Evidence

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    who passed away this year.
I. INTRODUCTION

This year's survey of Florida law demonstrated a familiar pattern in Florida evidence. Criminal evidentiary cases outnumbered civil evidentiary cases almost four to one. Once again, hearsay was the predominant area, with expert testimony and scientific evidence drawing the most divergent opinions. A troubling theme throughout the survey period was the incredibly high number of cases being reversed without timely objections being made to the error.1 The majority of these reversals occurred during closing argument, although cases involving improper voir dire and opening statements also received reversals.2 The district courts seem intent on curbing the unethical behavior of attorneys who use “scorched earth” tactics in the presentation of their case to the jury.3 It appears that the appellate courts

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1. See FLA. STAT. § 90.104 (1995). Section 90.104(1)(a) requires a timely objection in order to preserve error for appeal. Id.

2. A few of the cases that have been reversed without objection are: Baptist Hosp., Inc. v. Rawson, 674 So. 2d 777 (Fla. 1st Dist. Ct. App. 1996) (reversed for improper closing argument, calling defendant’s witnesses “idiots,” referring to defenses as “unbelievable” as to insult jurors, and including numerous other improper comments); Norman v. Gloria Farms, Inc., 668 So. 2d 1016 (Fla. 4th Dist. Ct. App. 1996) (reversed for threat to jurors that a verdict for opposing side would destroy jurors’ lifestyles); Muhammad v. Toys “R” Us, Inc., 668 So. 2d 254 (Fla. 1st Dist. Ct. App. 1996) (reversed for improper closing arguments, including personal opinion and comments which accused plaintiff of perpetrating fraud upon court and jury).

Although an objection was made in Williams v. State, 673 So. 2d 974 (Fla. 1st Dist. Ct. App. 1996), the comment was deemed innocuous. This case was reversed due to an improper comment which was made by the prosecutor during closing argument, wherein the prosecutor stated: “I submit to you that it’s not reasonable to consider that sworn police officers, doing their job, could come into court and perjure themselves.” Id. at 975. The district court felt that this was improperly bolstering the credibility of the police officers. Id. However, this was one of the more innocuous comments as compared to many other cases.

3. The district courts of appeal should be commended for attempting to stop this type of in-court behavior, such as when attorneys call witnesses and other attorneys “liars,” “scum,” and other expletives too numerous to discuss. However, this praise is not without reservation. It seems that there could be a growing trend toward “gotcha” trial tactics when one side is able to sit idly by and make no objections and then complain for the first time on appeal that there was error warranting a reversal. Section 90.104 of the Florida Evidence Code requires a timely objection in order to preserve a point for appeal. FLA. STAT. § 90.104(1)(a). The district courts are unable to consider an assertion of error in the admission of evidence, made in the trial court, if counsel fails to make a contemporaneous objection at trial. Only if the error is fundamental should an appellate court consider the issue on appeal. However, the Supreme Court of Florida has indicated that fundamental error should be found infrequently. Sanford v. Rubin, 237 So. 2d 134, 137 (Fla. 1970). As the supreme court stated: “The
have had enough of attorneys "pushing the envelope" of unethical behavior during trial.\(^4\) The Florida Legislature made no significant changes to the evidence code this year. Nevertheless, the Supreme Court of Florida took up the issue of DNA admissibility, and the district courts of appeal were divided over the admissibility of child abuse profile evidence.\(^5\)

II. OFFERS OF PROOF

One of the most important provisions in the *Florida Evidence Code* is the offer of proof provision in section 90.104.\(^6\) The importance of this section cannot be overlooked if a chance at a successful appeal is being considered. Section 90.104(1)(b) provides that when a trial judge erroneously sustains an objection, counsel must make an offer of proof of how the witness would have responded if allowed to answer the question, in order to preserve the point for appeal.\(^7\) An offer of proof may be made in the following ways: 1) by having the witness answer the question on the record out of the presence of the jury; 2) by including in the record a written statement of the anticipated answer; or 3) by a professional statement of counsel to the court divulging the answer which is made on the record. An offer of proof permits the trial court to learn the answer of the witness to the excluded question. An offer of proof gives the trial court the opportunity to change its ruling and provides the appellate court the opportunity to properly examine the full question and answer in determining if an error was made by the trial court. If an appellate court has to speculate as to the answer to an excluded question, it is unlikely that error will be preserved or found.\(^8\)

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\(^4\) See Devlin v. State, 674 So. 2d 795 (Fla. 5th Dist. Ct. App. 1996) (Dauksch, J., dissenting), wherein the dissent reproduced a page of improper comments and stated that these comments were inappropriate because they: "1) evoke sympathy for the state’s witness; 2) constitute an improper comment on defendant’s right to remain silent; 3) shift the burden of proof; 4) vouch for the credibility of the state’s witnesses; 5) state the prosecutor’s beliefs; 6) disparage defense counsel; and 6) [sic] invade the jury’s province." *Id.* at 798 (footnote omitted). This case provides a plethora of improper and inflammatory comments that should be avoided by counsel during trial.


\(^6\) FLA. STAT. § 90.104. This section is entitled “Rulings on Evidence.”

\(^7\) *Id.* § 90.104(1)(b).

\(^8\) See Nava v. State, 450 So. 2d 606 (Fla. 4th Dist. Ct. App. 1984), *cause dismissed*, 508 So. 2d 14 (Fla. 1987). Section 90.104(1)(b) also provides that an offer of proof is not necessary if the substance of the answer "was apparent from the context within which the questions were asked." FLA. STAT. § 90.104(1)(b). However, counsel should never count on
During the survey period, the Third District Court of Appeal addressed the issue of how an offer of proof is made when the trial court excludes documents from evidence. In *Brantley v. Snapper Power Equipment*, the third district reversed the trial court's ruling, granting the defendant's motion in limine, which excluded from evidence post-manufacture, pre-accident notices, service bulletins, and correspondence on which the plaintiffs were relying to prove the existence of a defect in a product. At the hearing on the motion in limine, the plaintiffs made no offer of proof of the excluded documents, nor were the excluded documents made part of the record at the trial. Although the plaintiffs felt they were excused from making the necessary offer of proof, the district court disagreed. The district court stated:

When the trial court excludes evidence, an offer of proof is necessary . . . if the claimed evidentiary error is to be preserved for appellate review. This can be done without violating the order in limine by offering the excluded documents at trial outside the presence of the jury. “Excluded documents . . . should be marked for identification with a number and described fully in the record. This makes a record of the excluded evidence available to an appellate court so it can determine if error was committed in excluding the

the appellate court’s generosity in finding that an answer was “apparent” from the context of the questions. A proffer should always be forthcoming. See Dale A. Bruschi, *Evidence: 1992 Survey of Florida Law*, 17 NOVA L. REV. 255, 257 (1992). This article provides additional cases which discuss offers of proof in criminal and civil cases.

10. Id. at 242.
11. Id. at 243. Apparently, the plaintiffs attempted to rely on *Bender v. State*, 472 So. 2d 1370, 1372–73 (Fla. 3d Dist. Ct. App. 1985), for the proposition that once the trial court has excluded evidence pursuant to a pretrial motion in limine, the proponent of the evidence should not attempt to elicit the testimony to preserve the error. *Brantley*, 665 So. 2d at 243. Professor Ehrhardt, in his treatise on evidence, seems to agree with this position, in stating that, “[s]ince the purpose of the motion [in limine] is to prevent a proffer of the evidence at trial, a party who abides by the court’s ruling should not be put in a position of waiver.” CHARLES W. EHHRHARDT, *FLORIDA EVIDENCE* § 104.5, at 22 (1996) (footnotes omitted). However, the Third District Court of Appeal in *Brantley* stated that *Bender* (also a Third District Court of Appeal case) stands for the proposition that the proponent of the excluded evidence should not violate the order in limine by offering the excluded evidence at trial in the presence of the jury. *Brantley*, 665 So. 2d at 243 n.3. *Bender* does not preclude the proffer of excluded evidence outside the presence of the jury. Id. The court felt that *Bender* proceeded on the implied assumption that an adequate record of the excluded evidence had been made during the motion in limine hearing. *Id.* However, where that has not been done, an offer of proof must be made at trial. *Id.* Unless an adequate offer of proof has been made in the motion in limine hearing, the necessary offer of proof *must* be made during the trial. *Id.*
evidence and also makes it available for post trial motions." . . . Alternatively, if an adequate record of excluded evidence has been made at the hearing on the motion in limine, it is not necessary to make an offer of proof at trial.\textsuperscript{12}

Naturally, the most prudent course of action, when a motion in limine has been granted excluding evidence, is to make an offer of proof during the trial. An offer of proof should still be made, outside the presence of the jury, even if an adequate record was made at the motion in limine hearing. This will give the trial court an opportunity to reconsider the ruling in light of the changing dynamics of the trial.\textsuperscript{13} This procedure will also demonstrate to the appellate court that trial counsel has not abandoned this matter and that the trial court has remained steadfast in its determination to exclude the evidence.

\textbf{III. SUMMING UP AND COMMENT BY THE JUDGE}

During the survey period, one of the few cases that discussed trial judges interrogating witnesses was reviewed by the Fourth District Court of Appeal. In \textit{Moton v. State},\textsuperscript{14} the defendant appealed a trial court's conviction for armed robbery of a convenience store clerk.\textsuperscript{15} The defense at trial was that the State had charged the wrong man. During the examination of a key prosecution witness (the store clerk), the trial judge asked a series of questions regarding the enclosure that separated the clerk from the shopping area. The trial judge then inquired of the clerk where the defendant was standing.\textsuperscript{16} The defense timely objected to these questions.

The Fourth District Court of Appeal agreed with the defendant that questioning by the trial judge can, and often does, suggest to the jury that some evidence may be more important than other evidence.\textsuperscript{17} This causes

\textsuperscript{12} \textit{Brantley}, 665 So. 2d at 243 (emphasis added) (citations omitted).
\textsuperscript{14} 659 So. 2d 1269 (Fla. 4th Dist. Ct. App. 1995).
\textsuperscript{15} Id. at 1269.
\textsuperscript{16} As can best be gleaned from the opinion, this was in an apparent attempt to clear up some confusion regarding which individual the witness was referring to when he was examining a group photograph (or videotape) which contained the defendant's picture.
\textsuperscript{17} \textit{Moton}, 659 So. 2d at 1270; \textit{but see} \textit{Williams v. State}, 143 So. 2d 484, 488 (Fla. 1962) (holding that the judge is permitted to ask questions in order to clarify the issues but he should not lean to the prosecution or defense lest it appear that his neutrality is departing from center).
the jury to focus on evidence it may not otherwise have strongly considered. In Moton, the case was apparently a very close call, with the identification of the defendant being a central issue in the case. Because of the closeness of the case, the district court was unable to find the questioning by the trial judge harmless and reversed the case for a new trial.

IV. JUDICIAL NOTICE

In the case of Cordova v. State, the Third District Court of Appeal wrestled with judicial notice in criminal cases. In Cordova, the defendant was found guilty of indirect criminal contempt, for violating a domestic violence injunction. During the nonjury trial, the court took judicial notice of the fact that the defendant had been served with a copy of the injunction. The trial court based this, in part, on the stamped return of service for the injunction.

