Evidence

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Abstract

Florida evidence has continued to develop in the same predictable patterns as seen in previous survey years.'

KEYWORDS: proof, relevance, rule
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Florida evidence has continued to develop in the same predictable patterns as seen in previous survey years.\textsuperscript{1} The areas of relevance and hearsay generated the most case law during the survey period, and criminal decisions again outnumbered civil cases in generating evidentiary case law.

Changes made during the 1990 legislative session should have a distinct impact on Florida evidence. These changes will have the biggest affect in the areas of relevance,\textsuperscript{2} impeachment,\textsuperscript{3} exclusion of witnesses\textsuperscript{4} and hearsay.\textsuperscript{5} The change that will probably generate the most

\begin{enumerate}
\item This is the fifth annual survey of Florida evidence that the Nova Law Review has published. The annual survey generally runs from December of one calendar year through November of the following year. A break in the annual survey of evidence occurred last year. Therefore, to bring the evidence survey up to date, this issue will consider Florida evidence decisions from October 1988 through October 1990.
\item 1990 Fla. Sess. Law Serv. 40 (West) amended section 794.022 of the Florida Statutes which affects the rules of evidence concerning relevancy. This change directly affects section 90.404(1)(b)1 (Supp. 1990) regarding the character of the victim by “excluding evidence presented for the purpose of showing that manner of dress of the victim at the time of the offense incited the sexual battery.” 1990 Fla. Sess. Law Serv. 90-40 (West).
\item 1990 Fla. Sess. Law Serv. 174 (West), amending FLA. STAT. § 90.608 (1989). This change allows a party to impeach his own witness. See FLA. STAT. § 90.608 (1989).
\item 1990 Fla. Sess. Law Serv. 174 (West) created section 90.616 of the Florida Statutes, which is a codification of the term “invoking the rule,” or more commonly stated as sequestration of witnesses. The section reads as follows:
\begin{itemize}
\item (1) At the request of a party the court shall order, or upon its own motion the court may order, witnesses excluded from a proceeding so that they cannot hear the testimony of other witnesses except as provided in subsection (2).
\item (2) A witness may not be excluded if he is:
\begin{itemize}
\item (a) A party who is a natural person.
\item (b) In a civil case, an officer or employee of a party that is not a natural person. The party’s attorney shall designate the officer or employee who shall be the party’s representative.
\item (c) A person whose presence is shown by the party’s attorney to be essential to the presentation of the party’s cause.
\end{itemize}
\end{itemize}
FLA. STAT. § 90.616 (Supp. 1990).
\end{enumerate}
problems, and the most case law, will be the change in impeachment. The impact of this change will be distinctly felt in the criminal area.\textsuperscript{6}

This article will discuss the major cases affecting Florida evidence law. As with prior surveys, the focus will be on Florida Supreme Court cases. District and circuit court cases will be discussed if the impact on Florida evidence is significant, or an important conflict between Florida jurisdictions is present.

\section*{II. Contemporaneous Objection Rule and Offers of Proof}

Though a varying amount of case law was generated in this evidentiary area during the survey period, the importance of making contemporaneous objections and offers of proof at trial cannot be understated.\textsuperscript{7} Although no significant changes occurred in this evidentiary

\begin{itemize}
\item \textsuperscript{5} 1990 Fla. Sess. Law Serv. 174 (West), amending \textit{Fla. Stat.} §§ 90.803(23), 90.804(2)(c) (1989).
\item \textsuperscript{6} Though there will be an impact on civil cases as well as criminal, the criminal cases will probably generate more law since prosecutors will be able to call hostile or adverse witnesses and impeach them without the necessity of using section 90.801(2)(a) or declaring the witness adverse under section 90.608(2). Subsection (2) was eliminated after the 1990 amendment to section 90.608.
\item Some attorneys, on a literal reading of section 90.801(2)(a), believe that this section merely makes inconsistent statements nonhearsay because they are not used to prove the truth of the matter asserted but are simply used to demonstrate that an in court statement differs from an out of court statement. This is a misreading of section 90.801(2)(a) because it allows the prior inconsistent statement to be offered to prove the truth of the matter asserted. Professor Ehrhardt stated it best in his treatise on evidence:

Although normally a witness may not be impeached by the party who calls him, that restriction is not applicable to a statement offered under [section 90.801(2)(a)] because the purpose for offering the evidence is to prove the truth of the contents of the prior statement rather than to attack the credibility of the witness.

C. EHRHARDT, \textit{FLORIDA EVIDENCE} 449 (2d ed. 1984). This is important in criminal cases because it allows the prosecutor to argue the truth of the inconsistent statements in closing. This area has caused a lot of reversals, if the appellate court finds that impeachment under section 90.801(2)(a) does not meet all the prerequisites of that section.
\item \textsuperscript{7} See \textit{Fla. Stat.} § 90.104 (1989), providing in part that:
\begin{itemize}
\item (1) A court may predicate error . . . on the basis of admitted . . . evidence when a substantial right of the party is adversely affected and: (a) When the ruling is one admitting evidence, a timely objection or motion to strike appears on the record, stating the specific ground of objection . . .
\end{itemize}
\end{itemize}
area, Florida courts examined various cases during the survey period of which the following are worth noting.

In *Glendening v. State*, the Florida Supreme Court affirmed the defendant's conviction because defense counsel failed to object when the State's expert witness testified that the father of the sexual abuse victim was the person who actually committed the sexual offense. The court ruled that the testimony was more prejudicial than probative, but declined to reverse the conviction finding that "[d]efense counsel neither objected to the answer nor moved to strike it and the error was not of a fundamental nature . . . [Therefore], the issue was not properly preserved for appeal . . . ." Additionally, the court stated that although the State's expert witness was "improperly allowed to vouch for the credibility of a witness," the issue was not cognizable on appeal because defense counsel objected on the grounds of relevance, and not because "the question called for improper vouching for the credibility of the hearsay declarant."  

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(b) When the ruling is one excluding evidence, the substance of the evidence was made known to the court by offer of proof or was apparent from the context within which the questions were asked.

A proper contemporaneous objection has two primary ingredients, both of which are needed to preserve objections for appellate review. First, the objection must be timely. If counsel does not promptly object, the problem is waived. Second, the objection must be specific. Failure to state the correct grounds for objection will waive it. The appellate courts have strictly monitored this rule.

A proper offer of proof merely requires that when evidence is excluded, the substance of the evidence must be made known to the court. If the substance of the proof is not apparent from the record, the appellate court will be unable to render a decision on the excluded evidence and will thus dismiss the argument for failure to properly have substance of the excluded evidence before it.

8. 536 So. 2d 212 (Fla. 1988).
9. *Id.* at 221.
10. *Id.* The court seems to be splitting hairs regarding the specificity needed to preserve an issue for appeal. Though the court did not elaborate on the relevance objection by defense counsel, it would seem that counsel may have made the correct objection. Vouching for the credibility of a witness brings into play a witness's character under section 90.404, which states that "[e]vidence of a person's character or a trait of his character is inadmissible to prove that he acted in conformity with it on a particular occasion . . . ." *Fla. Stat.* § 90.404 (Supp. 1989). Additionally, vouching for an individual's credibility can, in fact, be more prejudicial than probative since the jury may give that individual's testimony more weight than it normally would have. *See Fla. Stat.* § 90.403 (1989). This is alleviated when the individual's credibility has already been attacked.

Some trial judges may not allow objections such as "improper vouching for the credibility of the hearsay declarant" but may instead ask for the "legal objection."
In *Assiag v. State,* the Fifth District Court of Appeal also affirmed a defendant’s conviction, even though two expert witnesses improperly vouched for the credibility of the sex crime victim. The court stated that, by itself, the error was not fundamental and therefore, failed to justify reversal in the absence of a timely objection. The district court went on to compare other cases where similar errors occurred and no objection was made, but the court, nevertheless, found those errors fundamental. The Fifth District stated that those cases involved cumulative errors which combined to deny the defendant a fair trial and rose to the level of fundamental error.

Making an objection, based on relevance under section 90.404 because the question calls for improper character evidence, should be specific enough. However, a proper, and perhaps more specific objection, could be made under section 90.609, which provides that evidence of the truthful character of a witness is only admissible “after the character of the witness for truthfulness has been attacked by reputation evidence.” FLA. STAT. § 90.609 (1989).

Another specific “legal objection” could be made under section 90.806 regarding attacking and supporting the credibility of a hearsay declarant. FLA. STAT. § 90.806 (1989). It is improper to vouch for the credibility of a hearsay declarant whose credibility has not been attacked. However, both section 90.609 and section 90.806 are grounded in the rule of relevance, which states that the jury will attach more weight to a witness whose credibility is bolstered by others. Since the court did not elaborate on the specifics of the relevance objection in the *Glendening* case, the reader is left to speculate regarding the proper specificity of these other objections. See *Glendening,* 536 So. 2d at 212.

This case, once again, illustrates the importance of making specific objections at trial. It also demonstrates that all possible objections should be raised if there is a reasonable basis for the objection.

