

**The "fellow officer rule" did not permit admission of hearsay testimony concerning statements of stopping officer to arresting officer regarding probable cause in stopping defendant**

**Following a traffic stop on March 27, 2007, Bowers was arrested and charged in county court with the misdemeanor offenses of possession of marijuana, possession of paraphernalia, and driving under the influence (DUI). She filed a motion to suppress all evidence obtained during a search of her vehicle following the stop. She argued that the stop was illegal because it was not founded upon probable cause that she had committed a traffic infraction and thus the warrantless search of her vehicle was also illegal.**

**The county court held an evidentiary hearing on Bowers' motion. The officer who performed the stop of Bowers' vehicle, Officer Suskovich, did not appear for the hearing, despite the fact that he had been subpoenaed by the State. The State called Officer Tracy, who performed the DUI investigation and arrested Bowers, but who was neither involved in nor present at the scene of the stop of Bowers' vehicle. Officer Tracy arrived at the scene after Bowers' vehicle was already stopped. Therefore, he never observed Bowers' driving, and his understanding of the reason she was stopped was based solely on what Officer Suskovich told him.**

**Bowers' counsel raised a hearsay objection to Officer Tracy testifying**

**as to what Officer Suskovich told him. The State responded that Officer Tracy's testimony was admissible under the fellow officer rule. Defense counsel disagreed. The county court overruled the objection and permitted Officer Tracy to testify as to what Officer Suskovich told him was the basis for the stop of Bowers' vehicle. Bowers also testified and gave her account of the events leading up to the stop. At the conclusion of the hearing, the county judge made comments reflecting that he was troubled by the inability to get clarification about details of the stop from Officer Suskovich. The judge expressed difficulty in reaching a decision about whether the officer had a reasonable basis to believe that Bowers committed a traffic infraction. The county court concluded the hearing by stating that the evidence would be suppressed. A written order was entered granting Bowers' motion without explanation.**

**The State appealed the suppression order to the circuit court. The circuit court issued an opinion reversing the county court's order. The circuit court found that Officer Tracy's testimony regarding Officer Suskovich's statements was admissible under the fellow officer rule and concluded that the county court's decision to grant the motion to suppress was not supported by competent, substantial evidence or the law.**

**Bowers argues that the circuit court departed from the essential requirements of law by concluding that Officer Tracy's testimony was properly admitted under the fellow officer rule and by reweighing the**

**evidence to reach a different conclusion than the county court with respect to the validity of the stop. We conclude that the circuit court applied the wrong law in determining that Officer Tracy's testimony was admissible. Because the only evidence presented by the State to meet its burden of proving a valid stop was the erroneously admitted testimony of Officer Tracy, the county court's order granting Bowers' motion to suppress must be affirmed. Our quashal of the circuit court's opinion on the admissibility issue of Officer Tracy's testimony renders moot the arguments on the issue of reweighing the evidence.**

**Officer Tracy's testimony as to what Officer Suskovich told him about Bowers' driving was hearsay and as such was not admissible to prove that Officer Suskovich witnessed Bowers' violating a traffic law.** *See* **§§ 90.801(1)(c), 90.802, Fla. Stat. (2008). The circuit court relied on** *Ferrer v. State,* **785 So.2d 709 (Fla. 4th DCA 2001), to conclude that Officer Tracy's hearsay testimony was admissible under the fellow officer rule.** *Ferrer* **was wrongly decided because it misapplies the fellow officer rule to circumvent the hearsay rule of evidence.**

**The fellow officer rule provides a mechanism by which officers can rely on their collective knowledge to act in the field. Under this rule, the collective knowledge of officers investigating a crime is imputed to each officer and one officer may rely on the knowledge and information possessed by another officer to establish probable cause.**

**Under the rule, one officer may rely on the knowledge and information possessed by another officer to establish probable cause for an arrest for a felony or misdemeanor offense, *Boatman,* 901 So.2d at 224, or to establish probable cause for a search.**

**The fellow officer rule is not a rule of evidence. It does not change the rules of evidence. And, it is not one of the enumerated exceptions to the hearsay rule.**

## *Review Granted by State v. Bowers*, 87 So.3d 704 (Fla. 2012)

**The "fellow officer rule" does not allow an officer who does not have firsthand knowledge of the traffic stop and was not yet involved in the investigation to testify as to hearsay regarding what the initial officer who conducted the stop told him in order to establish the validity of the initial stop**

**We have for review the decision of *Bowers v. State,* 23 So.3d 767 (Fla. 2d DCA 2009), in which the Second District Court of Appeal certified conflict with the decision of the Fourth District Court of Appeal in *Ferrer v. State,* 785 So.2d 709 (Fla. 4th DCA 2001). We have jurisdiction. *See* art. V, § 3(b)(4), Fla. Const. The conflict issue involves the application of the fellow officer rule to testimony in a motion to suppress hearing where the defendant is challenging the validity of a traffic stop. We hold that the fellow officer rule does not allow an officer who does not have firsthand knowledge of the traffic stop and was not involved in the investigation at that time to testify as to hearsay regarding what the initial officer who conducted the stop told him or her for the purpose of proving a violation of the traffic law so as to**

**establish the validity of the initial stop. For the reasons explained below, we approve *Bowers* and disapprove *Ferrer.***

**On March 27, 2007, after a traffic stop, Michelle Bowers was arrested and charged in county court with the misdemeanor offenses of possessing marijuana, possessing drug paraphernalia, and driving under the influence (DUI). *Bowers,* 23 So.3d at 768. Bowers filed a motion to suppress all evidence obtained during the search that followed the stop, claiming that the stop was illegal because it was not based upon probable cause that she had committed a traffic infraction. *Id.***

**The county court held an evidentiary hearing on the motion to suppress, but the officer who performed the initial stop did not appear for the hearing. *Id.* The State called as a witness a second officer to testify because the second officer had performed the DUI investigation and subsequent arrest, even though that officer was not present at the scene during the initial stop of the vehicle. *Id.* The Second District noted that the second officer "never observed Bowers' driving, and his understanding of the reason she was stopped was based solely on what [the initial officer] told him." *Id.* Bowers' counsel raised a hearsay objection to the second officer testifying as to what the initial officer told him, and the State responded that the second officer's testimony was admissible under the fellow officer rule. *Id.* Although the county court overruled the defense's objection, the trial court was troubled by its inability to obtain clarification about the details of**