The district court framed the issue to be "whether a trial court may judicially notice the fact that a defendant was served with an injunction where he is charged with indirect criminal contempt for violating its provisions." The parties to the action agreed that notice of an injunction is an essential element of the charge of violating its provisions.

The district court noted that before the enactment of the evidence code, judicial notice of a fact meant that it was taken as true without the necessity

18. Moton, 659 So. 2d at 1270. It appears that there was little other evidence, such as fingerprints, etc., to tie the defendant to the crime. Thus, the case balanced on the credibility of the eyewitness and his ability to make a positive identification of the defendant during an emotionally charged few moments.

19. Id. The two concurring opinions make it clear that questioning by the trial judge, though not specifically improper, is unwise. Justice Stone indicated that neutral questions by the trial judge to “clarify the direction from which a photograph is taken or a diagram viewed, or, as here, where a witness has referred to an individual on a videotape containing more than one person in the picture and it is not clear to which individual the testimony refers,” can be helpful to the jury and the appellate court. Id. (Stone, J., specially concurring). However, a judge travels a dangerous road in attempting to avoid the pitfalls associated with questioning witnesses in front of a jury and, for the most part, should remain a neutral and impartial mediator.

21. Id. at 634.
22. Id.
23. Id.
24. In criminal cases, the state must prove every essential element of the crime charged by proof beyond a 'reasonable doubt. Therefore, the analysis must be aimed at the effect the judicial notice has on the state’s constitutional burden.
of offering evidence by the party who would do so.\textsuperscript{25} However, the rule did not prevent an opposing party from introducing rebuttal evidence after a fact had been noticed. Therefore, judicial notice served as prima facie evidence of the fact so noticed.

When the evidence code was enacted in 1976, section 90.206 required the trial judge to instruct the jury to accept as a fact, a matter judicially noticed.\textsuperscript{26} A matter judicially noticed was meant to be binding on the trier of fact, and no evidence disputing or rebutting the matter was permitted, once it had been noticed by the judge.\textsuperscript{27} The mandatory “shall” section of the rule was later changed to “may,” and the provision now reads that the judge “may instruct the jury during the trial to accept as a fact a matter judicially noticed.”\textsuperscript{28} The district court found that the change now allowed the trial court the discretion to determine whether taking judicial notice of a particular fact is conclusive as to that fact, or whether the opposing party can introduce conflicting evidence.\textsuperscript{29}

The district court examined the use of judicial notice in a criminal case and noted that for a defendant’s Sixth Amendment right to a jury trial to operate within constitutional boundaries, “judicial notice should only be used as a device to establish the prima facie existence of a particular fact which the finder of fact is free to disregard despite the defendant’s failure to introduce evidence to the contrary.”\textsuperscript{30} The district court’s main concern now was whether the foregoing principles would apply in a case where the defendant does not have a right to a jury trial. The district court examined the law regarding mandatory presumptions in making its determination and stated:

Conclusive judicial notice not only establishes the existence of a particular fact, it precludes the adverse party from introducing evidence to rebut it. Such a device would certainly run afoul of the same due process rights implicated in the case of mandatory presumptions. Even in the case of a bench trial, judicial notice “must not undermine the factfinder’s responsibility at trial, based on evidence adduced by the State, to find the ultimate facts beyond a rea-

\begin{footnotesize}
\textsuperscript{25} Cordova, 675 So. 2d at 635 (citing FLA. STAT. ANN. § 90.206 (West 1979) (Law Revision Council Note-1976)).
\textsuperscript{26} Id. (citing EHRHARDT, supra note 11, § 206.1).
\textsuperscript{27} Id. (citing FLA. STAT. ANN. § 90.206).
\textsuperscript{28} Id. (quoting EHRHARDT, supra note 11, § 206.1).
\textsuperscript{29} Id.
\textsuperscript{30} Cordova, 675 So. 2d at 635.
\end{footnotesize}
sonable doubt.” Accordingly, much like a permissive inference, a constitutional use of judicial notice in a criminal case allows, but does not require, the trier of fact to accept as true a fact so noticed.31

Having determined that judicial notice of elemental facts in a criminal case is constitutionally permissible, the district court turned its attention to whether the judicial notice in this case was correctly taken.32 The trial court took judicial notice under sections 90.202(11) and (12) of the evidence code.33 The district court determined that these sections were inappropriate for judicial notice of an injunction.34 First, an injunction is not “generally known within the territorial jurisdiction of the court.”35 Judicially noticing an injunction simply does not fit under this exception. Second, the district court found that service of the injunction is not the type of fact that is not subject to dispute because it is capable of accurate and ready determination by resort to a source whose accuracy cannot be questioned.36 This section was also improper for judicially noticing an injunction.37

Having determined that the injunction could not be judicially noticed under the sections argued by the State, the district court upheld the conviction, finding that the trial court was right for the wrong reasons.38 The district court found that the trial court could allow the State to use a permissive inference to establish the fact of service.39 “A permissive inference allows, but does not require, the trier of fact to infer an elemental fact [service] upon proof of a basic fact [return of service] and places no burden on the defendant.”40 The defendant would also be permitted to introduce evidence to rebut these facts.41

31. Id. at 636 (citation omitted).
32. Id.
33. Section 90.202(11) of the Florida Statutes states, “[f]acts that are not subject to dispute because they are generally known within the territorial jurisdiction of the court.” FLA. STAT. § 90.202(11) (1993). Section 90.202(12) states, “[f]acts that are not subject to dispute because they are capable of accurate and ready determination by resort to sources whose accuracy cannot be questioned.” Id. § 90.202(12).
34. Cordova, 675 So. 2d at 636.
35. Id. (quoting FLA. STAT. § 90.202(11)).
36. Id.
37. Id.
38. Id.
40. Id. at 637 (alterations in original) (quoting Marcolini v. State, 673 So. 2d 3, 5 (Fla. 1996)).
41. Id.
V. RELEVANT EVIDENCE

A. Computer Animations

During the survey period, an interesting case arose regarding the use of a computer generated accident reconstruction animation to illustrate an accident reconstruction expert's opinion. In *Pierce v. State*, the defendant appealed from a conviction when he was found guilty of vehicular homicide and leaving the scene of an accident, involving the death of a young girl. Eyewitnesses to the accident indicated that the vehicle which struck the child was a Chevrolet Silverado truck with a camper top. At the scene of the accident, the police investigators located a piece of a grille and a piece of plastic from a turn signal lens. The medical examiner opined that there might be a dent in the vehicle caused by the impact on the victim's head. Three weeks after the accident, the police located the defendant's truck, which had a dent where the hood meets the grille. Although this truck did not have a camper top, neighbors stated that the defendant recently removed the camper top from his vehicle.

The State Attorney's Office filed a Notice of Intent to offer computer generated animation of its expert's accident reconstruction. The State intended to illustrate its expert's opinions of how the accident occurred through the computer animation. The State's expert in accident reconstruction testified that the AUTOCAD computer program which was used for the illustration was accepted in the engineering field as one of the leading computer aided design programs. The expert's accident reconstruction measurements were fed directly into the computer.

The State contended that the computer animation was a visualization of its expert's opinion as to how the accident occurred. The State proffered the computer animation as a demonstrative exhibit, to help its accident reconstruction expert explain his opinion to the jury, and as substantive evidence. The trial court found the computer animation would express the expert's opinion and was not a scientific or experimental test which would subject its

42. 671 So. 2d 186 (Fla. 4th Dist. Ct. App. 1996).
43. *Id.* at 187.
44. *Id.* at 188.
animation to the Frye test. The trial court also ruled that the computer animation could not be used as substantive evidence.

Demonstrative exhibits may be used during a trial as an aid to help the jury understand a material fact or issue. A demonstrative exhibit must be an accurate and reasonable reproduction of the object involved. This is the same foundation that must be established for any photographic evidence, such as a videotape, motion picture, or photograph. However, before admitting the computer generated animation, the proponent of the evidence must first establish the foundational requirements necessary to introduce an expert opinion.

Any preliminary facts constituting the foundation for the admissibility of evidence must be proven to the court by a preponderance of the evidence, even in a criminal case. In Pierce, the appellate court found that the trial court made the appropriate findings of preliminary facts, supported by evidence introduced at the pretrial hearing. The expert was found to be qualified as an expert in accident reconstruction and his opinion as to how the accident occurred was applied to evidence offered at trial. The data the expert relied on in forming his opinion was of a type reasonably relied upon by experts in the field. Finally, the trial court specifically found that the computer animation was a fair and accurate depiction of the expert's opinion as to how the accident occurred and that the expert's opinion and the computer animation would aid the jury in understanding the issues in the case.

45. See Frye v. United States, 293 F. 1013 (D.C. Cir. 1923). Tests such as DNA or blood splattering are subject to the Frye analysis to determine whether they are accepted in the scientific community.

46. Pierce, 671 So. 2d at 188.

47. The foundation requirements for expert testimony are: 1) the opinion evidence must be helpful to the trier of fact; 2) the witness must be qualified as an expert; 3) the opinion evidence must be applied to evidence offered at trial; and 4) pursuant to section 90.403 of the Florida Statutes, the evidence, although technically relevant, must not present a substantial danger of unfair prejudice that outweighs its probative value. FLA. STAT. § 90.702 (1995). See Kruse v. State, 483 So. 2d 1383, 1384 (Fla. 4th Dist. Ct. App. 1986), cause dismissed, 507 So. 2d 588 (Fla. 1987). Another foundational requirement is that the facts or data relied on by the expert in forming the opinion expressed by the computer animation must be of a type reasonably relied upon by experts in the subject area. FLA. STAT. § 90.704 (1995).

48. Pierce, 671 So. 2d at 190 (citing CHARLES W. EHRHARDT, FLORIDA EVIDENCE § 105.1 (1995)).

49. Id.

50. Id.

51. Id.

52. Id.
B. Bolstering Witness Credibility

In *Smith v. State*, the district court reversed the conviction of a New Smyrna Beach police officer who was found guilty of lewd and lascivious assault upon a child under the age of sixteen years. The district court reversed the conviction, finding that the trial court committed reversible error. The trial court erred by allowing the victim's mother to testify that the victim never made false statements against anyone, and for allowing the State's expert witness to bolster the victim's credibility.

The testimony at trial indicated that the defendant was a twenty-four-year-old police officer. He met the victim through her boyfriend, who was a police explorer. A short time after, the victim tried to commit suicide. The defendant befriended the victim and her mother and acted as a counselor to the victim. After getting to know the child and his mother, the victim would go to the defendant's house to watch Music Television ("MTV"). It was during one of these visits, that the defendant allegedly fondled, caressed, and had intercourse with the victim, which was consensual. After intercourse, the defendant allegedly told the victim to keep it a secret because he was twenty-four and she was fourteen and, as a police officer, he could get into trouble.

The victim allegedly told her best friend about the incident and some weeks later, she told her mother about the sexual relationship. The mother reported the allegations to the police. The crime was reported approximately one month after it occurred, and the police could not obtain any medical or physical forensic evidence to corroborate the child's testimony. The only direct evidence was the child's testimony and hearsay statements. This testimony was contested by the defendant, who testified that the victim had been to his house, but they did not have sex.