12. *Id.* at 388.
13. *Id.* Cumulative error cases generally point out that counsel was ineffective during trial. In criminal cases, this type of error may be more appropriate under the collateral attack provisions of Florida Rule of Criminal Procedure 3.850 for ineffective assistance of counsel. Although an allegation of ineffective assistance of counsel is rarely allowed on direct appeal, it may be brought before the court when the errors are apparent on the record. Stewart v. State, 420 So. 2d 862 (Fla. 1982), *cert. denied,* 110 S. Ct 2575 (1991); Foster v. State, 387 So. 2d 344 (Fla. 1980), *cert. denied,* 464 U.S. 1052 (1984). However, since ineffective assistance of counsel claims are rarely apparent from the record, this would preclude direct review and would confine this claim to collateral attack. This would, in essence, deter the appellate court from examining the case in light of cumulative error on direct appeal and move the court to examine the case from a more advantageous perspective under the standard set out in *Strickland v. Washington,* 466 U.S. 668 (1984), for ineffective assistance of counsel, after a collateral attack has been made. In this way the court can examine the case from the perspective of whether counsel’s lack of objection was a strategic decision designed to al-
In *Fernandez v. State*, the trial court excluded two statements directly affecting the defendant’s alibi defense. The district court affirmed the conviction because there was no proffer of the statements, nor were the statements apparent from the record.

Finally, the district court, in *G.A. v. State*, reversed the trial court when the trial court refused to allow the defense attorney to proffer excluded testimony. The district court concluded that defense counsel’s failure to state the relevancy and materiality did not preclude review of the issue, because the trial court cut off defense counsel’s proffer. The proffer was necessary for the appellate court to determine whether the testimony was relevant, and material, and the trial court erred by refusing to allow the proffer.

### III. Relevancy

Relevance forms the basic foundation for every evidentiary principle and should be closely examined whenever evidence is being entered pursuant to any rule in the evidence code. Relevance is best understood by remembering two basic fundamentals. First, is the evidence to explore previously closed evidentiary areas in defending the client, by allowing the State to “open the door” to previously excluded evidence, instead of from the perspective of cumulative error.


15. In a somewhat similar case, the district court in *Reaves v. State*, 531 So. 2d 401 (Fla. 5th Dist. Ct. App. 1988), a case reported in the last survey period, reversed a conviction even though there was no proffer of the surrebuttal testimony in the trial court. The district court stated that the proffer was not needed because the trial judge believed that surrebuttal did not exist in Florida and, therefore, the proffer would have been unavailing. The attorney in *Reaves* was fortunate that the trial judge stated that he did not believe surrebuttal existed in Florida, otherwise the error would not have been preserved for review.


17. *Id.* at 1204.


For an excellent article on relevancy, see Pearson, *Ungarbling Relevancy*, FLA. BAR J. 45 (Feb. 1990).

19. As an example, even though evidence may fall clearly within an exception to the hearsay rule, if the hearsay is not relevant it should not come into evidence. Similarly, even though a piece of evidence is authentic, or self-authenticating, if the evidence is not relevant to any fact in issue, or the evidence is more prejudicial than probative, it should not come into evidence.
vidence logically relevant? That is, will the evidence prove or disprove a material fact in issue? Second, is the evidence legally relevant? In other words, will the evidence be prohibited by specific statutory law or will its probative value be "outweighed by the danger of unfair prejudice, confusion of the issues, misleading the jury, or needless pres-

21. FLA. STAT. § 90.402 (1989). The author's position is that once it has been demonstrated that an item of evidence will make a material fact in issue more or less probative, then the only basis for excluding the item from evidence is a legal rule of law. Therefore, the author finds that section 90.402 and section 90.403 should be lumped together under the term of legal relevance. Professor Ehrhardt has recognized the broad concept of legal relevance and stated that "[t]hese exclusionary policy rules, often referred to under the concept of legal relevancy, are included in sections 90.403-404 and 90-407-410 of the Code." C. EHRHARDT, FLORIDA EVIDENCE § 90.402.1 (2d ed. 1984).

Section 90.402 states that "[a]ll relevant evidence is admissible, except as provided by law." FLA. STAT. § 90.402 (1989). This section would exclude logically relevant evidence when a statute specifically prohibits it. Two examples excluding relevant evidence are section 934.06, which excludes logically relevant evidence obtained by a wire-tap in violation of the Florida Statutes, and section 794.022, which excludes specific instances of sexual activity between the victim and any person other than the offender. See FLA. STAT. §§ 794.022, 934.06 (1989).

Section 90.403 is also a rule of law that excludes logically relevant evidence when its probative value is outweighed by "unfair prejudice, confusion of issues, misleading the jury or needless presentation of cumulative evidence." FLA. STAT. § 90.403 (1989). Therefore, both sections are categorized under the term of legal relevance.
entation of cumulative evidence?" By examining all evidence for logical and legal relevance, the trial attorney can minimize the use of harmful evidence and safeguard against error and possible reversal.

The following flow chart demonstrates the relationship between logical and legal relevance:

- **Is the evidence LOGICALLY RELEVANT?**
  - **NO** → evidence excluded
  - **YES**
    - **Is the evidence LEGALLY RELEVANT?**
      - **NO** → evidence excluded
      - **YES** → evidence excluded
    - **NO**
      - **Is the evidence excluded by statutory law such as 934.06 or 794.033 etc.?**
        - **YES** → evidence excluded
        - **NO**
          - **Is the evidence excluded by another evidentiary rule such as 90.403?**
            - **YES** → evidence excluded
            - **NO**
              - **The evidence is ADMISSIBLE**

22. FLA. STAT. § 90.403 (1989).
23. Logical and legal relevance are the watchdogs of evidence. For example, an improper evidentiary foundation can be excluded from evidence based on relevance grounds.

A typical scenario has opposing counsel attempting to enter a hearsay statement in evidence as an excited utterance. The foundation for an excited utterance is:
A. Logical Relevance

Logical relevance is defined in section 90.401 of the Florida Statutes and determines whether the relevant evidence is evidence "tending to prove or disprove a material fact." Though many cases discuss logical relevance, they are dependant on the logical connection between the evidence and the matter it is being offered to prove or disprove in that particular factual setting. Therefore, a slight change in the fact pattern can produce a substantially different result. This does not lead to sound precedential value and, generally, offers little guidance, other than the court's analysis during that particular factual setting. However, a few cases are worth discussing.

In Martinez v. State, the issue of DNA fingerprinting in Florida was once again the center of attention. The issue was whether the overwhelming statistical probabilities of DNA fingerprint evidence invades the province of the jury by suggesting proof beyond a reasonable doubt. The court held that it did not. The court stated that rigorous

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1. A statement or utterance,
2. relating to a startling event or condition,
3. while the declarant,
4. was under the stress of excitement,
5. caused by the event or condition.

FLA. STAT. § 90.803 (Supp. 1990).

Opposing counsel does not elicit testimony that the statement was made under the stress of excitement. The statement must be examined under the auspices of logical and legal relevance. First, does the statement make some fact in issue more or less probative? If the statement does not make a fact in issue more or less probative, then the statement is not relevant and does not go into evidence. There is no need to examine the statement for legal relevance. If the statement does make a fact in issue more or less probative, then it is logically relevant and to this point, admissible.

Second, is the statement outweighed by the danger of unfair prejudice, confusion of issues, misleading the jury, or needless cumulative evidence? If the statement was not made under the stress of excitement, then it is more prejudicial than probative and not legally relevant, and should be inadmissible as evidence. The reasoning is simple. A person who is excited as a result of a startling event does not have the reflective capacity which is essential for conscious misrepresentation. If the foundational element of excitement is left out, then the individual making the statement could easily fabricate it. The reliability of the hearsay statement is, therefore, in question. The statement's probative value may be substantially outweighed by the danger of unfair prejudice it could cause the opposing party, and it could also mislead the jury. The jury could reach an incorrect verdict based on an unreliable statement fabricated out of court.

25. 549 So. 2d 694 (Fla. 5th Dist. Ct. App. 1989).
26. DNA material recovered from the victim's clothing matched the defendant's
cross-examination of expert witnesses, or an attack upon the scientific bases upon which the statistical proofs are based, will guard against such errors. 28 The Martinez court agreed with the large majority of out of state courts in reaching its conclusion that overwhelming statistical probability is both relevant and probative in assisting the jury in making its final decision, when the statistical probability testimony is scientifically and reliably grounded. 29

In Odice v. Pearson, 30 plaintiff was stabbed in a restaurant parking lot. The plaintiff brought suit against the restaurant owners for negligent lighting and security. At trial, plaintiff attempted to enter police reports concerning prior crimes committed near the restaurant owners' property in order to establish the owners' failure to foresee criminal activity and take reasonable precautions to guard against crime on the restaurant premises. The trial court excluded the police reports regarding the prior crimes. 31 The appellate court reversed, finding the police reports of prior crimes relevant and probative of a material fact in issue, foreseeability. 32 The appellate court stated that "[e]vidence as to the nature and likelihood of any crime occurring has a direct bearing on whether the preventive measures taken by the property owner were reasonable in light of all the other relevant facts and circumstances in the case." 33

DNA. The State's expert testified that only one individual in 243 billion would have the same DNA pattern. Id. at 695. Since the present population of the world is only five billion, it makes the argument of identity rather overwhelming, as well as compelling.