**the stop and ultimately granted Bowers' motion to suppress. *See id.* at 768–69.**

**The Second District in *Bowers* accurately set forth the purpose of the fellow officer rule as a rule developed to assist officers investigating in the field to make arrests and conduct searches:**

**Under the rule, one officer may rely on the knowledge and information possessed by another officer to establish probable cause for an arrest for a felony or misdemeanor offense, *Boatman,* 901 So.2d at 224, or to establish probable cause for a search, *State v. Peterson,* 739 So.2d 561, 567 (Fla.1999).**

**The Court explained that the fellow officer rule is a constructive knowledge rule and that the affiant need not have personal knowledge of the informant's veracity if another officer working in connection with the affiant has such knowledge. *Id.* at 564–65, 567. We stated the rationale behind this rule as follows: "In light of the need for efficient law enforcement, this finding is both practical and necessary, because it allows reliable informants to be utilized by more than one officer." *Id.* at 567 (citing *People v. Lopez,* 95 A.D.2d 241, 465 N.Y.S.2d 998, 1002–03 (N.Y.App.Div.1983)). However, the Court stressed it was important that the officer applying for the search warrant was aware of the informant's previous dealings with law enforcement officers at the time he made the representations in the affidavit. *Id.* Thus, an "unknowing officer cannot rely on the 'fellow officer' rule simply**

**because the officer finds out *after the fact* that the informant had previously provided reliable information to the police." *Id.* at 568 (emphasis added). In *Peterson,* we recognized that without Officer NeSmith's knowledge of the informant's prior dealings with other officers at the time he submitted the affidavit, he could not have established the informant's reliability within the affidavit. *Id.***

**("The fellow officers rule allows the arresting officer to assume that probable cause to arrest a suspect exists when he relies upon the representations of an officer who has firsthand knowledge of the events."). However, this is not the same as permitting an officer to testify as to knowledge that another officer possessed in order to justify the *other* officer's conduct.**

**In both *Ferrer* and *Bowers,* the initial traffic stop was made by one officer and then another officer made the arrest for DUI after testing the defendant for use of drugs and alcohol. The issue in both cases was not the DUI arrest but the validity of the initial traffic stop. In both *Ferrer* and *Bowers,* the police officer whose observations formed the basis for the initial stop failed to attend the suppression hearing. The State then called the arresting officer to testify as to what the initial officer told him was the basis for the stop. In both cases, the defendants made timely hearsay objections to the introduction of the testimony of the second officer who did not participate in the traffic stop.**

**Specifically, Officer Tracy was called to testify as to whether Officer Suskovich possessed probable cause at the time that Officer Suskovich initiated the stop. However, at the time of the stop, Officer Tracy had no knowledge as to the information that Officer Suskovich possessed when the stop was initiated. Officer Tracy was not involved at that time in an ongoing investigation of Bowers; he was not present at the time of the stop and did not witness Bowers' driving—he learned the relevant information after the fact, when he arrived to perform a DUI investigation and arrest.**

**As this Court stressed in *Peterson,* another "unknowing" officer cannot rely on the fellow officer rule simply because the officer finds out relevant information possessed by another officer "after the fact." *Peterson,* 739 So.2d at 568.**

**Here, Officer Tracy learned of the information after he became involved in the investigation, which occurred subsequent to the challenged stop. Thus, Officer Tracy cannot testify as to information that Officer Suskovich told him as a basis for determining the validity of the initial stop.**

**Our ruling is consistent with our precedent and the purpose of the fellow officer rule. The fellow officer rule has been applied by this Court only to instances where the officer is testifying as to the details of a search or seizure in which the officer was a direct participant. If an officer relies on a chain of evidence to formulate his or her belief as to the existence of probable cause for a search or seizure, the rule excuses the officer from**

**possessing personal knowledge of each link in the chain of evidence *if* the collective knowledge of all the officers involved supports a finding of probable cause. In short, the rule allows an officer to testify with regard to a previous link in the chain for the purpose of justifying his or her *own* conduct.**

## (g) Hearsay & Proof of Habitualization

### *Cunningham v. State*, 109 So.3d 1261 (Fla. 3d DCA 2013)

**Release-date letter from Department of Corrections, not accompanied by a crime and time report bearing defendant's name, was inadmissible hearsay for purposes of establishing that present offenses were committed within five years of defendant's release**

**Christopher Cunningham appeals from an order denying his three-claim motion filed pursuant to Florida Rule of Criminal Procedure 3.850. We affirm as to claims one and two without further comment. We reverse and remand as to claim three, treated by the postconviction court as if filed under rule 3.800(a), because the records of previous convictions provided by the State and attached to the order on appeal do not clearly demonstrate that Cunningham could be sentenced as a habitual offender.**

**This is improper because it is impossible to confirm that the original sentencing for the second set of predicate offenses did not take place together with the sentencing for the offenses of the first predicate. *See Butler v. State,* 93 So.3d 328, 330 (Fla. 2d DCA 2011) (holding that a "judgment" entered on violation of probation did not reflect a new conviction**

**and thus did not support a violent career criminal sentence). On remand, the postconviction court may again deny this claim if it attaches documents from the record demonstrating sequential predicates.** *See Martin v. State,* **884 So.2d 452, 453 (Fla. 3d DCA 2004).**

## *Ventura v. State*, 29 So.3d 1086 (Fla. 2010)

**Signed and under seal release-date letter from Department of Corrections was admissible as a means of authenticating an attached Crime and Time Report offered to establish defendant's criminal history for purposes of imposition of a prison-releasee-reoffender sentence**

**We have for review** *Ventura v. State,* **973 So.2d 634 (Fla. 3d DCA 2008), in which the Third District Court of Appeal affirmed the admissibility of a Department of Corrections release-date letter as a permissible means of establishing the defendant's status as a prison-releasee reoffender.** *See id.* **at 638. In the process, the Third District relied upon the reasoning and rule of law articulated in** *Yisrael v. State,* **938 So.2d 546 (Fla. 4th DCA 2006) (en banc) (***Yisrael I* **),** *disapproved in part,* **993 So.2d 952 (Fla.2008).** *See Ventura,* **973 So.2d at 638. We have jurisdiction.** *See* **art. V, § 3(b)(3), Fla. Const.**