During trial, the State offered the testimony of the victim's mother and, over defense objection, elicited from the mother that the victim had never "made any false criminal allegations against anyone else." This was error. The victim's credibility was a crucial factor in the case, since no medical or physical evidence corroborated the victim's testimony. Allow-

53. 674 So. 2d 791 (Fla. 5th Dist. Ct. App. 1996).
54. *Id.* at 792.
55. *Id.* at 794.
56. *Id.* at 793.
57. *Id.* (citation omitted).
58. *Smith*, 674 So. 2d at 793.
59. *Id.*
ing the mother to testify that the child never made false statements against anyone was extremely prejudicial, unnecessarily bolstered the credibility of the victim, and was improper character evidence. 60

The district court also found that testimony from the State’s child abuse expert was reversible error. 61 The State’s expert testified that most sexual abuse victims come from single parent households, that children who were previously sexually abused were at a greater risk of being abused a second time, and that this victim was sexually abused by the defendant. Evidence at trial indicated that the victim’s parents were separated, that the victim lived with her mother, and that the victim had been previously sexually abused. The district court found that admission of this testimony was reversible error. 62

The district court distinguished Glendening v. State, 63 in which the Supreme Court of Florida held that it was not fundamental error to allow a child abuse expert to testify that the child had been abused. 64 However, in Glendening, the child was three and one-half-years-old at the time of the abuse, which would make it difficult for the child to describe the incident. Here, in Smith, the victim was fifteen years of age. Additionally, the expert’s testimony in Glendening was limited to and supported by a recorded “doll interview” which was played for the jury.

The district court noted that in the present case, the State’s expert provided no support for her opinion that the victim had been abused. 65 The State’s expert testified regarding the numerous child abuse cases she worked on and testified that she reviewed the child’s deposition and her statements to the police and victim’s advocate, but she did not give any foundation in science, or any other area of specialized knowledge, to support her belief that the victim had been abused. 66 The district court found that with no foundation for this belief, “the expression of this belief amounted to no more than an impermissible comment on the credibility of the child.” 67 Additionally, the district court noted that, unlike the expert testimony in Glendening,

60. Id. The district court indicated that the defense did not attack the victim’s character relating to truthfulness or put the child’s character or reputation at issue. Id. Therefore, the testimony was not admissible under either section 90.609(2) or 90.404(1)(b). Id. 61. Smith, 674 So. 2d at 794.
62. Id.
64. Id. at 220.
65. Smith, 674 So. 2d at 793.
66. Id.
67. Id.
the State’s expert testimony in Smith was not helpful to the jury, since the child in this case was fifteen-years-old and fully capable of describing what happened. The testimony by the State’s expert that she believed the defendant abused the child is a classic example of irrelevant and impermissible evidence. Testimony regarding the guilt or innocence of the accused is almost always inadmissible because the probative value of the testimony is outweighed by the danger of unfair prejudice.

The district court also examined the logical relevance of the expert’s statistics regarding abused children. The State’s expert stated that most abused children came from single family homes and that children who have been previously abused are at a greater risk of being abused a second time. The district court questioned how these statements, or statistics, make it more likely than not that a crime was committed against this victim and/or that the defendant committed the crime. Conversely, if the evidence was presented to demonstrate the propensity on the part of a child to be victimized, the district court found it to be impermissible character evidence.

VI. IMPEACHMENT

During the survey period, a rather novel piece of impeachment work was discussed by the Third District Court of Appeal in Little Bridge Marina, Inc. v. Jones Boat Yard, Inc. In this case, the plaintiff appealed from an adverse final judgment in a breach of contract action. Since each party disputed the facts upon which the case was based, the trial centered around the question of credibility of the main witnesses on each side.

At trial, defense counsel questioned the plaintiff about being an attorney. Defense counsel’s cross-examination in this area ended with the following question: “In fact, the type of law you did you represented crimi-

68. Id.
69. See Fla. Stat. § 90.403 (1995). This section is titled “Exclusion on Grounds of Prejudice or Confusion.” See also Glendening, 536 So. 2d at 221.
70. Evidence should always be examined from the standpoint of whether the evidence is logically relevant and whether the evidence is legally relevant. Logical relevance is simply whether the evidence will make a fact in issue more or less probative. Evidence is examined for legal relevancy to determine whether another rule of law excludes the evidence even if it proves a fact in issue. For a thorough explanation of logical and legal relevancy, see Dale A. Bruschi, Evidence: 1990 Survey of Florida Law, 15 Nova L. Rev. 1131, 1136 (1991).
71. Smith, 674 So. 2d at 794.
72. Id.
73. 673 So. 2d 77 (Fla. 3d Dist. Ct. App. 1996).
74. Id. at 78.
nals. You got them off." It is presumed that defense counsel felt this impeachment was a rather brilliant tactic. However, as pointed out by the district court, and probably by defense counsel's trial advocacy professor, this was patently improper.

The resolution of the case depended upon the jury's view of the credibility of the parties' account of the facts. The district court found that it was reversible error to allow the trial attorney to use the plaintiff's past career as a criminal defense attorney as impeachment. The district court went on to say:

These statements by appellee's attorney were not only inappropriate, but they were also legally immaterial and irrelevant to the case. Furthermore, the statements cannot be condoned by this court as a form of impeachment. Clearly, these recriminations were intended to denigrate the witness, Mr. Gustinger, in the eyes of the jury by inflaming the jury against Mr. Gustinger based on the sentiment held by many laypersons in the community to the effect that attorneys are not to be respected.

The district court found the statements to be even more damaging, since the credibility of the witness was critical, as it was the primary testimony to be measured against the testimony of the appellee. The district court also noted that the cross-examination did not attempt to demonstrate that the witness had done anything wrong, but was merely done to establish that the witness was a criminal attorney and was meant to lower the jury's opinion of the witness. Since the outcome of the case hinged on the credibility of the witnesses, the improper impeachment destroyed the plaintiff's opportunity for a fair trial.

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75. Id. at 79.
76. Id.
77. Id.
78. Little Bridge Marina, 673 So. 2d at 79 (citations omitted).
79. Id.
80. Id.
81. Id.
VII. EXPERT OPINION TESTIMONY

A. Scientific Evidence

In Hayes v. State, the Supreme Court of Florida addressed, for the first time, the admissibility of DNA evidence in a criminal trial. The facts in Hayes revealed that a female groom at the Pompano Harness Track was murdered in her dormitory room. Crime scene investigation found the victim on the floor wearing only blue jeans and a T-shirt. A tank top shirt was found lying nearby on the floor. The victim was clutching a piece of brown hair. Seminal fluid was found on the tank top, the blue jeans, and in a vaginal swab taken from the victim. Robert Hayes, another groom who worked at the harness track, was arrested for the murder.

In addressing the issue of the admissibility of DNA evidence, the Supreme Court of Florida made it clear that Florida utilizes the Frye test to determine the admissibility of new or novel scientific evidence. A four-part inquiry must be addressed by the trial court before expert opinion testimony will be admitted at trial. First, the expert testimony must assist the trier of fact in understanding the evidence or in determining a fact in issue. Second, the scientific principle or discovery must be sufficiently established to have gained general acceptance in the scientific field in which it belongs. Third, the expert witness must be qualified to present evidence on the subject in issue. Fourth, expert opinion must be presented to the jury.

The Supreme Court of Florida earnestly examined the report on DNA standards and methodologies drafted by the National Research Council of the National Academy of Sciences. The report explains that in applying

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82. 660 So. 2d 257 (Fla. 1995).
83. Id. at 259.
84. See Frye v. United States, 293 F. 1013 (D.C. Cir. 1923).
85. Hayes, 660 So. 2d at 262.
86. See Ramirez v. State, 651 So. 2d 1164, 1166 (Fla. 1995) (holding that Florida utilizes the Frye test to determine the admissibility of new or novel evidence, such as DNA evidence).
87. Hayes, 660 So. 2d at 262.
88. Id.
89. Id.
90. Id.
91. Id. See NATIONAL ACADEMY OF SCIENCES, DNA TECHNOLOGY IN FORENSIC SCIENCE (1992). This report and the full language of this case should be meticulously studied by anyone who will be the proponent of DNA evidence or who will be defending against DNA evidence.
the *Frye* test to DNA testing procedures, there are four pertinent assumptions. 92 Though all four of these assumptions are important, the Supreme Court of Florida focused on the second and fourth assumptions. 93 The second assumption concerned the reliability of the underlying theory regarding "correcting for band shifting." 94 The fourth assumption concerned the proper procedures that must be followed for DNA evidence to be admissible. 95

In the *Hayes* case, the DNA test on the tank top was inconclusive. However, after the prosecution's expert witness applied the controversial "band shifting" technique, a three band match was found with samples taken from the defendant. The defense challenged the expert on the "band shifting" technique, claiming that a three band match was not truly a match. The defense also claimed that any corrections that were made due to "band shifting" were not accepted in the scientific community. The supreme court examined the findings of the National Research Council and agreed with the Council's report that "[u]ntil testing laboratories have published adequate studies on the accuracy and reliability of such corrections, we recommend that they adopt the policy of declaring samples that show apparent band shifting to be ‘inconclusive.'" 96 Therefore, the Supreme Court of Florida found that the test on the tank top was unreliable. 97

The Supreme Court of Florida next examined the DNA test done on the vaginal swab taken from the victim. 98 There was a seven band match on this sample. The supreme court felt that this DNA evidence could not be excluded as a matter of law. 99 However, the supreme court also believed that it could not approve this evidence for admission at this juncture, since it found that the *Frye* test was not properly applied, as suggested in the National Research Council's report. 100

In summarizing its findings, the Supreme Court of Florida stated:

92. NATIONAL ACADEMY OF SCIENCES, *supra* note 91, at 133–34.
93. *Hayes*, 660 So. 2d at 263.
94. NATIONAL ACADEMY OF SCIENCES, *supra* note 91, at 133–34.
95. *Id.* Even if proper procedures are followed, the probative force of the evidence will depend on the quality of the laboratory work.
96. *Hayes*, 660 So. 2d at 264 (alteration in original) (quoting NATIONAL ACADEMY OF SCIENCES, *supra* note 91, at 60–61).
97. *Id.*
98. *Id.*
99. *Id.*
100. *Id.* The supreme court suggested that the vaginal swab DNA evidence could be presented by the State if the methodology utilized by the technician in performing the test met the requirements of the *Frye* test. *Hayes*, 660 So. 2d at 264.
[W]e find that the DNA evidence would assist the jury in this case in determining a fact in issue. We take judicial notice that DNA test results are generally accepted as reliable in the scientific community, provided that the laboratory has followed accepted testing procedures that meet the Frye test to protect against false readings and contamination. With regard to the tank top, we find that the DNA test was inadmissible because it did not meet accepted scientific principles. Finally, we find that, while this record does not support a proper application of the required Frye test to the procedures utilized to obtain the DNA test results on the vaginal swab, the DNA evidence may be presented upon retrial subject to a proper finding under the Frye test.  