27. Id. at 694.
28. Id. at 697.
29. The State had little evidence to prove the identity of the victim's attacker. The victim suffered from a form of night blindness and the attack took place at night with the electrical current severed from outside the house. The victim's description of her attacker was less than accurate and the best piece of evidence the State had to prove the defendant's identity was a fingerprint from the victim's electrical box. Therefore, the DNA fingerprint material was highly probative of a material fact in issue, the defendant's identity. Because there was little other identity evidence, its probative value simply outweighed the prejudicial effect of the overwhelming statistics. Id.

31. Id. at 706.
32. Id.
33. Id.
Exclusion on the Grounds of Unfair Prejudice or Confusion—Legal Relevance

One form of legal relevance is defined in Florida Statutes section 90.403.\(^\text{34}\) Once the prerequisites of logical relevance have been satisfied, it must be determined if the evidence is legally relevant. Is there a statutory law which excludes the evidence or is the evidence more prejudicial than probative? Numerous cases decided during the survey period relied upon section 90.403. However, few cases demonstrated any remarkable significance.\(^\text{35}\) For example, appellate courts have continued to examine gruesome photographs, which are entered into evidence at the trial level, to determine if they are unduly prejudicial.\(^\text{36}\) However, no cases demonstrate a break or change in the courts’ analysis of such evidence. Additionally, no courts have changed the standard usage or analysis of section 90.403 regarding other relevant evidence.

In one application of section 90.403, the Second District Court of Appeal, in \textit{State v. Sawyer},\(^\text{37}\) held that the admission of a single hair found in the murder victim’s apartment, alleged to be that of the defendant, had the danger of unfairly prejudicing the defendant. During a pre-trial hearing on a motion \textit{in limine}, an FBI hair and fiber expert testified that the hair in question matched the defendant’s in twenty

\(^{34}\) FLA. STAT. § 90.403 (1989).

\(^{35}\) Cases excluding evidence based on statutory law under section 90.402 are discussed under the specific evidentiary sections they affect.

\(^{36}\) \textit{See Thompson v. State}, 565 So. 2d 1311 (Fla. 1990). In \textit{Thompson}, the Florida Supreme Court held that the trial court has discretion to admit photographic evidence as long as that evidence is relevant. Photographs of the murder victim were relevant to establish the victim’s identity and to demonstrate that the defendant’s out-of-court confessions were consistent with the physical evidence found at the scene, so that the gruesome nature of the photographs did not render the decision to admit them an abuse of discretion. \textit{Id.} at 1315; \textit{see also} \textit{Gomaco Corp. v. Faith}, 550 So. 2d 482 (Fla. 2d Dist. Ct. App. 1989). In \textit{Gomaco}, the court held that photographs of the accident victim’s nearly severed foot may have been tangentially relevant to the victim’s action against the manufacturer of the curbing machine the victim was operating when he suffered the injury. However, relevance was overwhelmingly outweighed by the photographs’ gruesome and inflammatory nature, which was prejudicial to the manufacturer. \textit{Id.} at 483. The photographs did not in themselves independently establish any material part of the victim’s case, nor were they necessary to corroborate some disputed factual issue. \textit{Id. But see Tompkins v. Dugger}, 549 So. 2d 1370 (Fla. 1989), \textit{cert. denied}, 110 S. Ct. 1170 (1990) (decision of the trial judge to admit inflammatory photographs of murder victim’s skeletal remains was within his discretion).

\(^{37}\) 561 So. 2d 278 (Fla. 2d Dist. Ct. App. 1990).
observable characteristics. However, this only meant that the hair came from a class of individuals having the same hair characteristics. The expert also testified with regard to how hair is transferred from place to place. Although the defendant had stated he was never in the victim's apartment, he lived next door and the victim had visited his apartment a few days before the murder. The trial court ruled that the hair had no probative value regarding the defendant's presence in the victim's apartment at the time of the murder. The appellate court affirmed and indicated that admission of the hair would seriously prejudice the defendant before the jury. The court explained:

[T]he probative value of the single hair cannot be positively identified as being from [the defendant]. Even if it is his hair, it is simply not probative of proving that [the defendant] was even in [the victim's] apartment much less that he was there at the time of the murder in light of the extensive contamination of the crime scene. However, [the defendant] could have been seriously prejudiced before the jury if this hair evidence were presented to them.

In West v. State, the appellate court reversed the defendant's conviction for DUI manslaughter, stating that the trial court committed reversible error in admitting evidence that the defendant had a trace of valium in his blood. Expert testimony in the case indicated that the valium had no measurable effect on the defendant's driving. Therefore, the evidence concerning the valium had no probative value, or relevance, to the charge of driving under the influence of alcohol and was unfairly prejudicial.

The West court cited to State v. McClain in finding error in admitting this evidence. McClain was a case similar to West, where the court found testimony regarding drugs found in the defendant's system more prejudicial than probative since the State already had a high blood alcohol reading on which to prove impairment. There is still

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38. Id. at 283.
39. Id. at 284.
40. Id.
41. Id.
42. 553 So. 2d 254 (Fla. 4th Dist. Ct. App. 1989).
43. Id. at 255.
44. 508 So. 2d 1259 (Fla. 4th Dist. Ct. App. 1987), aff'd, 525 So. 2d 420 (Fla. 1988).
45. Id. at 1260.
some confusion caused by *State v. Weitz*[^46] even after the Florida Supreme Court's decision in *McClain* resolved the apparent conflict between the cases.[^47] *Weitz* involved the introduction of evidence regarding drugs in the defendant's system after the State had already taken a breath reading. However, the breath reading in the case was only 0.017%, and the drugs offered the only reasonable explanation for the defendant's acute intoxication, even though the drugs in the defendant's system could not be quantified.[^48] It can only be assumed that in *West*, the State had the necessary blood alcohol level needed to prove impairment, since this information was not included in the case facts.

C. **Character Evidence in General**

Character evidence inevitably causes judges and attorneys innumerable headaches and numerous reversals. General character evidence is codified in section 90.404(1) of the Florida Statutes, and is a general prohibition against using a person's character, or a trait of the person's character, to prove that the person acted in conformity with that character trait on a particular occasion.[^49] This general prohibition has a few enumerated exceptions,[^50] generally limited to criminal cases.[^51]


[^47]: The Florida Supreme Court addressed *Weitz* in *McClain* and stated: In both cases, it could be said that the prejudicial impact of permitting the jury to hear that the defendant had taken illegal drugs was equal but that it was the difference in probative value which tipped the scales. In *Weitz*, the defendant's low blood alcohol test belied the other evidence of his intoxication. Thus, the presence of even a small amount of drugs in the defendant's urine was significant because it provided an explanation for his impaired conduct. In the instant case, McClain's blood alcohol level substantially exceeded the figure necessary to raise a presumption of impairment. Therefore, evidence of a trace amount of cocaine in McClain's blood added little to the state's proof of intoxication. *McClain*, 525 So. 2d at 423.

[^48]: *Weitz*, 500 So. 2d at 657-58.


[^50]: The particular character of the accused, of the victim, or of a witness all have special exemptions. FLA. STAT. § 90.401(1)(a)-(c) (Supp. 1990). Similar fact evidence is basically character evidence which is admissible under specific circumstances. Similar fact evidence, otherwise known as the “Williams Rule,” from the case of Williams v. State, 110 So. 2d 654 (Fla. 1959), cert. denied, 361 U.S. 847 (1959), will be discussed infra note 65 and accompanying text.

[^51]: Section 90.404(1) provides that character evidence is inadmissible to prove
In *Erickson v. State*, the defendant objected to expert psychiatric testimony presented by the State in an indecent assault case on a child under sixteen. The State’s expert witness testified that the defendant’s condition was diagnosed as pedophilia and antisocial behavior. The expert also testified that the defendant had not been truthful during the psychiatric interview. The State claimed that this testimony was needed to rebut the defendant’s defense, regarding lack of intent, and to establish the defendant’s capacity to understand and waive his rights. The Fourth District Court of Appeal disagreed with the State’s position and found that the testimony was inadmissible character evidence. The court determined that: (1) the testimony was used to demonstrate the defendant’s bad character and propensity to the commit the crime charged; and (2) expert testimony is not allowed to attack the credibility of the defendant when the defendant has not become a witness in the case.