**With regard to the** *Yisrael* **issue, the Third District relied upon the rule articulated in** *Yisrael I* **to erroneously state that a Department of Corrections (DOC) release-date letter standing alone is admissible under the public-records exception to the hearsay rule to establish a defendant's criminal history for the purposes of imposition of a prison-releasee-reoffender sentence. This Court disapproved that rule in** *Yisrael II.* **However, upon**

**review of the appellate record, it is clear that, although not reflected in the opinion of the Third District, the trial court was actually supplied with a signed release-date letter, written under seal, *and* an attached Crime and Time Report. In *Yisrael II,* we held that these DOC records can together be used to render the entire report admissible as a public record. *See Yisrael II,* 993 So.2d at 960–61 (approving usage of the signed release-date letter, written under seal, as authentication of an attached Crime and Time Report); *see also* §§ 90.803(6), 90.902(11), Fla. Stat (2003). Further, Ventura concedes that both documents (i.e., the signed release-date letter under seal and the Crime and Time Report) were provided to the trial court. Accordingly, as we did in *Yisrael II,* we approve the ultimate result reached by the Third District Court of Appeal below because the signed and under seal release-date letter provided in this case was used as a permissible means of authenticating an attached Crime and Time Report, but disapprove its reliance upon the rule expressed in *Yisrael I. See Yisrael II,* 993 So.2d at 960–61; *see also Smith v. State,* 990 So.2d 1162, 1164–65 (Fla. 3d DCA 2008); *Parker v. State,* 973 So.2d 1167, 1168–69 (Fla. 1st DCA 2007), *review denied,* 1 So.3d 173, 2009 WL 427313 (Fla.2009).**

## (h) Hearsay & Violations of Probation

**Evidence consisting solely of hearsay evidence was insufficient to support probation revocation order**

### *White v. State*, 170 So.3d 144 (Fla. 1st DCA 2015)

**The trial court found Appellant in violation of his probation for failing to adhere to his curfew, revoked his probation, and sentenced him to thirty-six months in prison. That sentence was later reduced to thirty-three months for an unrelated reason.**

**In arguing that the revocation was based on more than hearsay, the State relies on the probation officer's personal observations on the evening at issue, her discussion with Appellant the next morning, testimony concerning a post-curfew visit to Appellant's home on a prior occasion, and Appellant's knowledge of the protocol in case an emergency precludes compliance with his curfew. None of this testimony provides evidence that Appellant violated his curfew on the night in question. Rather, the only evidence substantiating the charge that Appellant violated his probation was hearsay. Therefore, we reverse the revocation of probation and the resulting prison sentence.**

### *Carrington v. State*, 168 So.3d 285 (Fla. 2d DCA 2015)

**Competent, substantial evidence did not support trial court's finding that defendant violated probation condition requiring him to obtain permission before moving from his residence; although probation officer testified that he was informed by defendant's mother that defendant was no**

**longer living at her residence and that she would no longer allow him to live there and probation officer testified that defendant's father verified that defendant was not living there, this evidence constituted hearsay, and hearsay evidence could not be the sole basis for the revocation, and there was no other nonhearsay evidence—such as the probation officer's testimony that he searched the home and confirmed that defendant was not present—presented on this issue.**

## *Vidale v. State*, 166 So.3d 935 (Fla. 4th DCA 2015)

**When the State seeks to revoke probation based on the commission of new offenses, it must present direct, nonhearsay evidence linking the defendant to the commission of the offense at issue; if the State fails to do so, revocation is improper.**

**Revocation of probation based on defendant's commission of the new crime of burglary and his association with persons engaged in criminal activities was improper, where state failed to present non-hearsay evidence to prove the allegations; eyewitness who saw the perpetrators of burglary did not testify, testifying officers had no direct knowledge of defendant's involvement, no one testified from firsthand knowledge that defendant had any of the victims' stolen property, and state did not present any non-hearsay evidence to tie defendant's two associates to the burglary or any other crimes.**

## *Rutland v. State*, 166 So.3d 878 (Fla. 1st DCA 2015)

**The trial court revoked Appellant's probation for violation of two conditions; in particular, Condition 2: moving residences without prior approval. The only evidence Appellant moved came when Appellant's probation officer testified Appellant's mother told the probation officer Appellant had moved.**

**But a probation officer's hearsay testimony, by itself, that another person told him or her the probationer no longer lived at a residence is insufficient to support a change of residence violation; the cases are clear and legion.**

## *Williams v. State*, 163 So.3d 1257 (Fla. 1st DCA 2015)

**Isaac Williams appeals the order revoking his probation and the sentence he received after the trial court found that he had violated two terms of his probation. Because the state did not put on sufficient evidence to prove a violation of either condition cited as a basis for revocation, we reverse and remand with directions to reinstate the initial probation order.**

**The state argues, however, that there is sufficient evidence to support the trial court's finding that he violated condition (6) of his probation, forbidding "associating with persons engaged in criminal activity." But the state also failed to present any evidence that Mr. Williams knew he was associating with someone engaged in criminal activity. The policeman who stopped the vehicle testified that Mr. Williams entered the vehicle only a**

**minute and a half before he pulled the car over, and that the firearms and other contraband the officer found concealed in the vehicle would not have been visible to Mr. Williams during this brief period. There was, in short, no competent evidence that Mr. Williams was aware of the drugs, drug paraphernalia, or concealed weapons a search of the vehicle turned up.**

***Lewis v. State*, 995 So.2d 1123 (Fla. 4th DCA 2008)**

**The defendant appeals an order revoking her probation, adjudicating her guilty of the underlying offense of felony petit theft, and sentencing her to three years of incarceration. She argues the trial court erred in revoking her probation by relying solely on hearsay evidence. We agree and reverse.**

**The defendant objected to the probation officer's testimony on hearsay grounds. The trial court overruled the objection, explaining that it would allow the evidence to be admitted, but could not rely solely on hearsay to find a violation. The defendant also objected to the admission of the arrest affidavit. Once again, the trial court found that it was admissible, but could not be the sole basis for finding a violation. And lastly, over the defendant's hearsay objection, the trial court admitted the orders of supervision and written monthly report as business records.**

**While a revocation can be based "upon a combination of hearsay and non-hearsay evidence," it may not be "based solely upon hearsay." *J.F. v. State,* 889 So.2d 130, 131-32 (Fla. 4th DCA 2004). Here, only hearsay evidence was presented to prove the defendant had been arrested for new**

**charges. The probation officer based her testimony on supposition, the probable cause affidavit, and the court file. She had no personal knowledge of the alleged new arrest.**