B. Testimony by Experts

During the survey period, two district courts of appeal wrestled with the dilemma of whether the Frye standard should be applied to testimony of a psychologist that the alleged victim in a child sex abuse case exhibits symptoms consistent with those of a child who has been sexually abused. This is commonly referred to as the “child abuse profile.”

The child abuse profile arises when an expert in the area of psychology gives an opinion that the victim in a child abuse case fits within the profile. Naturally, in child abuse cases, there are no eyewitnesses, and the evidence generally comes down to the statements of the child victim and, in some cases, the protestations of innocence by the defendant. However, the addition of a psychological expert testifying that the child victim fits within the profile of an abused child, or that the child victim’s case is consistent with that of other abused children, tends to bolster the credibility of the child’s story. This is generally to the detriment of the defendant, who may be claiming that another individual abused the child.

Syndrome testimony has been difficult for the Florida district courts of appeal to interpret due to the divergent opinions rendered by the Supreme Court.

101. Id. at 264–65.
104. This is so often the case because there is generally no objective physical evidence of the abuse which may have occurred months or years before.
Court of Florida in the last few years.\textsuperscript{105} The inconsistency is due in part because the court in \textit{Flanagan v. State},\textsuperscript{106} held that "profile" evidence is inadmissible because it does not meet the \textit{Frye} test.\textsuperscript{107} However, the court in \textit{State v. Townsend},\textsuperscript{108} apparently relying on the relevance standard of section 90.702,\textsuperscript{109} held that "if relevant, a medical expert witness may testify as to whether, in the expert's opinion, the behavior of a child is consistent with the behavior of a child who has been sexually abused."\textsuperscript{110}

The First District Court of Appeal in \textit{Hadden v. State},\textsuperscript{111} attempted to harmonize these cases by intimating that \textit{Flanagan} dealt only with new and novel scientific profiles, which requires a \textit{Frye} analysis.\textsuperscript{112} \textit{Townsend}, the \textit{Hadden} court surmised, recognized that evidence which is not new or novel and which has been received in cases under the more relaxed relevancy standard, does not have to meet the \textit{Frye} standard.\textsuperscript{113} In \textit{Beaulieu v. State},\textsuperscript{114} as well as in \textit{Hadden}, the issue was the admissibility of the child abuse syndrome, or child abuse profile. Both courts reasoned that this evidence had been admissible in a number of cases and was, therefore, no longer new and novel and subject to \textit{Frye}.\textsuperscript{115} However, the issue remains whether the Supreme Court of Florida follows the view that the child abuse profile need not be subjected to a \textit{Frye} analysis.

The Fifth District Court of Appeal in \textit{Beaulieu} was so perplexed that it stated: "Because \textit{Flanagan} did not mention \textit{Ward} or \textit{Kruse}, \textit{Townsend} did not mention \textit{Flanagan}, and \textit{Ramirez} ... did not mention \textit{Townsend}, who can tell?"\textsuperscript{116} Both courts certified the

\textsuperscript{105} State v. Townsend, 635 So. 2d 949 (Fla. 1994); Flanagan v. State, 625 So. 2d 827 (Fla. 1993); Glendening v. State, 536 So. 2d 212 (Fla. 1988), cert. denied, 492 U.S. 907 (1989).
\textsuperscript{106} 625 So. 2d 827 (Fla. 1993).
\textsuperscript{107} Id. at 829.
\textsuperscript{108} 635 So. 2d 949 (Fla. 1994).
\textsuperscript{109} FLA. STAT. § 90.702 (1993). This section is entitled "Testimony by Experts."
\textsuperscript{110} Townsend, 635 So. 2d at 958.
\textsuperscript{111} 670 So. 2d 77 (Fla. 1st Dist. Ct. App. 1996).
\textsuperscript{112} Id. at 82. The \textit{Hadden} court felt that new and novel scientific profiles included pedophile and child sex offender profiles. \textit{Id.}
\textsuperscript{113} Id. at 82.
\textsuperscript{114} 671 So. 2d 807 (Fla. 5th Dist. Ct. App. 1996).
\textsuperscript{115} Id. at 809; \textit{Hadden}, 670 So. 2d at 82. See also Ward v. State, 519 So. 2d 1082 (Fla. 1st Dist. Ct. App. 1988).
\textsuperscript{116} Beaulieu, 671 So. 2d at 809 (footnotes omitted) (citations omitted). See Ramirez v. State, 651 So. 2d 1164 (Fla. 1995) (establishing a four-step process under section 90.702 in order to determine the admissibility of a new or novel scientific principle; one such step requires a \textit{Frye} analysis); Kruse v. State, 483 So. 2d 1383 (Fla. 4th Dist. Ct. App. 1986).
issue to be of great public importance,\textsuperscript{117} so a decision clearing up this quandary should be forthcoming from the Supreme Court of Florida in the coming year.

C. \textit{Basis of Expert Opinion}

In a lengthy personal injury case, the First District Court of Appeal examined the use of expert testimony relative to the seat belt defense. Although no startling evidentiary issues are present, the case does elaborate on the use of expert opinions and the facts which experts rely on in forming their opinions.

\textit{Houghton v. Bond}\textsuperscript{118} is a classic case of an attorney stepping over the bounds of proper trial advocacy and pushing the limits of ethical behavior.\textsuperscript{119} A head on collision was the impetus of the \textit{Houghton} case. Mr. Houghton, the single occupant of his vehicle, was killed in the accident. The driver of the other vehicle was the plaintiff, Mr. Bond, who was not wearing a seatbelt. Mr. Bond was seriously injured in the crash. However, his passenger, Mr. Lindsay, was wearing a seat belt and walked away from the accident with only superficial injuries.

The two main contentions at trial were who caused the accident, and the seat belt defense. The plaintiff’s expert on accident reconstruction opined that Mr. Houghton was partially in Bond’s lane when the accident occurred. The plaintiff’s expert was not qualified to render an opinion regarding seatbelts and offered no crash test testimony.

The defendant’s expert was qualified at trial as an expert on accident reconstruction, occupant kinematics, and biomechanics related to an automobile seat belt restraint system in a motor vehicle involved in a crash. The testimony from the defendant’s expert dealing with accident reconstruction demonstrated that the vehicle in which Bond and Lindsay were riding drove off the shoulder of the road, and Bond over-corrected and swerved across the center line of the highway into the path of Houghton’s vehicle.\textsuperscript{120}

In examining the use of a seat belt in this accident, the defense expert opined that had Bond been wearing his seatbelt, the forces he experienced and injuries he sustained would have been less than or, at most, equal to

\begin{footnotes}
\footnotation{117} Beaulieu, 671 So. 2d at 811; Hadden, 670 So. 2d at 83.
\footnotation{119} The district court points out these shortcomings in a sharply written opinion that is recommended reading for anyone interested in doing trial work.
\footnotation{120} Apparently, the jury was convinced by the defendant’s accident reconstruction expert, as the verdict was clearly in favor of the defendant and against the plaintiff.
\end{footnotes}
those sustained by Lindsay.\textsuperscript{121} The defense expert also testified regarding government crash test data on cars including head injury criteria. This material was important because had Bond been wearing a seatbelt, the defense expert contended, the forces inside the car during the collision would not have been sufficient for him to sustain a serious head injury.

The jury returned a verdict, finding that Bond was eighty percent responsible for the collision, and ninety percent of Bond's injuries resulted from his failure to wear a seatbelt. Therefore, Bond's damages of $3,000,000 were reduced to $60,000.\textsuperscript{122} Bond's counsel filed post-trial motions for a new trial and directed verdict. Bond's counsel also filed affidavits contesting the defendant's expert's opinions. The purpose of these affidavits was to contradict and discredit portions of the defense expert's testimony.\textsuperscript{123}

The trial court inexplicably granted the plaintiff's motions and allowed the plaintiff's attorney to "draft a detailed order that makes specific reference in the record to the testimony necessary to support the court's order on appeal."\textsuperscript{124} This order granted Bond's post trial motion for directed verdict and struck the defendant's seatbelt defense in its entirety.\textsuperscript{125}

\textsuperscript{121} Lindsay walked away from this accident with only superficial injuries. The plaintiff, Bond, on the other hand, was not expected to live, since his injuries were so severe when he was brought to the hospital. Both Lindsay and Bond were riding in the same vehicle. This is a pretty clear indication that seatbelts should always be worn and the seatbelt defense should be used to properly apportion those damages associated with not wearing one.

\textsuperscript{122} Mr. Houghton sustained damages of $472,000 which was reduced by twenty percent to $377,600.

\textsuperscript{123} How the attorney determined this was proper is hard to say. The district court was unable to find any authority to support this action. \textit{Houghton}, 21 Fla. L. Weekly at D1069. Since the plaintiff's attorney did not assert any of the grounds laid out in the affidavits prior to or during trial, he cannot seek a reversal of the judgment now. \textit{See FLA. R. Civ. P. 1.480; Allstate Ins. Co. v. Gonzalez}, 619 So. 2d 318 (Fla. 3d Dist. Ct. App. 1993).\textsuperscript{124} \textit{Houghton}, 21 Fla. L. Weekly at D1069.

\textsuperscript{125} \textit{Id.} The district court's review of this order is some of the more interesting reading that will be found in an appellate opinion and is recommended reading for those who do not wish to be embarrassed by the appellate court for inappropriate behavior. The district court stated:

\textit{Notwithstanding Bond's counsel's commitment to the trial court to make "specific reference in the order to the testimony necessary to support the court's order" if permitted to draft a "detailed order," the order entered contains no such references.} Indeed, the order primarily reflects counsel's rather generalized disdain for both Dr. Benedict and his testimony, which was underscored at one point during the proceedings below when counsel advised the court that "Benedict is the source of my irritation" and referred to him later as the actor/witness Benedict.
The district court reversed the order and in doing so, specifically addressed the issue that the defense expert’s use of government conducted crash tests rendered him a conduit for inadmissible hearsay evidence. The district court first pointed out that no objection was made to the use of the governmental data during the testimony. The district court went on to find that the defense expert used the crash data to determine the speed of the vehicles involved in this accident. Naturally, the government crash test data does not in and of itself have to be admissible for the expert’s opinion to be admissible. The court concluded that the testimony aided the jury in understanding the defense expert’s opinion, and was not a conduit for inadmissible evidence.

*Id.* at D1070 (emphasis added). The trial court order went on to find that there was no plausible basis for the jury finding that ninety percent of plaintiff Bond’s injuries were caused by his failure to wear an available seatbelt. The district court naturally disagreed with this finding, and stated, “The record contains more than ample evidence to support this finding quite apart from Benedict’s apportionment testimony.” *Id.* (emphasis added). This district court went on to state:

Given the appealed order’s reliance on Bond’s counsel’s personal opinions regarding Dr. Benedict’s “demeanor”, “custom” and “habit” to support striking the seatbelt defense, we have carefully plumbed the record to find support for what have become findings by a stroke of the judicial pen. Our independent research has failed to turn up the “testimony necessary to support the court’s order” as promised by Bond’s counsel, which seems to us a reasonably predictable result when counsel for one of the parties to a hotly contested lawsuit requests and is permitted to prepare a dispositive order in that litigation without judicial guidance of record and counsel’s work product is uncritically accepted and entered as submitted. If, for example, as the order finds, Dr. Benedict’s “performance on the stand” was more a debate with counsel than a proper attempt to answer the questions posed by bond’s counsel, such was due in no small measure to the tenor of counsel’s often argumentative and sarcastic questioning of the witness.