A type of character evidence which causes innumerable problems is “high crime area” testimony. A number of cases have been devoted to this scenario. The problem arises when a state witness describes the area where the defendant was apprehended, or lived, as a high crime area. The argument takes the following form: since the defendant was located in a high crime area, he must be associated with the criminal activity occurring there. In other words, if the area is one where criminal activity takes place, the defendant must be a criminal. This association could prejudice the defendant in the eyes of a jury, especially when the defendant comes from an impoverished neighborhood. A jury with a different cultural background than the defendant

that a person acted in conformity with that character, unless one of three exceptions appear. The first two exceptions specifically refer to the “prosecution” and the “ac-Hardt, supra note 21, at § 404.

52. 565 So. 2d 328 (Fla. 4th Dist. Ct. App. 1990).
53. Id. at 330.
54. Id. at 331.
55. Id.
56. Id. The court ultimately affirmed the defendant’s conviction, finding the error to be harmless in light of the overwhelming evidence of guilt.
may simply be unable to accept the fact that an individual who lives in a “designated high crime area” may not be a criminal.

The Florida courts have tried to address the issue to prevent the needless reversal of convictions. The key issue is one of prejudice. Did the evidence presented in court have the effect of demonstrating the defendant’s bad character, or was the use of this evidence admissible for some other purpose which simply outweighs any prejudice it may have had on the defendant? The courts have pointed to two factors which prevent this evidence from reversing a defendant’s convictions. First, the identification of a neighborhood as a “high crime area” may be considered *de minimus* if its use was merely descriptive. Second, the evidence must be used for some purpose other than to demonstrate the defendant’s bad character. Typically the evidence is used to demonstrate why a witness was in the neighborhood or why a witness was more observant or alert than normal.

The “high crime area” evidence is fact specific. Therefore, what is reversible in one case may not be in the next case. In *Black v. State*, the Fourth District Court of Appeal reversed a drug conviction when an objection was made to the testimony given by one of the police officers in the case. The officer stated that he had been watching several areas of drug activity called “crack houses” and in particular the “crack house” where the defendant was arrested. The officer also testified that numerous arrests were made here and that no “normal people” live there.

In *Gillion v. State*, the Fourth District Court of Appeal affirmed a drug conviction even though “high crime area” testimony was admitted into evidence. The police officer in the case testified that the area

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58. See, e.g., *Jefferson v. State*, 560 So. 2d 1374 (Fla. 5th Dist. Ct. App. 1990); *Gillion v. State*, 547 So. 2d 719 (Fla. 4th Dist. Ct. App. 1989). The description was considered *de minimus* since it was used for “mere identification.” No mention was made that the prosecutor in either case used the “high crime area” testimony in argument to the jury or that the prosecution tried to deliberately elicit the “high crime area” testimony from the witness to demonstrate propensity. In *Gillion*, the fact that the neighborhood was described as a high crime area was completely irrelevant and could not have prejudiced the defendant, since the defendant was claiming mistaken identity. *Gillian*, 547 So. 2d 719.

59. In *Jefferson*, the evidence was used to explain why the witness was sent to this particular location and why the witness was monitored. *Jefferson*, 560 So. 2d at 1374.

60. 545 So. 2d 498 (Fla. 4th Dist. Ct. App. 1989).

61. *Id.* at 499.

was a "high crime area," and that several narcotics transactions were taking place there. Additionally, he testified that there were many individuals known to him as narcotics dealers in the area, and that the defendant was arrested in this area. The Fourth District Court of Appeal stated that the "mere identification of a neighborhood as a high-crime area [should not] constitute [sic] reversible error in and of itself, especially...where the defense is claiming mistaken identity."64

D. Other Crimes, Wrongs or Acts

Section 90.404(2) of the Florida Statutes, otherwise known as "Williams Rule," or similar fact evidence, is one of the single biggest causes for reversal in criminal cases. It prohibits the introduction of other crimes, wrongs or acts to prove the defendant's propensity to commit crime. However, evidence of other crimes, wrongs or acts is admissible when relevant to prove a material fact in issue.67

In order to utilize section 90.404(2), the State must notify the defense in writing at least ten days prior to trial. The State must furnish a written statement of the acts or offenses it intends to offer as similar fact evidence.68 If the evidence is used for impeachment or on rebuttal, no notice is required. Additionally, if the evidence presented at trial is "inextricably interwoven" or "inseparable" from the crime being charged, there is no notice requirement.

The State in a criminal prosecution should never rely solely on the evidence being "inseparable" and thus being outside of the ten day provision. If the court disagrees with the State's interpretation of the evidence, the State will be precluded from using the similar fact evidence as Williams rule material because it did not comply with the ten day provision. The State should always file its ten day notice when possible and cover itself should the court disagree with the argument that the evidence is inseparable. However, whenever the State would have to tell the story of the crime in a vacuum, or would have to leave out parts of

63. Id. at 720.
64. Id.
67. Id.
69. Id.
70. Id.
the story that would disrupt the logical sequence of events, the court has ruled that the evidence is admissible because it is “inextricably interwoven” with the main crime. In other words, it would be impossible to illustrate the events surrounding the main crime, and give a uniform picture of the event, without evidence of both crimes being given.71

In Erikson v. State,72 the Fourth District Court of Appeal allowed the admission of collateral crimes evidence even though the State did not comply with the ten day notice provision. In this case, both the victim and another little girl were assaulted in the course of the day’s activities at a Parents Without Partners beach picnic. The touching of the one young girl lead to the defendant’s apprehension after a witness observed the incident. The court held that this testimony, regarding this uncharged crime, was relevant because it was so “inextricably intertwined” in the scenario of the crime charged.73 The events leading to the apprehension and detention of the defendant could not be given without reference to the other crime, and therefore, it was admissible.74

A recent trend in the last few years has been the use of “reverse” Williams rule, which develops when the defendant wants to use evidence of crimes, wrongs, or acts of another to prove his innocence. Section 90.404(2)(a) does not specifically preclude this use. Invariably, the problem with this type of usage is defining its application. When section 90.404(2)(a) is used within the criminal context, the evidence is limited to evidence proving a material fact in issue, such as motive, opportunity, intent, or identity.75 However, when applied as reverse Williams rule, it is more difficult to demonstrate that evidence of the crimes, wrongs or acts of a third person will prove a material fact in issue. The only legitimate claim may be when identity is in issue and the similar fact evidence, which the defense wishes to use, demonstrates that an individual other than the defendant committed the crime. Other applications take on a strained relationship with the rule.

Reverse Williams rule has been addressed sparingly by our district courts.76 However, during the survey period, the Florida Supreme

73. Id. at 333.
74. Id.
75. FLA. STAT. § 90.404(2)(a) (1989).
Court faced this issue for the first time in *Rivera v. State.* In *Rivera,* the defendant assaulted and killed a little girl and left her body in an open field. The defendant attempted to establish that a crime of similar nature had been committed by another person. The court stated that "reverse" *Williams* rule is permissible and set out the standards on which to base its admission. The court held that evidence which tends, in any way, to establish a reasonable doubt should be admissible. However, "the admissibility of this evidence must be gauged by the same principle of relevancy as any other evidence offered by the defendant." The court then examined the two crimes and found them dissimilar. The Florida Supreme Court stated that since the two crimes were dissimilar, the trial court did not abuse its discretion in excluding the evidence.

The Florida Supreme Court again addressed the issue of reverse *Williams* rule in *State v. Savino.* In *Savino,* the defendant was charged with the murder of his stepson. The stepson died of injuries inflicted by blunt trauma to the stomach. The defendant advanced the theory that his wife killed the boy. The defendant sought to introduce evidence of the death of his wife's daughter seven years before, caused by blunt trauma. However, the court found that the wife's alleged abuse of a one month old child, in a different state, in a different marriage, was not sufficiently similar to be admissible in the defendant's trial for the death of the six year old child. The court stated, once again, that the admissibility of reverse *Williams* rule evidence is the same as for any other evidence under section 90.404(b)(2). First, the relevancy must be established, then the issue of prejudice must be weighed. In *Savino* the court found that the defendant did not meet the relevancy test. In other words, the defendant did not demonstrate the required close similarity of facts needed for the evidence to be relevant.

77. 561 So. 2d 536 (Fla. 1990).
78. *Id.* at 539.
79. *Id.*
80. *Id.*
81. *Id.* at 540.
82. *Id.*
83. 567 So. 2d 892 (Fla. 1990).
84. *Id.* at 894.
85. *Id.*
86. *Id.*
87. *Id.*
E. Rape Shield Law

Section 90.404(b) permits a criminal defendant to introduce pertinent character traits of a victim. However, this section of the evidence code is specifically limited in rape cases by section 794.022, otherwise known as the Florida Rape Shield Statute. This statute sets up a procedure to determine the admissibility of a victim’s previous sexual conduct. Previous sexual conduct is ordinarily deemed inadmissible under this statutory section, unless an in camera hearing is held prior to trial to determine the relevance of the evidence.

During the survey period, a significant amendment took place in the Florida Rape Shield Statute. The amendment was fueled by a highly publicized Broward County rape case. In that case, the defense claimed that the victim’s provocative clothing was one of the catalysts for the rape. The underlying defense theory was that it was a “drugs for sex” scenario, which was set up by the victim’s enticing clothing. The verdict in the case came back not guilty, and the jury later stated that the victim was “asking for it.” The case caused a public furor spurred on by newspaper and television coverage.