## *State v. Queior* , 2016 WL 1592740 (Fla. Apr. 21, 2016)

**Probation Officer's testimony regarding results of field drug test which officer personally administered was competent, nonhearsay testimony upon which court could rely to corroborate hearsay evidence of defendant's illegal drug use and revoke his probation**

**The Supreme Court, Polston, J., held that probation officer's testimony regarding results of field drug test which officer personally administered was competent, nonhearsay testimony upon which court could rely to corroborate hearsay evidence of defendant's illegal drug use and revoke his probation as a result of the violation, disapproving *Dawson v. State*, 177 So.3d 658, *Rothe v. State*, 76 So.3d 1010, *Bray v. State*, 75 So.3d 749, *Weaver v. State*, 543 So.2d 443, and *Carter v. State*, 82 So.3d 993.**

**A probation officer testifying at a probation revocation hearing, subject to cross-examination, to what he or she personally did and observed is classic non-hearsay testimony.**

**Given the established reliability of field drug tests and their commonplace use in violation of probation proceedings, which are subject to relaxed evidentiary standards and a lesser burden of proof than a criminal trial, requiring the State to trot out an expert in a case where the field test has been confirmed by a lab test is unnecessary to satisfy the conscience of the**

**court that a probation violation has, in fact, occurred.**

**In an appeal from a violation of probation (VOP) proceeding, the Second District, in *Queior v. State,* 157 So.3d 370 (Fla. 2d DCA 2015), certified direct conflict with the Fifth District Court of Appeal's decision in *Terry v. State,* 777 So.2d 1093 (Fla. 5th DCA 2001), regarding whether probation officer testimony that the probationer failed a field drug test personally administered by the officer is competent, nonhearsay evidence of a probation violation.[1] For the reasons below, we hold that it is and that, in Queior's case, this evidence together with the hearsay evidence, including a lab report confirming the presence of opiates in Queior's urine, is sufficient to establish that Queior violated the conditions of his probation. Accordingly, we quash the Second District's decision to the contrary in *Queior.***

**Therefore, to corroborate this hearsay evidence, the State introduced the testimony of Queior's probation officer, who testified that Queior failed a field drug test that the officer personally administered on Queior's urine before sending it to the lab for testing. Queior objected to the probation officer's testimony regarding the result of the field drug test "on the ground that the State had not laid the proper predicate to establish the reliability of the [field drug] presumptive test, a scientific analysis." *Queior,* 157 So.3d at 372.**

**Despite the prevalent use and documented reliability of field drug tests, our district courts are split on the issue of whether probation officer**

**testimony of the results of a field drug test personally performed by the officer constitutes competent, nonhearsay evidence that may be used to corroborate a hearsay lab report confirming the probationer's drug use.**

**In addition to not being hearsay, the probation officer's testimony concerning the results of the field drug test that the officer personally administered is otherwise competent evidence, "relevant and material" to the allegation that Queior violated his probation by using illegal drugs.**

**Rather, given the established reliability of field drug tests and their commonplace use in VOP proceedings, which are subject to relaxed evidentiary standards and a lesser burden of proof than a criminal trial, requiring the State to trot out an expert in a case like Queior's where the field test has been confirmed by a lab test is unnecessary to satisfy the conscience of the court that a probation violation has, in fact, occurred.** *Cf. United States v. Bell,* **785 F.2d 640, 643 (8th Cir.1986) (explaining that "urinalysis laboratory reports bear substantial indicia of reliability" as "the regular reports of a company whose business it is to conduct such tests, and which expects its clients to act on the basis of its reports").**

**Rather, in a VOP proceeding, the officer's training and experience in administering field drug tests goes to the weight to be given to the officer's testimony, which is an issue for the trial court.**

**Accordingly, in Queior's case, "[b]ecause the hearsay evidence regarding the independent confirmatory [lab] test was corroborated by the**

**probation officer's non-hearsay testimony regarding his field test results, we find no abuse of discretion in the trial court's finding that [Queior] violated his probation as alleged." *Bell,* 179 So.3d at 358.**

**For the foregoing reasons, we hold that testimony by Queior's probation officer that Queior failed a field drug test the officer personally administered is competent, nonhearsay evidence. Accordingly, the trial court did not abuse its discretion by relying upon this testimony to corroborate the hearsay evidence presented, including a confirmatory lab report, to find the probation violation necessary to revoke Queior's probation. Therefore, we quash the Second District's decision to the contrary in *Queior.***

**We also disapprove the First District's decisions in *Dawson, Rothe,* and *Bray* to the extent those decisions hold probation officer testimony about the results of a field drug test personally administered by the officer is hearsay, and we further disapprove the First District's decision in *Carter* and the Third District's decision in *Weaver* to the extent those decisions require the probation officer to demonstrate scientific expertise concerning the workings of the field drug test or its reliability in order for the officer's testimony regarding personal observations in administering the test to be considered competent evidence.**

****COMMENT:** Prior to the Court's opinion issued above, the position of each of the District Courts of Appeal was as follows:**

**1st DCA: *Dawson v. State* 177 So.3d 658 (Fla. 1st DCA 2015): Probation officer's hearsay testimony, that she conducted a urinalysis in her office that indicated defendant used cocaine, and that she then sent a urine sample to a laboratory that issued a report indicating the sample tested positive for cocaine, was an insufficient basis for revoking defendant's probation where officer failed to demonstrate expertise with regard to the test she administered.**

**2d DCA: *Queior v. State*, 157 So.3d 370 (Fla. 2d DCA 2015): Probation officer's testimony about the drug field test results did not constitute competent, nonhearsay evidence that defendant had used an opiate in violation of his probation.**

**4th DCA: *Turner v. State*, 179 So.3d 526 (Fla. 4th DCA 2015): Probation officer's testimony regarding the results of an in-office drug test that the qualified officer personally conducted is non-hearsay corroborating evidence sufficient to support revocation.**

**5th DCA: *Bell v. State*, 179 So.3d 349 (Fla. 5th DCA 2015): Probation officer's testimony about his or her personal observations regarding field drug test results is not hearsay**

## *Forbes v. State*, 38 So.3d 232 (Fla. 3d DCA 2010)

**Hearsay laboratory report, although admissible in probation revocation proceeding, could not serve as the sole evidentiary basis for revoking defendant's probation**