*Id.* (emphasis added).


127. *Id.*

128. *Id.*

129. Section 90.704 of the *Florida Statutes* provides:

The facts or data upon which an expert bases an opinion or inference may be those perceived by, or made know to, him at or before the trial. If the facts or data are of a type reasonably relied upon by experts in the subject to support the opinion expressed, the facts or data need not be admissible in evidence.


130. The district court also found that whether a defendant is obliged at all to present expert testimony in support of a seatbelt defense appears to depend upon the nature of the plaintiff’s injuries. *Houghton*, 21 Fla. L. Weekly at D1071. The rule appears to be that in
VIII. HEARSAY

A. Nonhearsay

Occasionally, a poor argument in the trial court and a cold transcript read by the district court leads to a poor opinion. In Aneiro v. State, this is apparently what happened. The defendant, Aneiro, was convicted of trafficking in cocaine. The issue for appeal was whether the trial court improperly admitted hearsay testimony of a taped telephone conversation between the confidential informant ("CI") and the defendant. The defendant argued entrapment at trial and testified that the CI induced him to deliver cocaine in return for $200 and the use of the CI's car for fifteen days.

The Fourth District Court of Appeal reversed the defendant's conviction. The exact sixteen word conversation that caused this reversal is as follows:

[CI]: What kind of car will you be in?
[Appellant]: A Nissan.
[CI]: A Lincoln?
[Appellant]: Gray. A gray Nissan.

The district court found this to be inadmissible hearsay because it was offered to prove that the CI did not know what kind of a car appellant would use to transport the cocaine. From the meager facts presented, the best that can be discerned is that the defendant was claiming that the CI entrapped him and, accordingly, wanted to show that the CI did know what type of car the defendant would bring the cocaine in, in order to prove that the CI gave him the car as an inducement to bring the cocaine. The prosecution used this taped telephone conversation to argue, in closing, that the CI had no knowledge of the type of car the defendant would be in and this would thus demonstrate to the jury that the defendant’s argument, that the loan of the car was an inducement for the drug transaction, was untrue. This is, of course, a guess based on what few facts were given.
car the defendant was in, and in turn, used this to demonstrate that the defendant's argument that the deal was induced, in part, by the loan of a car, was untrue.137 If the defendant was not induced into the deal, in part, by the loan of the car, then there may be no entrapment. Arguably, if the CI had to ask what kind of car the defendant would be in, this would rebut the defense that he lent the defendant the car, and therefore, entrapped him.

The district court of appeal rejected the State's argument that this conversation constituted "verbal acts" and was not hearsay.138 This was probably due to two separate things. First, the prosecution made no argument in the trial court that the hearsay was merely verbal acts.139 It was argued for the first time on appeal. Second, the conversation was used by the prosecution to demonstrate the truth of the statements.

The district court rejected the plethora of case law which held that verbal acts evidence is admissible in these types of cases because the statements serve to prove the nature of the act.140 The dissent written by Judge Shahood is the better analysis;141 however, the opinion can also be upheld on two different analyses. First, reciprocal conversations between two individuals, one of whom is an opposing party in a case, is generally not hearsay. All the statements made by the party against whom the statement is being offered is simply admissible as a statement of a party opponent under section 90.803(18) of the evidence code.142 Questions by the other individu-

137. Apparently, at the trial, the prosecution failed to make any arguments that this statement was simply not hearsay, as the district court pointed out that this was argued for the first time on appeal. Id. at 914. Additionally, no objection was made and no limiting instruction for the hearsay statement was requested by the defense when the prosecution argued about the type of car the defendant would be in. This was a nice job of finding error, when there was no objection to the use of this closing argument by the defense, no limiting instruction was requested, and there was no finding that the error was fundamental.

138. Id.

139. However, this could be of no real importance, because evidence admitted by the trial judge for the wrong reasons will not cause a reversal if there were proper grounds to admit the evidence. Irving v. State, 627 So. 2d 92, 94 n.1 (Fla. 3d Dist. Ct. App. 1993) (holding that an appellate court will not reverse when the trial court reaches the right result for the wrong reason); see also Belvin v. State, 585 So. 2d 1103 (Fla. 2d Dist. Ct. App. 1991). Additionally, a conviction should not be reversed unless the admittance of the evidence deprived the defendant of a fair trial.

140. Aneiro, 674 So. 2d at 914. See Breedlove v. State, 413 So. 2d 1 (Fla.), cert. denied, 459 U.S. 882 (1982); Chacon v. State, 102 So. 2d 578 (Fla. 1957); Decile v. State, 516 So. 2d 1139 (Fla. 4th Dist. Ct. App. 1987); State v. McPhadder, 452 So. 2d 1017 (Fla. 1st Dist. Ct. App. 1984), quashed, 475 So. 2d 1215 (Fla. 1985).

141. Aneiro, 674 So. 2d at 915–16 (Shahood, J., dissenting).

als are simply not hearsay because they are not within the definition of hearsay. Generally, only a "declaratory" statement can be considered hearsay. Interrogatory, imperative, or exclamatory statements are not within the definition of hearsay because they are not statements of opinions or facts similar to a declaratory statement.\textsuperscript{143} Therefore, the questions by the CI, asking what kind of car the defendant would be in, should not be considered hearsay, since they are not declarations of opinion or fact.\textsuperscript{144}

The statement could also be considered nonhearsay because it was not offered for the truth of the matter asserted, but was relevant for the following reasons: 1) to demonstrate that the defendant engaged in the conversation with the CI and took part in plans to supply illegal drugs; 2) to demonstrate lack of knowledge or notice on the part of the CI; and 3) to rebut the defendant's entrapment claim.\textsuperscript{145} The statement is not needed to prove that the

\textsuperscript{143} See United States v. Lewis, 902 F.2d 1176, 1179 (5th Cir. 1990) (holding that while an "assertion" is not defined in the Federal Rules of Evidence, the term has the connotation of a positive declaration); Lark v. State, 617 So. 2d 782, 789 (Fla. 1st Dist. Ct. App. 1993) (holding that the defendant's statement to police investigator, "Who shot Wes Butler?" was not hearsay. "We find that Lark's query was not an oral assertion."). See also Olin G. Wellborn III, The Definition of Hearsay in the Federal Rules of Evidence, 61 Tex. L. Rev. 49, 73 (1982), which provides: "[A] verbal expression is hearsay only if it is (1) a declarative sentence (2) the terms of which 'affirm positively, assuredly, plainly or strongly,' the matter that it is offered to prove." Id. Since generally, only declarative statements can be considered hearsay, a question to someone should not fall within the definition of hearsay.

\textsuperscript{144} Whenever a statement is entered into evidence as nonhearsay and therefore, not for the truth of the matter asserted, a limiting instruction can be requested that the truth of the matter not be argued to the jury. That limiting instruction was apparently not requested at the time of the entry of the statement, nor was an objection or a limiting instruction requested at the time the statements were used in closing argument. A contemporaneous objection is needed to preserve an issue for review. FLA. STAT. § 90.104. There was none here. Therefore, this issue should not have been heard, let alone used to reverse a conviction.

\textsuperscript{145} See Warner v. Walker, 500 So. 2d 645 (Fla. 2d Dist. Ct. App. 1986) (holding that hearsay statements concerning purported drug use by custodial parent's new husband was admissible for limited purpose of showing child's knowledge of drugs); City of Miami v. Fletcher, 167 So. 2d 638 (Fla. 3d Dist. Ct. App. 1964) (holding that proof that a statement was made was relevant to show knowledge of dangerous condition). Although the defendant allegedly borrowed the car from the CI, it was unusual that the defendant did not make some inquiry when the CI asked what type of car the defendant would be driving. One would think that the defendant would say, "Hey, what do you mean, what kind of car am I in, I'm in your car." Therefore, maybe it could also be argued that the failure to correct this inconsistency or the defendant's silence demonstrates the defendant's knowledge of the ownership of the car and rebuts his assertion of entrapment. The defendant's silence in the face of this unusual question might be considered an adoptive admission under section 90.803(18)(b). Under limited circumstances, a party's failure to deny a statement made by a third party will give rise to the inference that the party's silence is an admission of the truth of such statement (i.e. that
defendant was really in a gray Nissan, but to prove the lack of knowledge of
the type of car that defendant was driving (i.e. it is not proving the truth of
the matter asserted, that defendant drove a gray Nissan, but the fact was
relevant to prove the lack of knowledge on the CI’s part and used to rebut
the defendant’s entrapment argument). Therefore, the statements were
properly admitted; the dissent was correct, and this case was improperly
reversed.

B. Prior Inconsistent Statements as Substantive Evidence

In a very important hearsay case for prosecutors and defense attorneys,
the Supreme Court of Florida used some fancy footwork and circuitous
reasoning to conclude that a prior inconsistent statement that is taken as
part of a discovery deposition, pursuant to rule 3.220, is not admissible
under section 90.801(2)(a), as substantive evidence. This case will, unfortu-
nately, only add to the complexity and problems associated with criminal
depositions, as the high court obfuscates the true meaning of a trial as a
“search for the truth.”

In State v. Green, the defendant appealed from a trial court’s convic-
tion of sexual battery and lewd, lascivious, and indecent assault on a child. The fourteen-year-old child was also mildly retarded. In a defense deposi-
tion, the child victim implicated the defendant with statements about specific
sexual offenses he had committed upon her. At trial, however, she recanted
these earlier accusations. During the trial, she accused another man as the
person who forced her to have sex. The prosecution used section
90.801(2)(a), the victim’s prior deposition testimony taken under oath, to

the CI did not know what type of car the defendant would be in because the CI did not lend
him his car). See Daughtery v. State, 269 So. 2d 426 (Fla. 1st Dist. Ct. App. 1972); Johnson
146. Section 90.801(2)(a) of the Florida Statutes, provides in part:
(2) 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:
(a) Inconsistent with the declarant’s testimony and was given under oath
subject to the penalty of perjury at a trial, hearing, or other proceeding or in a deposition.

147. FLA. R. CRIM. P. 3.220(h).
148. 667 So. 2d 756 (Fla. 1995).
149. Id. at 757.
150. The prosecution also utilized section 90.803(23), the child hearsay exception, to
elicit from the victim’s sister and sister-in-law the accusations the victim had related to them
impeach the witness' testimony, and used these statements as substantive evidence.¹⁵¹

A very divided First District Court of Appeal reversed the defendant's conviction.¹⁵² The district court found that the deposition statements were admissible as substantive evidence, pursuant to section 90.801(2)(a).¹⁵³ However, that evidence standing alone was insufficient to convict the defendant, because the only evidence that the defendant had committed a crime was that single out-of-court statement.¹⁵⁴

The Supreme Court of Florida began its analysis with the interpretation and use of section 90.801(2)(a).¹⁵⁵ Prior to the adoption of the Florida Evidence Code,¹⁵⁶ prior inconsistent statements could never be admitted as substantive evidence. The adoption of the Florida Evidence Code allowed, for the first time, the use of prior inconsistent statements as substantive evidence.