Fueled by public outrage, the legislature hastily amended section 794.022 to exclude evidence of the victim’s manner of dress at the time of the sexual assault. However, what the legislature failed to discover was that the victim in the Broward rape case was later charged by the State Attorney’s Office for Trafficking and Conspiracy to Traffick in

88. FLA. STAT. § 90.404(b) (1989).
89. FLA. STAT. § 794.022 (1989).
90. FLA. STAT. § 794.022(2) (1989).
91. 1990 Fla. Sess. Law Serv. 40 (West) amending FLA. STAT. § 794.022 (1989). The amendment affects the rules of evidence concerning relevancy. This change also directly affects Florida Statutes section 90.404(1)(b)1, regarding the character of the victim, by “excluding evidence presented for the purpose of showing that manner of dress of the victim at the time of the offense incited the sexual battery.” 1990 Fla. Sess. Law Serv. 40 (West).
92. State v. Lord, No. 88-024726CF10A (Broward County Fla. 1988). The case was prosecuted by James DeHart of the State Attorney’s Office Sexual Battery Unit and the case was defended by Timothy Day of the Public Defender’s Office. Both attorneys had extensive experience in trying sexual battery cases.
93. Id.
94. Id.
95. Id.
96. FLA. STAT. § 794.022 (1989).
Cocaine of over 400 grams. She was found guilty in a jury trial of Conspiracy to Traffic in Cocaine and was sentenced to the minimum fifteen year mandatory drug trafficking sentence.

It appears, based on the whole story, that the defense in the rape case was, in fact, much more than mere puffery. The victim’s drug trafficking charges supported the defense theory that the rape was a “drugs for sex” set-up that went bad. Provocative dress was needed in the set-up to attract the next target.

Though the intention of the new legislation was to protect the victim, and discourage the jury from deciding the case based merely on the manner of dress, the same protection could have been afforded by relying on logical relevancy and the trial judge’s common sense. Though rapes are insidious crimes, the legislature’s attempt to protect the victim, at any cost, could backfire on the wrongly accused defendant by unfairly preventing him from presenting favorable evidence on his behalf.

IV. PRIVILEGES

A significant case in the area of attorney-client privilege did not come from the Florida Courts but instead emanated from the United States Supreme Court. In United States v. Zolin, the Supreme Court ruled that a client’s privilege against self-incrimination extends to communications made with attorney, but not to communications made with others to help the attorney prepare a defense.

97. State v. Chiapponi, No. 89-26532CF10B (Broward County Fla. 1989).
98. Id.
99. The author does not wish to leave the impression that the defendant was not a culpable party in this case. However, had all the facts been known to the prosecuting attorney from the beginning, he may have attempted to try the case in a different manner to alleviate any damaging testimony, thus, enhancing his chances for a favorable outcome. The prosecuting attorney may also have changed his posture on plea negotiations.

In trial, the jury was confronted with a very plausible defense, bolstered by the victim’s lack of emotion upon her narration of the rape. In contrast, another rape victim that testified at the trial was extremely emotional upon recounting the events surrounding her rape by the same defendant. Additionally, the defense managed to hurt the credibility of the victim by pointing out inconsistencies in her testimony and demonstrating her unwillingness to cooperate with the State’s prosecution of the case. The victim’s unwillingness to cooperate was all the more revealing when it was later learned that she was involved in drug trafficking. Id.

100. Please see the case file and accompanying reports in State v. Chiapponi, No. 89-26532CF10B (Broward County Fla. 1989), located in the Broward County Clerk’s Office.
Court discussed the attorney-client privilege in relation to the "crime-fraud" exception. The Court set up a procedure to determine how the "crime-fraud" exception should be applied in privilege cases. Since Florida has implicitly recognized the "crime-fraud" exception, the opinion should offer guidance in privileged matters.

In Zolin, the IRS, as part of its investigation of the tax returns of L. Ron Hubbard, the founder of the Church of Scientology, attempted to enforce a summons on the Clerk of the Los Angeles County Court.

103. The "crime-fraud" exception to the attorney-client privilege simply stands for the proposition that confidential communications between an attorney and his client do not extend to communications made for the purpose of getting advice for the commission of a fraud or crime. Though the phrase "crime-fraud exception" is not generally used in Florida courts, the exception has been recognized in Florida cases. See Florida Mining & Materials v. Continental Casualty, 556 So. 2d 518 (Fla. 2d Dist. Ct. App. 1990); Eastern Air Lines, Inc. v. Gellert, 431 So. 2d 329 (Fla. 3d Dist. Ct. App. 1983); Leithauser v. Harrison, 168 So. 2d 95 (Fla. 2d Dist. Ct. App. 1964); see also FLA. STAT. § 90.502(4)(a) (1989). The "crime-fraud" exception applies to both the attorney-client privilege and the work-product doctrine. See In re Doe, 662 F.2d 1073 (4th Cir. 1981); In re Special September 1978 Grand Jury, 640 F.2d 49 (7th Cir. 1980); In re Grand Jury Proceedings (FMC), 604 F.2d 798 (3d Cir. 1979). The Third Circuit Court of Appeal stated:

The two privileges [attorney-client and work-product] are separate and distinct, but there is an overlap. Information furnished by the client to the lawyer may merge into his work-product; moreover, the overriding purpose of the two privileges is the same—to encourage proper functioning of the adversary system. From this viewpoint, there is no actual inconsistency in applying the crime-fraud exception to the work-product as well as to the attorney-client privilege. The rationale supporting the exception in both areas is virtually identical. The work-product privilege is perverted if it is used to further illegal activities as is the attorney-client privilege, and there are no overpowering considerations in either situation that would justify the shielding of evidence that aids continuing or future criminal activity.

In re Grand Jury Proceedings, 604 F.2d at 802.

The crime-fraud exception to attorney-client communications is becoming a popular tool to combat criminal activity of attorneys and their clients. As prosecutors aggressively pursue their cases, the Florida courts will find more and more cases involving confidential materials at their doorstep. See Glanzer & Taskier, Attorneys Before the Grand Jury: Assertion of the Attorney-Client Privilege to Protect a Client's Identity, 75 J. CRIM. L. & CRIMINOLOGY 1070 (1984); Silbert, The Crime-Fraud Exception to the Attorney-Client Privilege and Work-Product Doctrine, The Lawyer's Obligations of Disclosure, and the Lawyer's Response to Accusation of Wrongful Conduct, 23 AMER. CRIM. L. REV. 351 (1986).

for documents and two tapes in his possession concerning a pending suit. The Church of Scientology opposed the production of these materials by claiming they were privileged. The IRS claimed the materials fell within the "crime-fraud" exception because the material was in furtherance of future illegal conduct. The IRS urged the federal district court to listen to the tapes in making its privilege determination. The district court ruled that the tapes need not be produced, since they contained privileged attorney-client communications to which the crime-fraud exception did not apply. The district court refused to listen to the tapes in an in camera review to determine if the privilege existed. The court of appeal stated that the district court was powerless to grant the IRS demand for in camera review of the tapes because the Government's evidence of crime or fraud must come from sources independent of the attorney-client communications on the tape.

The United States Supreme Court, however, held that in camera review may be used to determine whether allegedly privileged attorney-client communications fall within the crime-fraud exception. Therefore, when determining whether material is privileged or not, the lower court may examine the material in camera before it makes its determination. The Supreme Court reasoned that in camera review was a lesser intrusion upon the confidentiality of the attorney-client relationship than public disclosure.

The Court also held that before the lower court could engage in an in camera review at the request of the party opposing the privilege, "that party must present evidence sufficient to support a reasonable belief that in camera review may yield evidence that establishes the exception's applicability." The Court believed that this would eliminate "fishing expeditions" and the enormous burden on the court system in examining voluminous records generated by parties opposing the privilege. The evidence does not have to be independent of the privileged materials and, in fact, may be used not only for the in camera review but can also be used for the ultimate showing that the

106. Id. at 2622.
107. Id.
108. Id. at 2632.
109. Id. at 2630.
110. 109 S. Ct. at 2630. This rule only applies to a party who opposes the privilege. The party that holds the privilege does not need to meet this criteria and may ask for in camera review of the privileged material at anytime. Id.
111. Id.
crime-fraud exception applies.

Finally, the Court stated that "the threshold showing to obtain in camera review may be met by using any relevant evidence, lawfully obtained, that has not been adjudicated to be privileged." In order for evidence to be adjudicated privileged, the lower court must make specific factual findings as to the privileged nature of the materials. Therefore, simply because one of the parties claims that the material is privileged does not prevent a court from considering the material. The court must make a specific factual finding regarding the privileged nature of the information to prevent its consideration.

Florida practitioners who have cases concerning privileged material should examine the procedures promulgated by Zolin when there is an attempt to abrogate the privilege using the "crime-fraud" exception. A "Zolin Inquiry" should be used to determine the privileged nature of the communications and the applicability of the "crime-fraud" exception.