**The defendant appeals from a violation and revocation of probation for**

**attempted strong-arm robbery. We reverse the revocation of probation on the ground that there is insufficient evidence from which the trial court could have concluded that the defendant violated his probation.**

**Another tactical unit stopped the defendant, searched him, and found in his pocket two plastic baggies containing what the officer suspected was powder cocaine. No field tests were conducted on the suspect cocaine and it was impounded and given to the lab. The officer could not offer an opinion as to whether the substance in the baggies was cocaine. Over defense objection, a lab report with a positive indication of cocaine was entered into evidence. The defendant testified that he did not have cocaine in his possession and denied having two baggies of powder cocaine. He stated that the officers found scratch-off tickets in his pockets. He admitted to smoking crack cocaine on the night before his arrest. Based upon the defendant's admission, the officer's testimony and the lab report, the trial court found that the defendant had violated his probation and revoked it. The defendant was sentenced to five years in prison as a habitual offender and given credit for time served from the date of his arrest. The trial judge denied defense counsel's request for additional credit for time served.**

**Reversed and remanded for resentencing.**

## (i) Hearsay & Restitution

### *McKown v. State*, 46 So.3d 174 (Fla. 4th DCA 2010)

**Hearsay evidence may not be used to determine the amount of restitution when there is a proper objection by the defense**

**Appellant, Laurie McKown, pleaded no contest pursuant to a plea offer to a charge of exploitation of an elderly person in an amount less than $20,000. She was placed on five years' probation and after a hearing, was ordered to pay restitution in the amount of $17,798.17. We reverse the order of restitution and remand for a new restitution hearing.**

**While the victim had her bank statements with her in court, a predicate was not laid for their authenticity or reliability. Section 90.803(6)(a), Florida Statutes (2009), requires that the records custodian or other qualified bank employee testify to the necessary predicate before bank statements may be admitted into evidence. Without laying that foundation, the evidence is inadmissible hearsay.** *See Medlock v. State,* **537 So.2d 1030 (Fla. 2d DCA 1989) (bank statements offered to prove the defendant's unauthorized withdrawals were inadmissible hearsay without the testimony of the records custodian regarding the necessary predicate). "Hearsay evidence may not be used to determine the amount of restitution when there is a proper objection by the defense to such evidence."** *Bigelow v. State,* **997 So.2d 1249, 1250 (Fla. 5th DCA 2009). "[T]he State is still not permitted to admit any and all hearsay. Rather, the trial court may only allow hearsay having some minimal indicia of reliability to be injected into the [restitution] proceeding."** *Box v.*

*State,* **993 So.2d 135, 139 (Fla. 5th DCA 2008) (citation omitted).**

**The summary compiled from these bank statements also was not authenticated by the party who prepared it. In *Johnson v. State,* 856 So.2d 1085 (Fla. 5th DCA 2003), the admission into evidence of a compilation of checks written on a victim's bank account was reversed because "[n]o evidence was adduced identifying who had made the compilation, nor was any further predicate shown that would render it admissible as a summary pursuant to section 90.956, Florida Statutes (2001)." *Id.* at 1086-87.**

## *Dreyer v. State*, 46 So.3d 613 (Fla. 2d DCA 2010)

**Officer's testimony regarding the amount of money defendant stole from victim was hearsay and was not admissible to prove the amount of restitution owed**

**William Dreyer appeals his conviction and sentence for exploitation of the elderly, as well as an order and judgment requiring him to pay restitution in the amount of $31,570. We affirm Dreyer's conviction and sentence without comment, but we reverse the order and judgment of restitution because the only evidence supporting the amount of restitution was hearsay evidence.**

**Here the State presented the testimony of Detective Adams to establish the amount of money Dreyer stole from the victim. However, Detective Adams did not have personal knowledge of that amount; rather, she received that information from employees of the victim's financial institutions and from financial statements from those institutions. Because**

**Dreyer objected to Detective Adams' testimony on the basis of hearsay, it was improperly admitted.**

## *Danzey v. State*, 2016 WL 455786 (Fla. 2d DCA, Feb. 5, 2016)

**A victim, who testifies about the price paid for an item to establish value for a restitution order, must have firsthand knowledge of the purchase price of the item; hearsay testimony that someone told her how much was paid for the item is insufficient**

**Tyler Joseph Danzey entered a guilty plea to third-degree grand theft and giving false verification of ownership to a second-hand dealer. In this appeal, Mr. Danzey challenges the amount of restitution the trial court ordered him to pay. He argues that the State failed to present competent evidence of the victim's loss. We agree and reverse the restitution order.**

**Although a trial court has discretion in determining the amount of restitution, the restitution award must be proven by competent, substantial evidence and the amount of the award must be established by the greater weight of the evidence.**

**However, the victim must have firsthand knowledge of the purchase price of the item, and the victim's hearsay testimony that someone told her how much was paid for the item is insufficient.**

**Here, the victim did not testify regarding how she learned of the purchase price of the canary diamond ring and the Omega gold watch, and she did not know the exact purchase price of the ruby ring. There was also no testimony regarding the condition of the three jewelry pieces or testimony regarding their current market value.**

**Therefore, the evidence was insufficient to establish the value of the jewelry for restitution purposes, and the restitution order is reversed as to the amount of restitution owed for the canary diamond ring, the Omega watch, and the diamond and ruby ring.**

**We also agree with Mr. Danzey that the trial court was required to reduce the restitution award by the amount that the victim was compensated by her insurance company.**

**On remand, the trial court is not precluded from also ordering restitution to the insurance company if the award is supported by competent, substantial evidence.**

## (j) Hearsay & Sexual Offenses

### Jimmy Ryce Act

### *McClam v. State*, 2016 WL 313972 (Fla. 4th DCA, Jan. 27, 2016)

**Provision of the Sexually Violent Predator Act permits hearsay evidence in civil commitment proceedings absent a finding that the evidence is not reliable**

*See infra* **at page 90.**

### Hearsay & Designation as Sexual Offender

### *Jershun v. State*, 169 So.3d 232 (Fla. 4th DCA 2015)

**Evidence insufficient to prove defendant was convicted of a sexual offense in another jurisdiction similar to an in-state offense where documents were unauthenticated hearsay**

**The State charged the defendant with one count of having a weapon**

**while engaged in the felony offense of failing to report as a sexual offender, and one count of failure of a sexual offender to report in person to a driver's license office within forty-eight hours after a change in address. Among the issues raised, the defendant argues the court erred in admitting unauthenticated, hearsay documents. We find merit in this argument and reverse.**