In Moore v. State,¹⁵⁷ the Supreme Court of Florida interpreted the words "other proceedings" found in section 90.801(2)(a) to mean Florida grand jury proceedings.¹⁵⁸ The supreme court found that since section 90.801(2)(a) was patterned after Rule 801 of the Federal Rules of Evidence,¹⁵⁹ and the federal rules were interpreted to include grand jury proceedings, prior inconsistent statements made in a Florida grand jury proceeding came within the confines of section 90.801(2)(a).¹⁶⁰ The Supreme Court of Florida in

concerning the defendant. These statements were allowed after extensive findings of reliability by the trial judge.

¹⁵¹ Statements taken pursuant to section 90.801(2)(a) can be used for impeachment and for substantive evidence. Fla. Stat. § 90.801(2)(a). See EHRRHARDT, supra note 48, § 801.7; Bruschi, supra note 70, at 1162.
¹⁵² Green, 667 So. 2d at 758.
¹⁵³ Id.
¹⁵⁴ Id. See State v. Moore, 485 So. 2d 1279 (Fla. 1986) (holding that prior inconsistent statements standing alone are insufficient for a criminal conviction).
¹⁵⁵ Green, 667 So. 2d at 758 (analyzing Fla. Stat. § 90.801(2)(a)).
¹⁵⁶ The effective date of the Florida Evidence Code was July 1, 1979 for criminal actions and was applicable to all civil actions pending on or brought after October 1, 1981.
¹⁵⁷ 452 So. 2d 559 (Fla. 1984).
¹⁵⁸ Id. at 562.
¹⁵⁹ FED. R. EVID. 801(d)(1).
¹⁶⁰ Moore, 452 So. 2d at 562. Florida and federal grand jury proceedings rarely have opposing counsel available to cross-examine or ask any questions of the witnesses. It is generally the prosecution presenting the evidence to the grand jury and questioning the witnesses without any questions from an opposing viewpoint. The grand jurors can ask questions; however, they are not in an adversarial position. It seems incomprehensible how a grand jury proceeding, which includes only one side, the prosecution, could produce more trustworthy and reliable evidence than a criminal deposition with both sides, the defense and
Green concluded that federal interpretations of the rule could not be utilized in this instance because Florida discovery rules regarding depositions are much broader than Federal discovery rules regarding depositions. Therefore, no meaningful interpretation of a federal precedent could be used.

In Green, the Supreme Court of Florida recognized that the Florida Rules of Criminal Procedure have two types of depositions available in criminal cases. First, depositions which are taken to perpetuate testimony brought under rule 3.190(j) and second, depositions which are taken for the purpose of discovery brought under rule 3.220(h).

Depositions under rule 3.190(j) are taken for the specific purpose of entering the deposition at trial in a criminal case for substantive evidence. This is similar to Rule 1.330 of the Florida Rules of Civil Procedure. The key here being that under either situation, subject to objections, the deposition can be read to a jury as substantive evidence. The Supreme Court of Florida found that depositions taken pursuant to rule 3.220 are for discovery purposes only and:

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.

the prosecution, in attendance and asking questions. The supreme court's ruling that criminal depositions under rule 3.220 were not intended to qualify as substantive evidence under section 90.801(2)(a) flies in the face of logic and reason. What raises testimony given in a grand jury proceeding to the level of being trustworthy and reliable, with only one side present and asking questions, above a criminal deposition with both sides present and the witness answering both sides' questions under oath? This is illogical, at best, and unsound and inconsistent reasoning, at worst.

161. Federal criminal discovery rules generally do not allow depositions of witnesses, unlike Florida's discovery rules, which allow depositions in criminal felony cases, and for good cause, in criminal misdemeanor cases.

162. Green, 667 So. 2d at 759.

163. Id.


165. Green, 667 So. 2d at 759.

166. Id. It seems what the Supreme Court of Florida is saying between the lines is that since 90% of depositions in criminal cases are taken by the defense, the defense attorney would not ask a question that would incriminate his client, for fear that this could be used as
The only use of rule 3.190(j) is to perpetuate testimony. It is generally used by the prosecution, when securing the witness at trial would be impossible. The most common use is when the witness will not be alive for the trial. The prosecution moves to perpetuate the testimony and then the whole deposition can be read to the jury. The cross-examination by the defense attorney can also be read to the jury and all testimony is subject to objections. In reality, this section operates similarly to Rule 1.330 of the Florida Rules of Civil Procedure. The prosecution does not perpetuate testimony in anticipation of a deposed witness changing his testimony and neither does the defense. Nevertheless, based on this court’s ruling, it would be wise substantive evidence at trial, if the witness recanted his or her testimony. This is absolutely absurd and flies in the face of the main tenet of what a trial is all about, a “Search For The Truth.” This search is aided by the evidence code, which assists the court and attorneys in presenting only trustworthy and reliable information to the trier of fact. Testimony given before a grand jury with only one side present is simply not more trustworthy than evidence given before two adversarial opponents. It is illogical and irrational to believe otherwise. We devised an adversarial system of justice, and that wonderful engine called cross-examination, to seek out and find the truth. It is the common belief of many jurors and lay people alike that the courts and attorneys do not present them with all the evidence. This is probably a true statement when cases such as this fly in the face of logic and reason.

The logic which the supreme court uses is that an attorney in a discovery deposition would be less likely to ask certain questions because of the chilling effect on the lawyer’s questioning of the witness, if the testimony could be used substantively at trial. This is absolutely absurd and if you apply this logic to a grand jury proceeding, you are faced with the unpleasant conclusion that the prosecutor will only ask the witnesses questions which would be favorable to getting an indictment. This clearly does not bolster the trustworthiness or reliability of the statements made at a grand jury proceeding. Therefore, it is fallacious reasoning at best to assume that a grand jury proceeding falls under the ambit of section 90.801(2)(a), and is therefore considered reliable and trustworthy evidence, but a criminal deposition taken under oath and with two adversarial opponents questioning the witness, is not sufficiently reliable and trustworthy.

The witness is under oath and is subject to perjury; why are these safeguards included in a discovery deposition? Why not just take an unsworn statement? It makes no sense. If the statement falls within the evidence code, it should come in at the trial.

167. However, it is apparent that in child molestation and rape cases, the prosecution should move to perpetuate testimony under rule 3.190(j). Rule 3.190(j)(2) specifically allows for a deposition of this sort:

If the defendant or the state desires to perpetuate the testimony of a witness living in or out of the state whose testimony is material and necessary to the case, the same proceedings shall be followed as provided in the preceding subdivision, but the testimony of the witness may be taken before an official court reporter, transcribed by the reporter, and filed in the trial court.

FLA. R. CRIM. P. 3.190(j)(2) (emphasis added). Additionally, rule 3.190(j)(1) states that perpetuation is desirable if the witness is outside the jurisdiction of the court or may not be
for both the defense and prosecution to only take depositions under rule 3.190 of material witnesses, for fear that if the witness changes his or her testimony at trial, the advocate will not be able to impeach the witness and argue the statement as substantive evidence.

In criminal cases, discovery depositions cannot be read to a jury as substantive evidence, as in civil cases. However, a deposition, whether taken in a civil or criminal case, should be allowed in evidence if the testimony falls within the ambit of the Florida Evidence Code. The purpose of the evidence code in the search for the truth is to filter out unreliable and untrustworthy evidence and to only allow that testimony which is trustworthy and reliable to go to the trier of fact. There is no logical basis for disallowing evidence, which clearly falls within the ambit of the evidence code, based on whether the deposition is offered in a criminal or civil case. Professor Ehrhardt, in his treatise on Florida evidence, points out that:

> the only depositions that are admissible [in criminal cases] are those taken to perpetuate testimony in compliance with Rule of Criminal Procedure 3.190(j). Thus the admissibility of a discovery deposition under the Evidence Code differs depending on whether the deposition is offered in a criminal or civil case. There appears to be no logical reason to draw the distinction.

Additionally, the Supreme Court of Florida ruled that "all present rules of evidence established by case law or express rules of court are hereby superseded to the extent they are in conflict with the code." The rules of criminal procedure determine the admissibility of deposition testimony and were established by an express rule of the court. When the evidence code able to attend trial and "the witness’s testimony is material, and that it is necessary to take the deposition to prevent a failure of justice." Fla. R. Crim. P. 3.190(j)(1) (emphasis added).

168. In civil cases, it is important to remember that a discovery deposition can be read to the jury under two circumstances: 1) the deposition falls within the guidelines of Rule 1.330 of the Florida Rules of Civil Procedure; or 2) the deposition is admissible under the Florida Evidence Code (i.e. it is relevant and an admission of a party opponent). It is important to keep in mind that under either scenario, the deposition still cannot be read if it does not meet the prerequisites of the evidence code. For example, simply because the deposition fits within rule 1.330, it does not mean it can all be read to the jury. Only the relevant and material parts can be read. Likewise, simply because parts of the deposition can be read under the evidence code, it does not mean that double hearsay given in the deposition can be read to the jury, unless each part of the hearsay has an exception.

169. EHRHARDT, supra note 11, § 804.1.

170. In re Florida Evidence Code, 372 So. 2d 1369 (Fla.), clarified, 376 So. 2d 1161 (Fla. 1979).
was adopted, it superseded any case law, or rules of court, which were in conflict with the code. 171 If the criminal rules of procedure limit the use of depositions as evidence, thereby operating as a rule of evidence, they have been superseded by the Florida Evidence Code to the extent the criminal rule of procedure conflicts with the evidence code. Therefore, section 90.801(2)(a) controls, and that part of the deposition which was inconsistent with the victim's trial testimony should have been admissible as substantive evidence.

The supreme court's statement in Green that, "[t]o permit the use of rule 3.220 depositions as substantive evidence would discourage and chill the use of discovery depositions and would limit the criminal pre-trial discovery process" 172 is unreasonable and illogical. The simple and limited use of inconsistent statements in a criminal discovery deposition as substantive evidence will in no way limit or chill the criminal pre-trial discovery process. The reliability and trustworthiness of testimony gathered in a criminal discovery deposition and the way a criminal discovery deposition is taken and utilized by both sides will not change in any manner. Any contention otherwise simply demonstrates the lack of understanding between our appellate judiciary and the day-to-day work of those trial attorneys for the prosecution and the defense who toil in the criminal justice system. 173 A trial is a search for the truth. The evidence code should perpetuate that goal and not subvert it in an attempt to place form over substance.

C. Child Hearsay Statements

In A.E. v. State, 174 the defendant appealed an adjudication which declared the defendant delinquent, for committing a sexual battery upon a

171. Id.
172. Green, 667 So. 2d at 759.
173. Green is another tough case making bad law. The supreme court was clearly concerned that the victim was retarded, had accused other individuals of the crime, and that a conviction based solely on the prior inconsistent statements of the victim would create too great a risk of convicting an innocent accused. These sentiments are significant in the court's determination of this case. However, the admission of the statements under section 90.801(2)(a) as substantive evidence would not have changed the outcome of the court's ruling, since inconsistent statements standing alone are insufficient as a matter of law to prove guilt beyond a reasonable doubt. See State v. Moore, 485 So. 2d 1279 (Fla. 1986). Therefore, the district court of appeal's finding, that the testimony from the deposition was admissible as substantive evidence under section 90.801(2)(a), should have been upheld by the supreme court.