V. WITNESSES

A. Impeaching One's Own Witness

Perhaps the biggest change in the Florida Evidence Code deals with impeachment. The legislature amended section 90.608 to allow impeachment of one's own witness. This brings Florida in line with the Federal Rules of Evidence which also allow impeachment of one's own witness. The change will probably cause some initial problems

112. Id. at 2632 (emphasis added).
113. 1990 Fla. Sess. Law Serv. 174 (West), amending Fla. Stat. § 90.608 (1989). Section 90.608 now reads as follows:
   Any party, including the party calling the witness, may attack the credibility of a witness by:
   (1) Introducing statements of the witness which are inconsistent with his present testimony.
   (2) Showing that the witness is biased.
   (3) Attacking the character of the witness in accordance with the provisions of s. 90.609 or s. 90.610.
   (4) Showing a defect of capacity, ability, or opportunity in the witness to observe, remember, or recount the matters about which he testified.
   (5) Proof by other witnesses that material facts are not as testified to by the witness being impeached.

114. See Fed. R. Evid. 607 ("The credibility of a witness may be attacked by
in criminal cases, since the prosecution may be inclined to call "adverse" witnesses and then impeach the witness in an attempt to use the impeaching evidence to bolster its case.\footnote{116} Since prior inconsistent statements used for impeachment purposes cannot be used as substantive evidence,\footnote{118} the State must be cautious, and the defense must be on guard to avoid having the impeaching statements argued to the jury as substantive evidence.\footnote{117} After a witness is impeached, opposing counsel should ask the court for a limiting instruction to inform the jury that the impeaching statement cannot be used as substantive evidence.

B. \textit{Impeachment by Other Witnesses with Inconsistent Material Facts}

Section 90.608(1)(e) allows proof, by other witnesses, that the material facts testified to are not the same as testified to by the witness being impeached.\footnote{118} One case worth noting was heard during the survey period. In \textit{Garcia v. State},\footnote{119} the defendant was charged with the first degree murder of two elderly women. There was little evidence in the case linking the defendant to the crime scene. However, the defendant was a farm field laborer at the same time and place as one of the State's witnesses. This witness overheard the defendant talk about the murder and testified about this conversation at trial. The defense attempted to impeach the witness by demonstrating that at the time of the alleged conversation, the defendant was no longer working at the farm.\footnote{120} The defense attempted to enter the payroll records to cast doubt on the credibility of the State's witness. The trial court disallowed this and the jury found the defendant guilty.\footnote{121}

The Florida Supreme Court reversed the defendant's conviction
and sentence of death in the case. The court found that the failure of the defense to impeach with the payroll records, plus the State's argument that the records were unavailable, lead the court to conclude that the error could not be harmless. The court reasoned that the payroll records could have impeached "a crucial link in the chain of circumstantial evidence." Without this link, there was little other evidence to tie the defendant to the crime. Therefore, the credibility of the witness was central to the State's case and failure to allow the jury to weigh this impeaching evidence against this witness justified the court's reversal of the conviction.

C. Bias

Demonstrating a witness's bias or motivation to testify falsely is one of the strongest arguments for the admissibility of what otherwise would be considered highly prejudicial evidence. Counsel should always examine a witness's testimony for any possible motivation or bias that would allow the admissibility of such evidence.

In McCrae v. State, the Third District Court of Appeal reversed the defendant's conviction of attempted murder when the trial court refused to allow defense counsel to demonstrate a witness's bias. In McCrae, the defendant attempted to elicit testimony that the State's sole witness, and the victim of the crime, was in fact a drug dealer who may have been shot by a third party during a drug deal. The defense argued that the trial testimony was an attempt to conceal that fact by blaming the shooting on the defendant. The district court dismissed the State's argument that this was merely a facade to demonstrate the witness's bad character, and stated that evidence which is inadmissible for one purpose can be admissible for another purpose under the rule of "limited admissibility." Since the State's case rested solely on the testimony of one witness, it was reversible error to exclude relevant evidence demonstrating the possible bias or motivation of the witness to testify falsely.

In Hernandez v. Ptomey, the Third District Court of Appeal

122. Id. at 129.
123. Id.
124. Id.
125. 549 So. 2d 1122 (Fla. 3d Dist. Ct. App. 1989).
126. Id. at 1123.
again discussed bias and motivation of a witness. In Hernandez, defense counsel attempted to elicit that the State’s witness was under internal review investigation for actions in other cases. The court recognized that the defense has an absolute right to examine any possible motivation of a State witness when that motivation may skew the witness’ testimony in favor of the State. However, the district court went on and discussed that “charges of unrelated offenses against a defense witness are not proper grounds for impeachment.” The court concluded that if the State can demonstrate, based on the pending charges, that the defense witness would color his testimony, then the bias testimony should be admissible. Note that the State should be cautious and avoid attempting to demonstrate a “general bias” by the witness against the State. Though most witnesses being charged by the State will probably have a general bias against the State, the testimony regarding a pending charge (such as murder) would probably be more prejudicial than the general bias evidence would be probative.

D. Negative Impeachment

Florida case law has stated that mere negative use of a police report for impeachment should not be allowed. However, this blanket restriction is often interpreted too broadly. In State v. Johnson, the preeminent case on negative impeachment, the Florida Supreme Court set forth a four-part test to determine if negative impeachment should be allowed. The court stated that “[i]t depends, as we have said, upon 1) being critical 2) upon a material and vital point 3) reasonably exculpatory of defendant, within sound judicial discretion, and 4) after ‘in camera’ review and deletion of any improper matter.” The “critical” issue in Johnson was the fact that the officer testified at trial that the defendant had white powder on his jacket but left this information out of his police report. The Johnson court found that failure to allow

129. Id. at 758.
130. Id. (emphasis in original)
131. Id.
132. See Fulton v. State, 335 So. 2d 280 (Fla. 1976) (discussing that a general bias is not a proper subject for impeachment).
133. State v. Johnson, 284 So. 2d 198 (Fla. 1973).
134. Id. at 201.
135. Id. at 199. The white powder was considered important because the entry point of the burglary in the Johnson case was a two by three foot hole surrounded by a white powdery substance.
the use of negative impeachment in that case caused reversible error. 136

Today, Florida courts use the *Johnson* case as a blanket restriction on the use of negative impeachment for police reports and rarely consider the four-part test promulgated by the Florida Supreme Court. A prime illustration of this is the case of *Jimenez v. State*. 137 In *Jimenez*, the defendant appealed his conviction for possession and sale of cocaine on the grounds the trial court precluded him from impeaching the officer's testimony regarding an incriminating fact which the officer left off his police reports. 138 At trial, the officer testified that he "observed the defendant arrive at the scene of the transaction carrying a silver box and exit shortly thereafter with a bag which officers had earlier filled with cash." 139 The officer did not note this in his police reports. 140 The appellate court affirmed the conviction concluding that no error had occurred concerning the precluded use of negative impeachment on this issue. 141 However, the appellate court failed to even acknowledge that this evidence may have fit within the four-part test enunciated in *Johnson*. 142 Since the charge was for sale and possession of cocaine, it would seem that the methodology of the transaction could be critical on the material issue of possession and, therefore, could have exculpated the defendant if the jury did not believe the officer. 143 It is hard to discern how the failure to report the methodology of a drug transaction in *Jimenez* is any less critical than the failure to report a white powdery substance on a jacket in *Johnson*. However, this will be left for another day and another court. 144

136. *Id.* at 200.
137. 554 So. 2d 15 (Fla. 3d Dist. Ct. App. 1989).
138. *Id.* at 16.
139. *Id.* at 16.
140. It seems somewhat odd that an officer doing a drug bust would fail to mention in any of his reports the method by which the contraband was transported.
141. *Jimenez*, 554 So. 2d at 16.
142. See *supra* note 134 and accompanying text.
143. The author believes the current viability of negative impeachment may be in doubt.
144. The continued vitality of *Johnson* should also be questioned in light of the changes in the rules of criminal discovery. Florida Rule of Criminal Procedure 3.220 now restricts the use of depositions in cases where the officer's "knowledge of the case is fully set out in a police report or other statement furnished to the defense." FLA. R. CRIM. P. 3.220(b)(1)(i)(b) (emphasis added). Since the incident must be "fully set out," this implies that material left out of the report should in all fairness be explored by defense counsel by the use of negative impeachment. Additionally, depositions in criminal misdemeanor cases no longer exist, unless
The Florida Supreme Court, in *Edwards v. State*,\(^{145}\) settled a conflict between the district courts of appeal regarding the prejudicial use of a witness' drug addiction during trial. In *Edwards*, the evidence at trial established that the defendant stabbed the victim with a knife. During the trial, the defense proffered the cross-examination testimony of the victim concerning her prior drug use. The proffered testimony demonstrated that the victim had been using drugs for twenty years but had been clean for the past several years. The victim's proffer also included the fact that she was not using drugs at the time of the incident and that during her testimony she was not using drugs.\(^{146}\) Defense counsel argued for the admittance of the victim's prior drug use to demonstrate that the victim was not a credible witness and that her prior drug use would impair her ability to perceive and remember. The trial court rejected this argument and excluded the proffered testimony but allowed the defense to question the victim about drug use on the days preceding the incident and on the night of the incident.\(^{147}\)