**During its case-in-chief, the State called a local detective, who testified that he checks with the FDLE website when he receives a failure to report case to see if the person is properly registered. The State then asked to introduce its Exhibit 2, which was the subject of the notice of intent to offer self-authenticating documents. The State relied upon section 92.605, Florida Statutes (2011), which provides for the admission of "out-of-state record[s] of regularly conducted business activity" as an exception to the hearsay rule. § 92.605(5)(a)-(d), Fla. Stat. However, it also requires an "out-of-state certification" of the record. *Id.* Defense counsel objected and requested a side bar conference.**

**Defense counsel explained that for the State to prove its case, it had to introduce certified copies of the defendant's conviction and establish the defendant's identify by matching his fingerprints.**

**Next, defense counsel objected to authentication of the copies of judgments and sentences, as there was no certified disposition showing the defendant was a sexual offender. He reiterated his hearsay objection to the**

**sixty-page document.**

**We review evidentiary decisions for an abuse of discretion.** ***Armstrong v. State,*** **73 So.3d 155, 171 (Fla.2011). Here, the trial court abused its discretion in admitting the unauthenticated "general court martial order" into evidence. Without that document, the State failed to prove the charges; the court erred in denying the motion for judgment of acquittal.**

**The first one requires the State to prove the defendant was convicted of an enumerated Florida crime or a similar offense within another jurisdiction.** ***Id.*** **§ 943.0435(1)(a)1.a. To do so, the State introduced unauthenticated, hearsay documents included within a sixty-page package obtained from the FDLE. The documents purported to be from the Department of the Army, 82nd Airborne Division, at Fort Bragg, North Carolina, and included a summary of charges and findings.**

**The detective testified that he had no firsthand knowledge of the Army documents, did not know the provisions of the Articles violated, did not inquire as to what the documents were, did not get a certified disposition from the military, and did not get a certified charging document. He could not vouch for the accuracy of the documents, their completeness, their authenticity, or their contents.**

**In short, the State offered no proof that the Army charges, or their elements, were similar to any enumerated qualifying Florida offense. In fact, the Army appears to have prosecuted the defendant for violations of various**

**Articles of War, including conduct unbecoming an officer and misuse of government resources. These charges are not similar to any of Florida's enumerated sexual offender charges.**

**The State did not introduce a certified copy of the conviction. Rather, it introduced the FDLE records, which referenced a "general court martial order" within a package of records it received from the Department of Justice. That order contained summarized findings made by the U.S. Army. But no one from the Army, the FDLE, or the Department of Justice authenticated the document. The State simply failed to prove the defendant was a sexual offender under section 943.0435(1)(a)1.a.**

## Hearsay & Oral Communications under § 934.02(2), Fla. Stat.

### *McDade v. State*, 154 So.3d 292 (Fla. 2014)

**Defendant's conversation with his stepdaughter in bedroom, that were recorded surreptitiously, which confirmed criminal activity, were "oral communications" that were uttered by a person expecting that his communication was not subject to interception, and thus recordings fell within statute prohibiting interception of oral communications without consent from all parties and were inadmissible**

**McDade was arrested and charged with various sex crimes after his then sixteen-year-old stepdaughter reported that he had been sexually abusing her since she was ten years old. Prior to McDade's arrest, his stepdaughter recorded two conversations with McDade. The stepdaughter provided these recordings to law enforcement, and McDade was arrested**

**that same day. Prior to trial, McDade moved to suppress the recordings under chapter 934, Florida Statutes. The trial court denied McDade's motion, and the case proceeded to a jury trial. The recordings were introduced at trial over McDade's objection.**

**In October 2010, the victim started going out with a boy. Her mother and McDade did not like the boyfriend, and this created conflict within the family. In an effort to prevent her from sneaking out of the house, her mother and McDade made her sleep in a closet near their bedroom. She told her boyfriend that McDade was raping her, and he encouraged her to gather proof of the abuse. He loaned her his MP3 player to use as a recording device. In April 2011, with the MP3 player hidden in her shirt, she approached McDade in his bedroom on two occasions when they were alone after school. She was essentially conducting her own investigation, hoping to prompt McDade into making incriminating statements that she could secretly record as evidence of abuse.**

**The district court concluded that "[b]ecause the statements in question were introduced to show why the boyfriend encouraged the victim to make the recordings," the boyfriend's statements did "not constitute hearsay and thus the court did not abuse its discretion in admitting them." *Id.* at 468–69.**

**The Second District then rejected McDade's argument that the trial court should have suppressed the recordings under the exclusionary rule of section 934.06, Florida Statutes (2010).**

**Section 934.03(2), Florida Statutes (2010), contains a list of specific exceptions to the general prohibition in section 934.03(1). One of these exceptions is for situations in which all parties to the conversation have consented. § 934.03(2)(d), Fla. Stat. (2010). None of the exceptions allow for the interception of conversations based on one's status as the victim of a crime. The State does not argue that any of the exceptions listed in section 934.03(2) are applicable in this case.**

**Similarly, under the definition of oral communication provided by section 934.02(2), Florida Statutes (2010), McDade's conversations with his stepdaughter in his bedroom are oral communications. The facts related to the recorded conversations support the conclusion that McDade's statements were "uttered by a person exhibiting an expectation that [his] communication [was] not subject to interception" and that McDade made those statements "under circumstances justifying" his expectation that his statements would not be recorded. § 934.02(2), Fla. Stat. (2010). The recordings were made surreptitiously. McDade did not consent to the conversations being recorded, and none of the other exceptions listed in section 934.03(2) apply. The recordings, therefore, were prohibited. Because the recordings impermissibly intercepted oral communications, the recordings are inadmissible under section 934.06, Florida Statutes (2010).**

**It may well be that a compelling case can be made for an exception from chapter 934's statutory exclusionary rule for recordings that provide**

**evidence of criminal activity—or at least certain types of criminal activities. But the adoption of such an exception is a matter for the Legislature. It is not within the province of the courts to create such an exception by ignoring the plain import of the statutory text.**

**McDade's argument that the trial judge erroneously permitted the boyfriend to testify about inadmissible hearsay statements is reviewed under an abuse of discretion standard.**

**Here, the boyfriend's testimony that the stepdaughter "told me that she was being raped when she was younger" was hearsay.**