174. 668 So. 2d 704 (Fla. 5th Dist. Ct. App. 1996).
five-year-old girl.\footnote{175} The defendant had a non-jury trial and the State called three witnesses to testify regarding out of court statements made by the child victim. The victim's statements to each witness included specific allegations of the sexual battery and an identification of the defendant as the perpetrator. The State introduced the statements pursuant to the applicable section 90.803(23) of the \textit{Florida Statutes}.\footnote{176} This section authorized the introduction of hearsay statements of the child victim, if the statements are shown to be trustworthy and reliable.\footnote{177} The defense objected to the admission of the statements under the child hearsay exception, since the trial court did not make specific findings of fact on the record as to the basis for its ruling. At the conclusion of the trial, the defendant was found guilty and adjudicated delinquent.\footnote{178}

On appeal, the defendant maintained that the trial court erred by not making the requisite findings of facts as required by section 90.803(23)(c).\footnote{179} The State conceded that the trial court did not comply with the statutory prerequisites, but argued that there was no reversible error because the requirement of the statute pertains only to jury trials.\footnote{180} However, no authority for this proposition was cited by the State or found by the appellate court. In fact, contrary to the State's assertion, if the trial court intends to use the hearsay evidence as a basis for its ruling in a nonjury trial, then it must support the use of the hearsay statements, by demonstrating that the prerequisites for the hearsay evidence have been complied with.\footnote{181} In this way, the reliability and trustworthiness of the evidence will be met.

\footnote{175. \textit{Id}. at 705.}
\footnote{176. \textit{See} \textit{FLA. STAT.} \textsection 90.803(23) (1993).}
\footnote{177. \textit{Id}. Section 90.803(23) provides that out of court statements made by a child victim with a physical, mental, emotional, or developmental age of eleven or less, describing any act of sexual abuse, are admissible if the source of information or the method or circumstances by which the statement is reported indicate trustworthiness, and if the court finds that the time, content, and circumstances of the statement provide sufficient safeguards of reliability. \textit{Id}. Subsection (c) of the statute directs the trial court to make specific findings of fact on the record as to the basis for a ruling under this subsection. \textit{Id}. \textsection 90.803(23)(c).}
\footnote{178. \textit{A.E.}, 668 So. 2d at 705.}
\footnote{179. \textit{Id}.}
\footnote{180. \textit{Id}.}
\footnote{181. This proposition is probably easier to understand by viewing another hearsay exception. If the court used an excited utterance, under section 90.803(2), as a basis for its ruling, yet the prerequisites for an excited utterance were not met, i.e. the statement was not made in relation to a startling event, while the declarant was under the stress of excitement, then the statement may not be trustworthy, because there is room for reflective thought and fabrication. If the trial judge used a hearsay statement, which may have been a fabrication, and therefore untrustworthy, as the basis for his ruling, without other substantiating evidence, the ruling...}
If there is other evidence, notwithstanding the hearsay evidence, then the trial court's ruling might be sustained. However, the appellate court noted that "[t]he child never testified concerning penile penetration, and therefore, in an effort to establish the elements of the offense, the state necessarily relied upon the hearsay evidence regarding the child victim's out-of-court statements." If the trial court relied on the hearsay statements, and the prerequisites were not met, the conviction could be based on unreliable and untrustworthy evidence. This is insufficient for a conviction. The district court concluded that based on the evidence presented at trial, the lower court must have relied on the hearsay evidence in finding the defendant guilty as charged. Therefore, the district court vacated the defendant's conviction.

D. Statements Against Penal Interest

In Jones v. State, the Supreme Court of Florida examined the use of hearsay statements against penal interest, in denying a convicted killer's motion for post conviction relief. On May 23, 1981, a police officer was shot in his squad car in Jacksonville, Florida. Officers investigating the scene learned that the shots had been fired from a nearby apartment complex. Upon investigating the complex, the police came upon the defendant and his cousin in their apartment. During a cursory search of the apartment, the officers found several high-powered rifles in plain view. Later, the
defendant confessed and signed a statement incriminating himself and exonerating his cousin. The defendant was convicted after a jury trial and sentenced to death.\textsuperscript{188}

The defendant filed numerous motions for post-conviction relief, claiming newly discovered evidence. During an evidentiary hearing on his last motion for post-conviction relief, the defendant claimed that another individual, Glen Schofield, confessed to the murder of the police officer. The trial court excluded the confession of Schofield at the hearing. The defendant argued that Schofield’s confession was admissible, and the trial court erred because the alleged confessions were declarations against penal interest.

The supreme court began its analysis by stating that for a statement against penal interest to be admissible, section 90.804(2) requires a showing that the declarant is unavailable as a witness.\textsuperscript{189} The party seeking to introduce a statement against penal interest, in this case, the defendant, has the burden of establishing the unavailability of the declarant.\textsuperscript{190} The supreme court determined that the defendant did not carry this burden.\textsuperscript{191}

At the evidentiary hearing, the prosecution stated that Schofield was available to testify. However, the defense refused to call him and instead, stated to the court that Schofield would merely take the stand and deny that he confessed to the murder of the police officer.\textsuperscript{192} The supreme court aptly stated that:

Contrary to Jones’ attorney’s position, we do not know what Schofield would have said had he been called as a witness. The burden was on Jones to establish that Schofield was unavailable and Jones failed to meet that burden. Consequently, we find that Schofield’s alleged confessions are not admissible under the declaration against penal interest exception to the hearsay rule.\textsuperscript{193}

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\textsuperscript{188.} Id. at 310.
\textsuperscript{189.} Id. at 313.
\textsuperscript{190.} Id. at 314.
\textsuperscript{191.} Id.
\textsuperscript{192.} Apparently, the defense attorney handling the post-conviction hearing spent much time in preparation and in finding witnesses and newly discovered evidence. It is a shame the same attorney did not spend the time to learn that merely stating that someone will change his or her testimony is insufficient. It is also a shame that the attorney did not read the evidentiary rule regarding the unavailability of witnesses, especially when the party is the proponent of the evidence.
\textsuperscript{193.} Jones, 678 So. 2d at 314.
\end{flushleft}
The supreme court went on to find that the defendant also had the burden of presenting corroborating circumstances demonstrating the trustworthiness of Schofield’s confessions. The supreme court did not reach the determination of whether the defendant carried this burden, since the defendant did not demonstrate that Schofield was unavailable.

This case is a good reminder that attorneys who attempt to use any hearsay exception in section 90.804 must carry the burden of demonstrating that the declarant is unavailable. Otherwise, the evidence will be inadmissible. Additionally, for statements against penal interest, attorneys have the burden of presenting corroborating circumstances that demonstrate the trustworthiness of the statements they wish to admit under this exception.

The Supreme Court of Florida again addressed the admissibility of the declaration against penal interest hearsay exception in Farina v. State. In Farina, two brothers were convicted of the fatal shooting of a seventeen-year-old employee of a Taco Bell restaurant and sentenced to death. On appeal, Anthony Farina argued that he was denied a fair trial when incriminating statements of his co-defendant brother were offered against him at trial. The State contended that the co-defendant’s taped conversations

194. Id.; see also United States v. Seabolt, 958 F.2d 231 (8th Cir. 1992), cert. denied, 507 U.S. 971 (1993) (holding that statements by one criminal to another is more likely to be jailhouse bragging than a statement against penal interest). The holding in Seabolt is a strong reason why other corroborating circumstances must be present before a statement against penal interest will be considered trustworthy enough to be admitted into evidence.

195. Jones, 678 So. 2d at 314.

196. The supreme court also went on to examine this case from the perspective of whether the statements were admissible under due process principles enunciated in Chambers v. Mississippi, 410 U.S. 284 (1973). Jones, 678 So. 2d at 314. The supreme court in Jones distinguished Chambers, finding that at the time Chambers was decided, Mississippi did not have a hearsay exception for declarations against penal interest; however, Florida did have such a rule in place at the time of Jones’ trial. Id. Additionally, the court found that the alleged confessions in the present case did not have the persuasive assurances of trustworthiness that was present in Chambers. Id. Therefore, Chambers is distinguishable and the statements are not admissible under due process principles. Id.

197. 21 Fla. L. Weekly S176 (April 18, 1996).

198. Id. at S176.

199. Id. at S177. This occurs when there is a joint trial of two defendants. The co-defendants cannot be called to the stand by one another. This would violate their Fifth Amendment privilege against self-incrimination. Therefore, the statements entered by the State against one defendant and admissible under the evidence code against that defendant may not be admissible against the other co-defendant. This is especially true when the statement or confession incriminates the other co-defendant. This would violate the co-defendant’s right to confront and cross-examine the witnesses against him. This is generally called a “Bruton violation” after Bruton v. United States, 391 U.S. 123 (1968), cert. denied,
were properly admitted as statements against penal interest pursuant to section 90.804(2)(c) of the Florida Statutes.\footnote{200}

Although the statement may be properly admissible as a statement against penal interest,\footnote{201} the problem occurs when the co-defendant’s statement or confession incriminates or implicates another defendant and is admitted during their joint trial.\footnote{202} However, the United States Supreme

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397 U.S. 1014 (1970). \textit{In Bruton}, the United States Supreme Court held that a defendant’s Sixth Amendment right to confrontation is violated when a co-defendant’s confession is admitted at the joint trial, despite the fact that the jury is instructed that the confession is admissible only against the co-defendant. If the statement is independently admissible against the co-defendant, then he cannot complain that his confrontation rights were violated. Hearsay falling within “a firmly rooted hearsay exception” is presumptively reliable and bears sufficient indicia of reliability. \textit{See} Ohio v. Roberts, 448 U.S. 56 (1980). However, even if hearsay evidence \textit{does not} fall within “a firmly rooted hearsay exception” and is thus presumptively unreliable and inadmissible for Confrontation Clause purposes, it may nonetheless meet Confrontation Clause reliability standards if it is supported by a showing of particularized guaranties of trustworthiness. \textit{Id.} at 66.

200. \textit{Farina}, 21 Fla. L. Weekly at S177 (citing FLA. STAT. § 90.804(2)(c) (1991)).

201. The State argued this as a statement against the declarant, Jeffery Farina’s, penal interest under section 90.804(2)(c). However, the statement implicated his brother and co-defendant, Anthony Farina. The statement, in and of itself, against Jeffery Farina would clearly be an admission of a party opponent, since Jeffery Farina was a party. \textit{See} FLA. STAT. § 90.803(18) (1995). Therefore, the statement would be admissible against Jeffery as an admission under section 90.803(18). The State apparently argued for entry of the statement against Anthony under section 90.804(2)(c), in an attempt to avoid a violation of the Confrontation Clause. A firmly rooted hearsay exception generally does not violate Confrontation Clause principles. \textit{Roberts}, 448 U.S. at 66. A declaration against penal interest (with facts similar to the \textit{Farina} case) which fits within the hearsay exception should be considered firmly rooted. \textit{See} Lee v. Illinois, 476 U.S. 530, 551 (1986) (Blackmun, J. dissenting). However, the United States Supreme Court has stated that these statements are less reliable than ordinary hearsay because of a co-defendant’s strong motivation to implicate the other defendant and to exonerate himself. \textit{Id.} at 541. The Supreme Court of Florida followed this dictate and indicated that confrontation issues will arise when a co-defendant’s statement against penal interest incriminates another defendant in a joint trial. \textit{Farina}, 21 Fla. L. Weekly at S177. Statements and confessions made by co-defendants which implicate the other defendants in a joint trial are considered presumptively unreliable because of the strong incentive to throw the blame on the accomplice.