The Fourth District Court of Appeal upheld the defendant's conviction and the Florida Supreme Court affirmed.\(^{148}\) The Florida Supreme Court noted that authoritative commentators have taken adverse views regarding the relevance of prior drug usage.\(^{149}\) The court cited Professor Ehrhardt and Professor McCormick's views that evidence of prior drug usage, other than during the incident or at trial, is admissible only if it can be demonstrated to be "relevant to the witness's ability to observe, remember and recount."\(^{150}\) However, the court noted that Professor Graham took a contrary view indicating that drug addiction possesses at least the minimum probative value necessary to establish relevancy, and the evidence could be excluded if it leads to unfair prejudice or could possibly mislead the jury.\(^{151}\) The Supreme Court

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145. 548 So. 2d 656 (Fla. 1989).
146. *Id.*
147. *Id.*
148. *Id.*
149. *Id.* at 657.
150. *Id.* (quoting C. EHRHARDT, FLORIDA EVIDENCE § 608.6 (2d ed. 1984)); *see also* E. CLEARY, MCCORMICK ON EVIDENCE § 45 (3d ed. 1984).
151. *Edwards*, 548 So. 2d at 657-58 (citing M. GRAHAM, HANDBOOK OF FLOR-
held that the introduction of evidence of drug use for the purpose of impeachment would be excluded unless:

(a) it can be shown that the witness had been using drugs at or about the time of the incident which is the subject of the witness's testimony;
(b) it can be shown that the witness is using drugs at or about the time of the testimony itself; or
(c) it is expressly shown by other relevant evidence that the prior drug use affects the witness's ability to observe, remember and recount.\(^\text{152}\)

This three-part test should aid the trial courts in discerning when impeachment by drug use is admissible at trial. Through Professor Graham's view that drug addiction possesses at least minimum probative value, it would seem that if the drug addiction did not fall within the three-part test, it would probably be more prejudicial than probative and should be excluded.

F. Mode and Order of Interrogation and Presentation

Two cases during the survey period established the importance of understanding the bounds of cross-examination. In *Eberhardt v. State*,\(^\text{153}\) the appellate court reversed the defendant's conviction and sentence for burglary when the trial court failed to allow the defense to question and explore all the facts relevant to the defendant's intoxicated state or condition. The State, on direct examination, elicited testimony that two witnesses found the defendant asleep in a desk chair inside the burglarized structure. On cross-examination, defense counsel was prohibited from asking the witnesses whether the defendant appeared to be under the influence of drugs or alcohol. The appellate court found this to be error, since the State opened the door by asking about the defendant's condition and appearance.\(^\text{154}\)

The State also elicited testimony from a police witness regarding statements made by the defendant. When defense counsel attempted to elicit the whole conversation from the witness, the State objected on

\(^{152}\) *Id.*

\(^{153}\) 550 So. 2d 102 (Fla. 1st Dist. Ct. App. 1989).

\(^{154}\) *Id.* at 105.
hearsay grounds, and the trial court sustained the objection. The appellate court once again found error and stated that the "rule of completeness" allowed admission of the "balance of the conversation as well as other related conversations that in fairness are necessary for the jury to accurately perceive the whole context of what has transpired between the two." Trial counsel should be aware that once a statement is elicited, opposing counsel has the right to explore other parts of the conversation free from any hearsay objections.

In Ellis v. State, the defendant was convicted of trafficking in cocaine and conspiracy to traffic in cocaine. After the State rested its case, the defendant took the stand and denied both of the charges. The defense counsel argued that these denials did not open the door for further questioning by the State. The trial court disagreed and instructed the jury to disregard the defendant's testimony after he refused to answer the State's cross-examination questions. The appellate court affirmed the convictions and noted that once the defendant takes the stand he does so as any other witness and, therefore, may be cross-examined as any other witness. Before committing a client to the stand, defense counsel should always inform his client that he will be treated, for cross-examination purposes, as any other witness and will be unable to reclaim the safeguards against self-incrimination whenever cross-examination becomes inconvenient.

VI. EXPERTS

One of the most interesting subjects to come along in recent years, in the area of expert testimony, is the psychological autopsy. The admissibility of such evidence was first discussed in this state in Jackson v. State. In Jackson, Judge Glickstein concurred specially and framed the issue as follows:

[Whether a psychological autopsy performed on a suicide victim is

155. Id.
156. FLA. STAT. § 90.108 (1989).
157. Eberhardt, 550 So. 2d at 105.
158. 550 So. 2d 110 (Fla. 2d Dist. Ct. App. 1989).
159. Id.
160. Id.
161. A psychological autopsy is a retrospective look at an individual's suicide to try to determine what lead the person to choose death over life.
162. 553 So. 2d 719 (Fla. 4th Dist. Ct. App. 1989).
proper evidence in a criminal case charging the defendant with child abuse in the form of the defendant causing her seventeen-year old daughter mental injury by requiring her to work as a strip dancer to earn money and that the defendant's demands on the child caused her such stress that she took her own life to escape the situation.163

The State charged the defendant with child abuse, pursuant to section 827.04(1) of the Florida Statutes. In order to help establish the child abuse, the State used a psychological autopsy to demonstrate that the nature of the relationship between the defendant and her daughter was a substantial contributing factor in the daughter’s decision to commit suicide. The underlying facts gleaned from Judge Glickstein’s concurring opinion demonstrate that the victim was forced, by her mother, the defendant, to work as a strip dancer at a nightclub to earn money.164 Doctor Jacob, the State’s expert witness, established the foundation for his expert opinion by testifying to his previous work as a pioneering psychologist at UCLA, interviewing people who attempted suicide and the surrounding basis of his findings during that study.165 He also testified that psychological autopsies are required by many hospitals when there is a suicide. The doctor then examined the life of Tina Mancini, the teenage victim. At trial, the doctor brought out a previous suicide attempt of the victim, her dysfunctional family atmosphere, her attempts to get away from her mother, her calls for help, and the method of her death.

The appellate court found that the expert witness’ review of the victim’s school records, police reports, medical records, testimony from various witnesses at the trial, and an incident report from an earlier suicide attempt established the foundation for his expert opinion that the relationship between the defendant and her daughter contributed to the daughter’s decision to commit suicide.166 Additionally, the court found that the State presented sufficient evidence to establish that the “psychological autopsy is accepted in the field of psychiatry as a method of evaluation for use in cases involving suicide and the trial judge acted within his discretion in admitting this evidence at trial.”167

163. Id. at 720 (Glickstein, J., concurring).
164. Id. at 719.
165. Id. at 721.
166. Id. at 720.
167. Id.
Hearsay case law once again tops the list for the total number of evidentiary cases contributed to this area. However, few cases made any noticeable changes in the evidentiary law, though a few are worth discussing.

A. Inconsistent Statements as Substantive Evidence

Florida Statutes section 90.801(2)(a) allows a prior inconsistent statement to be used as substantive evidence when certain prerequisites are met.¹⁶⁸ In Dudley v. State,¹⁶⁹ these prerequisites were not met. The facts in Dudley surround a plan to kill an elderly woman who had fired the defendant’s mother from her job as the woman’s companion. The defendant, along with her boyfriend, went to the woman’s house and cut her throat. During the trial, the State attempted to have the defendant’s former boyfriend called as a witness to elicit statement’s made by the defendant regarding the murder. The statements were made to a detective and an assistant state attorney during the police investigation. The trial court granted the State’s request, and the State impeached the witness with the prior inconsistent statements.¹⁷⁰ The trial court initially instructed the jury that the testimony could not be considered as substantive evidence. However, the State, in its final argument to the jury, and its argument before the judge, argued the prior inconsistent statement as substantive evidence.¹⁷¹

On appeal, the State relied on section 90.801(2)(a) for the proposition that the statements could be argued as substantive evidence, reasoning that they fell within the “other proceeding” section of the rule.¹⁷² The Florida Supreme Court disagreed and held “that this type of law enforcement investigation and inquiry was not an ‘other proceed-

¹⁶⁸. Fla. Stat. § 90.801(2) (1989). This section 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 his testimony and was given under oath subject to the penalty of perjury at a trial, hearing or other proceeding or in a deposition

¹⁶⁹. 545 So. 2d 857 (Fla. 1989).
¹⁷⁰. Id. at 858.
¹⁷¹. Id. at 859.
¹⁷². Id.
ing' under the code and, consequently, section 90.801(2)(a) did not apply. 173

B. Prior Consistent Statements

A typical problem associated with the use of prior consistent statements is the failure of counsel attempting to admit this evidence to properly have a time line of events squarely in place. 174 Basically, what this amounts to is knowing whether the consistent statement was made before or after the charge of improper influence, motive, or recent fabrication. State v. Lazarowicz 175 illustrates this problem. In Lazarowicz, the State charged the defendant with sexual battery of a child by a person in position of familial authority, pursuant to section 794.011 and 794.041 of the Florida Statutes. The defendant's seventeen-year old daughter testified that when she asked her father's permission to attend a school function with her boyfriend, her father denied the request and forced her to engage in sexual intercourse. He then rescinded the refusal. The trial court admitted the statements made by the daughter prior to trial, which were consistent with her in court testimony. 176

The appellate court found that the prior consistent statements were in fact made after an improper motive arose. 177 The defense claimed that the daughter had fabricated the charges of sexual battery to prevent her father from being in a position to prevent her from maintaining an active sexual relationship with her boyfriend. 178 The daughter's motive was indicated by her failure to report her father to the authorities until one week after she first engaged in sexual intercourse with her boyfriend. 179 Statements made after this improper motive would not be admissible under section 90.801(2)(b). At trial, various witnesses testified regarding the prior consistent statements. However, all these statements occurred after the improper motive arose, not before, and therefore, all the statements were inadmissible under section 90.801(2)(b).