**The Second District concluded that the boyfriend's testimony was offered not to establish the truth of the matter asserted by the stepdaughter but to show why the boyfriend assisted the stepdaughter in making the recordings.**

**Given our determination that the recordings were not admissible, this justification for the admission of the stepdaughter's statement collapses. The boyfriend's explanation of why he assisted the stepdaughter in making the inadmissible recordings is totally irrelevant. The State asserted no other basis in its brief to this Court for admitting the testimony. Therefore, the trial court abused its discretion in denying McDade's hearsay objection.**

## (k) § 90.608: Impeachment

## *Musson v. State*, 184 So.3d 575 (Fla. 2d DCA 2016)

**Utterances of a witness indicating motive or bias do not constitute hearsay when offered for impeachment purposes**

**To support her theory of defense and undermine Mr. Curtis' credibility, Ms. Musson sought to introduce the testimony of Twila Baccile. Ms. Baccile had, at some point, while being transported in a police van, engaged in a conversation through a grate with a man she believed to be Mr. Curtis. She claimed that they discussed these crimes during the ride. Ms. Baccile would have testified Mr. Curtis made statements to her that he was "going to blame it all [on] Vanessa ... [and] come to court and ... point fingers at Vanessa." Ms. Baccile would have further testified that Mr. Curtis told her that he had "threatened Vanessa's life," that Ms. Musson was "an easy target," and that he "was going to blame it on Vanessa because she was outside."**

**The trial court ruled that Ms. Baccile's testimony was inadmissible hearsay as it was offered "for the truth of the matter asserted, because the truth of the matter asserted is he plans to blame it all on her." The court struck Ms. Baccile as a witness, and the jury found Ms. Musson guilty of aggravated battery, simple battery, kidnapping, grand theft of an automobile, and armed robbery. The circuit court entered judgment and sentenced Ms. Musson to fifteen years in prison for the aggravated battery conviction, life without parole for the kidnapping and armed robbery**

**convictions, and to time served for the remaining counts, all to run concurrently. Ms. Musson then timely appealed.**

**While correctly capturing the essence of Ms. Baccile's proffered testimony—which was, indeed, a recitation of Mr. Curtis' alleged out-of-court statements—the trial court failed to apply an important definitional limitation of the hearsay rule.** ***See Lark v. State,*** **617 So.2d 782, 788 (Fla. 1st DCA 1993) ("If an out-of-court statement is offered in court to prove the truth of the facts contained in the statement, it is hearsay. If an out-of-court statement is not offered to prove the facts contained in the statement, it is not hearsay." (quoting Charles W. Ehrhardt,** ***Florida Evidence,*** **§ 801.2 (1992 ed.))).[4] Mr. Curtis' statements to Ms. Baccile were offered, not as substantive evidence of their truth, but to impeach Mr. Curtis' credibility as a witness.** ***See*** **§ 90.608(2), Fla. Stat. (2013) ("Any party ... may attack the credibility of a witness by .... [s]howing that the witness is biased."). That is, Ms. Baccile's testimony would have relayed Mr. Curtis' statements of his intention to exaggerate or fabricate the extent of Ms. Musson's involvement in these crimes. As the Fourth District has observed,**

> **[u]tterances of a witness indicating motive or bias do not constitute hearsay when offered for impeachment purposes. "Because liberty is at risk in a criminal case, a defendant is afforded wide latitude to develop the motive behind a witness' testimony." If cross-examination alone is not sufficient to expose a witness' improper motives, a defendant may**

**present other impeachment testimony.**

## *Hernandez v. State*, 31 So.3d 873 (Fla. 4th DCA 2010)

**Trial court erred in allowing State to call witness for the primary purpose of impeaching her with her otherwise inadmissible recorded conversation**

**Appellant, John Hernandez, appeals his convictions and sentences for two counts of lewd or lascivious molestation and one count of lewd or lascivious exhibition. First, he contends that the trial court erroneously permitted the State to call witness Sherill Hernandez for the sole purpose of introducing otherwise inadmissible impeachment evidence, which highly prejudiced appellant.**

**The standard of review on the admission of evidence is abuse of discretion as limited by the rules of evidence. *Hudson v. State,* 992 So.2d 96, 107 (Fla.2008). Unless it falls within a statutory exception, hearsay evidence is inadmissible. *See* § 90.802, Fla. Stat. (2008).**

**Section 90.803(5), Florida Statutes (2008), provides an exception to the hearsay rule when a witness cannot recall matters of which he or she previously had knowledge. If the proper foundation is laid, a tape-recorded statement may qualify as a recorded recollection. *See Montano v. State,* 846 So.2d 677, 680-81 (Fla. 4th DCA 2003). To be admitted into evidence, the past recollection recorded must be offered by the witness who is either devoid of a present recollection, or possessed of an imperfect present recollection and desires to use a memorandum of a past recollection. *See***

*Kimbrough v. State,* **846 So.2d 540, 543 (Fla. 4th DCA 2003); § 90.803(5). "***The witness must be able to assert now that the record correctly represented his knowledge and recollection at the time of making.***"** *Kimbrough,* **846 So.2d at 543 (citing J. Wigmore, Evidence §§ 734, 746(2) (Chadbourne rev. 1970));** *see also Montano,* **846 So.2d at 681-82 (witness's tape-recorded statement given to police shortly after criminal incident was improperly admitted under recorded recollection exception to hearsay rule where witness did not acknowledge its accuracy at trial).**

**Here, Sherill Hernandez was unable, or unwilling, to attest to the accuracy of the taped conversation. As such, the State was not able to show it could introduce the document as a "past recollection recorded." Sherill testified definitively that appellant denied abusing P.M. This directly conflicts with the conversation on the tape. Sherill also denied that appellant had offered an explanation to her for abusing P.M., i.e., that he was not mentally or psychologically well. She testified that the tape did not refresh her recollection.**

**Section 90.608(1), Florida Statutes, states that "[a]ny party, including the party calling the witness, may attack the credibility of a witness by ... [i]ntroducing statements of the witness which are inconsistent with the witness's present testimony." However, the supreme court in** *Morton v. State,* **689 So.2d 259 (Fla.1997),** *receded from on other grounds, Rodriguez v. State,* **753 So.2d 29 (Fla.2000), has recognized the risk of abuse where a**