202. Generally, section 90.804 is used when the declarant is an unavailable \textit{non-party} witness. Here, the declarant was a \textit{party}. It is uncertain if the State felt that admission under section 90.804(2)(c) would automatically resolve the confrontation problem against the defendant, Anthony Farina, since the statement here was inherently reliable, given the facts of this case and, therefore, no further showing of particularized guarantees of trustworthiness would be needed.

Prior to 1990, the \textit{Florida Evidence Code} contained the following language: “A statement or confession which is offered against the accused in a criminal action, and which is made by a co-defendant or other person implicating both himself and the accused, \textit{is not within this}
Court has ruled that the presumption of unreliability that attaches to a co-defendant’s confession or statement may be rebutted where there is a showing of particularized guarantees of trustworthiness.\textsuperscript{203} The supreme court, in examining the facts of \textit{Farina}, found that the “indicia of reliability” existed to rebut the presumption of unreliability.\textsuperscript{204} The supreme court found that neither brother had an incentive to shift the blame during the conversations, as these were not statements or confessions to the police.\textsuperscript{205} Both brothers were calmly discussing the crime in the back of the police car. Unbeknownst to them, they were being taped. Since neither was aware that the conversations were being taped, it was unlikely that the motivation for fabrication was present. The court felt that Anthony was present and confronting his brother face-to-face throughout the conversations.\textsuperscript{206} Anthony could have taken issue with what was said during this conversation; however, this did not occur. The brothers tacitly agreed on what was being said and discussed details of the crime. This is different from the situation where a confession from one co-defendant has been taken by the police. The other co-defendant in this situation is not confronting the confessor and the confessing defendant has an incentive to shift the blame to his partner in crime. The supreme court determined that the taped conversations were admissible, since there was a showing of particularized guarantees of trustworthiness.\textsuperscript{207} Therefore, the court held that a confrontation violation did not exist and the statement was properly admitted under section 90.804(2)(c).\textsuperscript{208}

\textbf{IX. AUTHENTICATION}

\textit{Mills v. Barker}\textsuperscript{209} was one of the only cases during the survey period to discuss authentication and self-authentication under the \textit{Florida Evidence exception.”} The import of this language was to clearly remove section 90.804(2)(c) from being the possible entry point of hearsay evidence against a codefendant in a joint trial. This was in an apparent attempt to codify \textit{Bruton}. However, this language was deleted in 1990 because it was felt that this sentence may have broadened the impact of \textit{Bruton}, by excluding evidence not specified by that decision.

\begin{itemize}
  \item \textsuperscript{203} \textit{Lee}, 476 U.S. at 543.
  \item \textsuperscript{204} \textit{Farina}, 21 Fla L. Weekly at S178.
  \item \textsuperscript{205} \textit{Id}.
  \item \textsuperscript{206} \textit{Id}.
  \item \textsuperscript{207} \textit{Id}.
  \item \textsuperscript{208} \textit{Id}.
  \item \textsuperscript{209} 664 So. 2d 1054 (Fla. 2d Dist. Ct. App. 1995).
\end{itemize}
The issue in *Mills* was whether a modification agreement, signed and notarized, was properly authenticated for admission during a replevin action in a Florida circuit court. The circuit court excluded the agreement on the grounds that the document could not be properly authenticated. The district court reversed and held that although the document could not be authenticated by extrinsic evidence, the document was self-authenticating and therefore, admissible.

Before evidence can be admitted at a trial or at a hearing, it must first be identified or authenticated. Section 90.901 of the *Florida Statutes* provides that “[a]uthentication or identification of evidence is required as a condition precedent to its admissibility. The requirements of this section are satisfied by evidence sufficient to support a finding that the matter in question is what its proponent claims.”

Evidence may be authenticated by the testimony of a witness who has personal knowledge of facts which are sufficient to authenticate the evidence. It has long been held that a witness may testify about having seen the writer sign his or her name on several occasions and is able to identify the writer’s signature. This is what happened in *Mills*. The proponent of the agreement, Mr. Mills, testified regarding the authentication of the modification agreement. Although Mr. Mills identified two of the signatures on the agreement, he could not properly identify the third signature purporting to be that of a Mr. Orland. Mr. Mills had never seen Mr. Orland affix his signature to any document, even though he had seen a signature which was purported to be Mr. Orland’s on more than one occasion. Therefore, the district court ruled that Mr. Mills testimony was insufficient to authenticate the modification agreement under section 90.901.

Although extrinsic testimony may not be sufficient to authenticate a document, the document may be admissible if is self-authenticating under

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210. *Id.* at 1057.
211. The agreement was acknowledged by all parties to be governed by the law of California. *Id.* at 1056.
212. *Id.*
213. *Id.* at 1057.
214. Even if the evidence has been authenticated, it is not automatically admitted into evidence. If an exclusionary rule excludes the evidence, the evidence is inadmissible. *See* United States v. One 1968 Piper Navajo Twin Engine Aircraft, 594 F.2d 1040 (5th Cir. 1979) (holding that a certain authenticated document should be excluded as hearsay).
216. *See* Pittman v. State, 41 So. 385, 393 (Fla. 1906).
217. *Mills*, 664 So. 2d at 1057.
There are a number of exceptions to the requirement of using extrinsic evidence to prove a document is authentic. When there is sufficient information contained in the document to meet one of these exceptions, the document is self-authenticating. The document proves itself and is admissible without further proof of extrinsic evidence.

In Mills, the district court found that the document was self-authenticating and admissible. The district court determined that the modification agreement was self-authenticating under section 90.902(9). The district court read this in conjunction with section 92.50(2), which provides that a notary public and certain judicial officers may administer oaths and acknowledgments. The certificate of the notary public is presumptive evidence that the person appeared before the notary and acknowledged the execution of the document. In the Mills case, the signatures were acknowledged by a notary public, who signed the modification agreement and attached his seal. Since the signatures were acknowledged by a notary public, and the legislature has declared that a document that is acknowledged by a notary public is presumptively authentic and genuine, the modification agreement was self-authenticating and should have been admitted into evidence.

The district court also examined the necessity of proving that the notary public who signed the agreement was, in fact, a notary. The district court dismissed this by explaining that unless a statute specifically requires evidence of official character to accompany the official act which it authorizes, no additional proof is needed. In fact, extrinsic proof of the fact that

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218. Fla. Stat. § 90.902 (1995). This section states that extrinsic evidence of authenticity as a condition precedent to admissibility is not required for documents falling under any of the ten enumerated exceptions listed in this rule. Id.
219. Id. § 90.902(1)–(10).
220. Mills, 664 So. 2d at 1057.
221. Id. See Fla. Stat. § 90.902(9). This section reads in part: “Extrinsic evidence of authenticity as a condition precedent to admissibility is not required for . . . [a]ny signature, document, or other matter declared by the Legislature to be presumptively or prima facie genuine or authentic.” Id.
222. Mills, 664 So. 2d at 1057 (citing Fla. Stat. § 92.50(2) (1995)).
223. Id. See also Mills v. Hamilton, 163 So. 857 (Fla. 1935).
224. The side opposing the admission of a self-authenticating document can still attack the genuineness of the document; however, the document is admissible subject to the weight the jury intends to give it. See Sunnyvale Maritime Co. v. Gomez, 546 So. 2d 6 (Fla. 3d Dist. Ct. App. 1989).
225. Mills, 664 So. 2d at 1057–58.
226. Id. at 1058.
the notary was, in fact, a notary would destroy the whole premise behind self-authenticating documents, which is that no other extrinsic proof is needed to prove that the document is genuine. Since the document itself provides sufficient information to be admitted without further proof of its genuineness, any additional extrinsic evidence is redundant and unnecessary.

X. ADDITIONS AND AMENDMENTS TO THE FLORIDA EVIDENCE CODE

During the survey period, the Florida Legislature made very few changes to the *Florida Evidence Code*. Although the new code sections bear directly on the admissibility of evidence at trial, no major changes were forthcoming this year.

A. Admissibility of Paternity Determinations in Certain Criminal Prosecutions

During the survey period, the Florida Legislature created section 90.4025 of the *Florida Statutes*, which deals with the admissibility of paternity evidence in a criminal prosecution. In criminal prosecutions for sexual battery and child abuse, evidence of the paternity of the child will be admissible under this section. This new evidence section will facilitate the prosecution in establishing the identity of the offender.

B. Prohibition Against a Prisoner Submitting Nondocumentary Physical Evidence Without Authorization of the Court

During the survey period, the Florida Legislature created section 92.351 of the *Florida Statutes*, which prohibits prisoners from submitting nondocumentary evidence to the trial court without its authorization.

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227. Ch. 96-215, § 8, 1996 Fla. Sess. Law Serv. 575, 579 (West) (creating FLA. STAT. § 90.4025 (1996)). This section reads as follows: "If a person less than 18 years of age gives birth to a child and the paternity of that child is established under chapter 742, such evidence of paternity is admissible in a criminal prosecution under s. 794.011, s. 794.05, s. 800.04, and s. 827.04(4)." *Id.*

228. Ch. 96-106, § 3, 1996 Fla. Sess. Law Serv. 72, 74 (West) (creating FLA. STAT. § 92.351 (1996)). This section provides:

(1) No prisoner as defined by s. 57.085 who is a party to a judicial proceeding may submit evidence or any other item that is not in paper document form to a court or clerk of court without first obtaining authorization from the court. This prohibition includes, but is not limited to, all nondocumentary evidence or items offered in support of a motion, pleading, or other document filed with the court. This prohibition does not preclude a prisoner who is appearing in person...
XI. CONCLUSION

A trial is a search for the truth. The evidence code facilitates that search by allowing only trustworthy and reliable evidence to be presented to the fact finder for a resolution of the case. The Supreme Court of Florida’s guidelines regarding the admissibility of DNA evidence will promote that search for the truth, by allowing only DNA evidence that has met certain guidelines into evidence. This will be especially beneficial to prosecutors and defense attorneys who prepare for DNA evidentiary issues. In contrast, the Supreme Court of Florida’s ruling on prior inconsistent statements used in criminal cases may invariably obscure that search. Although this ruling will not affect how the attorneys will question witnesses during discovery depositions, it may well affect how prosecutors and defense attorneys approach discovery depositions, if they feel there is a chance a witness may later change his or her story. Finally, the question of the admissibility of child abuse profiles is sure to reach the Supreme Court of Florida during the coming year. Hopefully, the court’s analysis will facilitate trial attorneys in their never-ending search for truth and justice in our complex legal system.