173. Id.
175. 561 So. 2d 392 (Fla. 3d Dist. Ct. App. 1990).
176. Id. at 393.
177. Id. at 394.
178. Id. at 393.
179. Id.
In *Stewart v. State*, a prior consistent statement was allowed because the charge of recent fabrication occurred after the statement. In *Stewart*, the defendant was charged with first degree murder. During trial, the state elicited testimony from a witness that the defendant had related details of the crime to him. The defense claimed that the witness fabricated his testimony to obtain favorable treatment from the State in his sentencing on other charges. However, the prior consistent statement, regarding the details of the crime, was made before the convictions had been obtained and the sentencing pending. Therefore, the statements were not hearsay under section 90.801(2)(b).

C. Spontaneous Statement and Excited Utterance

An interesting case analyzing both the spontaneous statement and excited utterance exceptions to the hearsay rule arose in the case of *Sunn v. Colonial Penn Insurance Co.* In that case, after the plaintiff purchased a boat, he then purchased insurance coverage for it from Colonial Penn Insurance Company. The plaintiff conspired with another individual, Joseph Keeton, to burn the boat and collect the insurance proceeds. The plan backfired when the boat exploded. Joseph Keeton was badly burned and returned home. After approximately 20 hours, Mr. Keeton told his son how he got the burns and informed him about the conspiracy. The insurance company denied the plaintiff’s claim for reimbursement for the loss of the boat because the coverage excluded intentional acts done by the policy holder. On a motion for summary judgment, the parties stipulated that judgement could be entered for the insurance company if the statements constituted competent evidence. The trial court held that the statements were admissible and granted summary judgment in favor of the insurers. The plaintiffs appealed.

On appeal, the insurance company argued that the statements were properly admitted as spontaneous statements or excited utter-

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180. 558 So. 2d 416 (Fla. 1990).
181. Id. at 419.
182. Id.
184. FLA. STAT. § 90.803(2) (1989).
185. 556 So. 2d 1156 (Fla. 3d Dist. Ct. App. 1990).
186. Id. at 1157.
187. Id.
188. Id.
The appellate court listed the factors to be analyzed in determining whether a statement qualifies under the exceptions, stating that these were "(a) the time gap between the incident and the statement, (b) the voluntariness of the statement, (c) whether the statement is self-serving, and (d) the declarant's mental and physical state at the time the statement was made." 189

The appellate court found that the most important of these factors is the duration of time between the incident and the statement. 190 The longer the time, the more chance of reflective thought in which to fabricate a statement. The appellate court held that the case did not provide a sufficient basis to conclude that the declarant made the statements without reflective thought and, thus, the standards for spontaneity as to the hearsay statements had not been proven by the insurers. 191 Therefore, it was error to grant the summary judgement in favor of the defendant. 192

D. Statements for Purposes of Medical Diagnosis

In Bradley v. State, 193 the appellate court reversed a rape conviction when the trial court erroneously admitted a hearsay statement that the victim was raped. The victim was raped by the defendant on July 4, 1987. The victim testified that a month later she told her mother about the incident. A few days later, the victim went to a family planning clinic for a pregnancy test and physical exam. While she was there she told a staff member that she had been raped on July 4, 1987 and the staff member wrote down "raped 7-4-87" on the victim's health history form. 194

At trial, the State entered this form as a statement for medical diagnosis under section 90.803(4). 195 The defense objects to the part of the form where it mentioned the victim had been raped. The trial

189. Id. at 1157-58.
190. 556 So. 2d at 1158.
191. Id.
192. Compare Edmond v. State, 559 So. 2d 85 (Fla. 3d Dist. Ct. App. 1990) (where the court held that an 11 year old witness' emotional description of an assailant to the police approximately two to three hours after the incident was admissible as an excited utterance, because the child was still excited and hysterical at the time the statement was made).
194. Id. at 446.
court overruled the objection and the jury found the defendant guilty.\textsuperscript{196} The appellate court reversed and reasoned that it was improper to allow the statement into evidence.\textsuperscript{197} The court found that only "statements which describe the inception or cause of the injury if they are reasonably pertinent to the treatment are . . . within the exception."\textsuperscript{198} The purpose of the victim's visit was not to receive treatment for injuries due to the rape but to substantiate her suspicion that she was pregnant. Therefore, the statement the victim gave to the clinical staff member was not reasonably pertinent to the diagnosis of whether the victim was pregnant, and it was error to allow the statement into evidence as a hearsay exception under 90.803(4).

In \textit{Danzy v. State},\textsuperscript{199} the same district court of appeal came to an entirely different conclusion than the \textit{Bradley} case. In this case, the victim was staying with her girlfriend and the defendant while recovering from a car accident. On the morning of the crime, the victim went to wake the defendant for work. The defendant then picked the victim up and carried her into the living room where the sexual assault occurred. The victim attempted to leave the apartment and fell down the stairs while exiting.

Upon returning to the medical center for treatment of her injuries, the doctor noticed that the victim was obviously upset and felt it was necessary to learn why the victim was so upset and why she had fallen. Upon learning of the incident the doctor instructed the victim to go to the hospital to obtain a rape examination.\textsuperscript{200}

At trial, the defendant objected to the testimony of the doctor and his nurse regarding the rape, arguing that it was hearsay. The appellate court found that the statement fell within the hearsay exception for purposes of medical diagnosis\textsuperscript{201} and distinguished the \textit{Bradley} case.\textsuperscript{202} The court stated that in \textit{Bradley} the only purpose was to determine whether the victim was pregnant.\textsuperscript{203} In contrast, in \textit{Danzy} the statement made to the doctor was made only hours after the incident had occurred and was made after repeated requests by the doctor who believed his patient's emotional condition was a consideration in his ex-

\begin{itemize}
  \item \textsuperscript{196} \textit{Bradley}, 546 So. 2d at 446.
  \item \textsuperscript{197} \textit{Id.} at 447.
  \item \textsuperscript{198} \textit{Id.} (quoting C. EHRHARDT, FLORIDA EVIDENCE § 803.4 (2d ed. 1984)).
  \item \textsuperscript{199} 553 So. 2d 380 (Fla. 1st Dist. Ct. App. 1989).
  \item \textsuperscript{200} \textit{Id.}
  \item \textsuperscript{201} \textit{See FLA. STAT. § 90.803(4) (1989).}
  \item \textsuperscript{202} \textit{Danzy}, 553 So. 2d at 381.
  \item \textsuperscript{203} \textit{Id.}
\end{itemize}
amination.\textsuperscript{204} Therefore, the court found that the "circumstances under which the statement was made and the purpose for which the same was elicited thus insure its trustworthiness and admissibility under the evidence code."\textsuperscript{205}

VIII. CONCLUSION

The vast number of evidentiary cases will continue to fill the case books on a daily basis. Attorneys should be aware of the new changes that have been made by our legislature and listed herein. Every attorney should strive to understand how the changes can be applied in a courtroom setting. Some of these changes will go by unnoticed, others are sure to generate even more case law. Though not every evidentiary case will cause earth-shaking changes, the methodology and analysis supplied by the appellate courts will aid the trial attorney in the application of these rules during trial.

With the volume of new evidentiary and substantive case law being produced every day, the trial attorney should strive to cull through the cases to develop a notebook of helpful cases. In this manner the attorney will have the cases he needs at his fingertips. With the advent of computer technology, the trial attorney can keep a simple notebook system of case law updated on a regular basis with a minimum of work.

\textsuperscript{204} Id.
\textsuperscript{205} Id. The court focused on the rationale behind the admissibility of the statements by focusing in on the patient's motive to be truthful, because the diagnosis or treatment will depend on what the patient will say. Id. An additional degree of trustworthiness is displayed when the information will be relied upon by the physician in making his diagnosis or determining treatment.