**prosecutor calls a witness who has previously given a statement implicating the defendant but who has since repudiated that statement.** *Bateson v. State,* **761 So.2d 1165, 1169 (Fla. 4th DCA 2000). "[W]here a prosecutor** *knows* **that the witness' testimony at trial will be favorable to the defendant but, nonetheless, calls the witness for the purpose of impeaching [her] with [her] prior statement, the practice may be considered abusive because 'there is no legitimate forensic purpose in calling a witness solely to impeach him.' "** *Id.* **(emphasis added.) Recognizing that a single rule could not be created to encompass all of the circumstances in which a party will seek to impeach her own witness, the court stated: "Generally ... if a party knowingly calls a witness for the primary purpose of introducing a prior statement which otherwise would be inadmissible, impeachment should ordinarily be excluded."** *Morton,* **689 So.2d at 264.**

**In determining whether a party calls a witness for the primary purpose of impeachment, courts may consider "(1) whether the witness's testimony surprised the calling party, (2) whether the witness's testimony affirmatively harmed the calling party, and (3) whether the impeachment of the witness was of** *de minimis* **substantive value."** *Senterfitt v. State,* **837 So.2d 599, 600 (Fla. 1st DCA 2003).**

**Recently, this court adopted the Third District's expanded explanation of the "primary purpose" analysis in** *State v. Richards,* **843 So.2d 962 (Fla. 3d DCA 2003), which noted that the witness's other testimony must be useful to**

**prove a significant fact in the litigation:**

> **Application of the "mere subterfuge" or "primary purpose" doctrine focuses on the content of the witness's testimony as a whole. If the witness's testimony is useful to establish any fact of consequence significant in the contest of the litigation, the witness may be impeached by means of a prior inconsistent statement as to any other matter testified to. In the words of one commentator, the pivotal question is whether the "party [is] calling a witness with the reasonable expectation that the witness will testify [to] something helpful to the party's case aside from the prior inconsistent statement."**

***Ruff v. State,* 31 So.3d 833, 837 (Fla. 4th DCA 2010) (quoting *Richards,* 843 So.2d at 965 (emphasis omitted) (quoting 1 *McCormick on Evidence* § 38, at 142-43 (John W. Strong ed., 5th ed. 1999)).**

## *Gosciminski v. State*, 994 So.2d 1018 (Fla. 2008)

**Statements were improperly admitted for impeachment purposes when they were actually being offered to prove the truth of the matter asserted**

**Gosciminski also argues that the trial court erred in admitting Joan Loughman's hearsay statements about Gosciminski noticing her jewelry through the testimonies of Joan's sister and husband, and through the videotaped interview between Detective Hickox and Gosciminski. The State asserts the evidence was properly admitted because the testimonies were**

**not offered for the truth of the matter asserted, but for impeachment purposes.**

**The State first attempted to introduce Joan's statements through the videotaped interview between Detective Hickox and Gosciminski, where Detective Hickox was telling Gosciminski things that Joan told her sister, Janet, who then told the detectives. After defense counsel objected based on triple hearsay and moved for a mistrial, the State argued that they were offering the statements for impeachment purposes. The trial court first agreed that the statements constituted triple hearsay, but after the State argued that they would get Joan's statements in through Janet's testimony, the trial court denied the motion for mistrial. However, the trial court informed the defense that they could renew the motion if the State was not able to get the statement in through another witness.**

**Subsequently, the State called both Joan's sister, Janet, and Joan's husband, Thomas, to testify regarding Joan's statements to them that Gosciminski had noticed her jewelry. In the middle of the State's direct examination of Thomas, defense counsel again objected based on hearsay. Defense counsel argued that Joan's statements to her husband and sister were hearsay because they were going to be used to prove the truth of the matter asserted. The State again argued that they were not trying to prove the truth of the matter asserted that Gosciminski was interested in Joan's jewelry, but to impeach statements Gosciminski made to law enforcement**

**during the videotaped interview that he never discussed jewelry with Joan. The trial court first explained that Joan's statements seemed to be hearsay within hearsay, with the first portion being the statement by Gosciminski to Joan and the second portion being the statement by Joan to her husband and sister. The trial court then stated that although the statement by Gosciminski to Joan would be admissible as a statement by a party opponent, the statement by Joan to her husband and sister did not fall under any hearsay exception.[7] However, the trial court ultimately agreed with the State and found that the State was using Joan's statements to impeach statements that Gosciminski made to law enforcement, and as a result, the statements were admissible as prior inconsistent statements for impeachment purposes.**

**We find that the trial court abused its discretion in finding that Joan's hearsay statements through the testimonies of her sister and husband, and through the videotaped interview between Detective Hickox and Gosciminski, were admissible for impeachment purposes. These statements were actually being offered to prove the truth of the matter asserted—that Gosciminski noticed and had an interest in Joan's jewelry. The State introduced Joan's statements regarding Gosciminski's interest in her jewelry through the videotaped interview between Detective Hickox and Gosciminski, and also through Joan's husband and sister. It was important for the State to demonstrate to the jury that Gosciminski had taken notice of Joan's jewelry to demonstrate that Gosciminski committed the crime**

**because during the attack jewelry had been removed from her body. Thus, although the State argued that they were using Joan's statements to impeach Gosciminski's statement to law enforcement, we find that this was not simply an attack on Gosciminski's credibility. Rather, the State made an active and continuing effort to persuade the jury to believe Joan's statements, both through the testimonies of both Joan's husband and sister and through the videotaped interview between Detective Hickox and Gosciminski, that Gosciminski did notice her jewelry, and to reject Gosciminski's statement to law enforcement that he did not notice Joan's jewelry. As a result, Joan's statements constitute hearsay.**

**Moreover, Joan's statements constitute hearsay within hearsay because Joan made her statements about Gosciminski noticing her jewelry to her sister and husband, who then told the detectives, and then Detective Hickox used those statements to question Gosciminski during the videotaped interview. As a result, each hearsay statement must fall under an exception for Joan's statements to be admissible. *See* § 90.805, Fla. Stat. (2007). In reviewing the listed exceptions under the hearsay rule, none of the statements fit into any of the recognized hearsay exceptions; thus, we find that Joan's statements are not admissible. *See* §§ 90.803(1)-(24), 90.804(2), Fla. Stat. (2007); *see also Stoll v. State,* 762 So.2d 870 (Fla.2000) (finding that a portion of a witness's testimony was inadmissible because it constituted hearsay within hearsay, and none of the hearsay exceptions**

**applied to any of the hearsay statements). Accordingly, the trial court erred in admitting this evidence over the defense's objection.**