DOMESTIC VIOLENCE: EVIDENCE (JUNE 2020)

A. PRIVILEGES APPLICABLE TO DOMESTIC VIOLENCE

Domestic Violence Advocate-Victim Privileges - § 90.5036.

- Section 90.5036(1)(d) - Any communication between a domestic violence advocate and a victim is "confidential" if it is related to the incident of domestic violence for which the victim is seeking assistance and if it is not intended to be disclosed to third persons other than:
    - Those persons present to further the interest of the victim in the consultation, assessment, or interview.
    - Those persons to whom disclosure is reasonably necessary to accomplish the purpose for which the domestic violence advocate is consulted.
- Section 90.5036(2) - A victim has a privilege to refuse to disclose and the privilege to prevent any other person from disclosing a confidential communication made by the victim to a domestic violence advocate or any record made in the course of advising, counseling, or assisting the victim.

Clergy-parishioner privilege – § 90.505.

- Any communication between a member of the clergy and a person is "confidential" if made privately for the purpose of seeking spiritual counsel and advice from the member of the clergy in the usual course of his or her practice or discipline and not intended for further disclosure except to other persons present in furtherance of the communication. § 90.505.
    - The court held that the clergy communication privilege statute contains no exceptions. *Nussbaumer v. State*, 882 So. 2d 1067 (Fla. 2d DCA 2004).
        - Further, the 2d DCA held that courts must be careful when examining the nature of the communication – specifically whether the clergy person is engaging in "spiritual counsel" – so as not to run afoul of the ecclesiastical abstention doctrine. Pursuant to the ecclesiastical abstention doctrine, courts do not interpret religious doctrine or otherwise inquire into matters involving religious dogma. See *Southeastern Conference Ass'n of Seventh-Day Adventists, Inc. v. Dennis*, 862 So. 2d 842, (Fla. 4th DCA 2003).

Attorney-Client Privilege - § 90.502.

- Attorney-client privilege is relatively limited in scope and, thus, does not require exclusion of evidence voluntarily submitted by an attorney in violation of that privilege. *State v. Sandini*, 395 So. 2d 1178 (Fla. 4th DCA 1981).

Spouse Privilege; § 90.504.

- No privilege "prevents the Government from enlisting one spouse to give information concerning the other or to aid in the other's apprehension. It is only the spouse's testimony in the courtroom that is prohibited." *Trammel v. U.S.*, 445 U.S. 40 (1980); *State v. Grady*, 811 So. 2d 829 (Fla. 2d DCA 2002).

- Statements of a spouse that would be privileged at trial can be used to establish cause to obtain a search warrant or to investigate a suspect based on those statements. *State v. Grady*, 811 So. 2d 829 (Fla. 2d DCA 2002).

- Husband-wife evidentiary privilege does not apply to criminal acts by one spouse.

    - A spouse has a privilege, during and after the marital relationship, to refuse to disclose, and to prevent another from disclosing, communications which were intended to be made in confidence between the spouses while they were husband and wife.

    - Section 90.504(3)(b). There is no privilege in a criminal proceeding in which one spouse is charged with a crime committed at any time against the person or property of the other spouse or the person or property of a child of either. *Valentine v. State*, 688 So. 2d 313 (Fla. 1996).

B. ALLOCATION OF DECISION MAKING/FINDER OF FACT

Question of Fact for the Trier

- **Emotional Distress:** The court looked to the 1st District Court of Appeal *in McMath v. Biernacki*, 776 So. 2d 1039 (Fla. 1st DCA 2001), agreeing with the First DCA's finding that in deciding whether an incident or series of incidents creates substantial emotional distress that distress should be judged on an objective, not subjective, standard and, even if a subjective standard is used, a person does not need to be reduced to "tears or hysteria in order to be considered substantially emotionally distressed." *D.L.D., Jr. v. State*, 815 So. 2d 746 (Fla. 5th DCA 2002).

- **Stalking:** The court's finding regarding whether following and repeatedly telephoning the victim fell within the statutory definition of stalking under the domestic violence statute so as to permit the issuance of an injunction was a question of fact for the trier of fact and was not clearly erroneous. The stalking statute (§ 784.048) was found not to be unconstitutionally vague or overbroad. *Biggs v. Elliot*, 707 So. 2d 1202 (Fla. 4th DCA 1998).

C. CONFIDENTIAL RECORDS

- A Petitioner's Place of Residence May Be Kept Confidential for Safety Reasons. § 741.30(6)(a)(7). *See also* Family Law Form 12.980(h), Request for Confidential Filing of Address, and § 119.071(2)(j)1.

D. DISCOVERY

- The court may not bar the opportunity for discovery but may limit the time in which a party may engage in discovery.
- "The court must balance the need to expedite the hearing and the need to ensure that the parties' due process rights are not violated. The trial court is imbued with discretion to limit the time frame and nature of discovery in such cases and can do so by examining individual discovery requests on a case-by-case basis." *Nettles v Hoyos*, 138 So. 3d 593 (Fla. 5th DCA 2014).

E. JUDICIAL NOTICE

It is Improper for the Court to Take Judicial Notice of Service which is an Essential Element that the State is Required to Prove.

  - *Cordova v. State*, 675 So. 2d 632 (Fla. 3d DCA 1996).

- Notice of injunction is an essential element of charge of violating its provisions.
- Return of service, while hearsay, was admissible in evidence under public records exception.
- Trial courts may not take judicial notice of fact that the defendant was served with an injunction.
- The fact that the defendant was served was not generally known within territorial jurisdiction of the court.
- It was not the type of fact that was not subject to dispute because it was capable of being determined by a source whose accuracy could not be questioned.
  - However: Trial courts may allow the State to use "permissive inference" to establish that the defendant was served with an injunction.
    - Permissive inference allows, but does not require, the trier of fact to infer elemental fact upon proof of a basic fact and places no burden on the defendant.

- Such inference passes the rational connection test, as fact of service more likely than not flowed from the return of service.

- The District Court of Appeal held that the defendant was entitled to a judgment of acquittal on the charge of violating a domestic violence injunction, as the trial court could not properly take judicial notice of an essential element that the State was required but failed to prove for conviction. *Hernandez v. State*, 713 So. 2d 1120 (Fla. 3d DCA 1998).

Court Records

The court can take judicial notice of a record from any Florida or U.S. Court when imminent danger to persons or property has been alleged and when it is impractical to give prior notice to the parties of the intent to take judicial notice. An opportunity to present evidence relevant to the propriety of taking judicial notice may be deferred until after judicial action has been taken. If judicial notice is taken, the court shall file a notice in the pending case of the matters judicially noticed within 2 business days. § 90.204(4).

F. BATTERED SPOUSE SYNDROME (BSS) or (BWS)

Admissible Against Batterers to Bolster Credibility of Victim

- "Where relevant, evidence of BWS may be admitted through a qualified expert to enlighten jurors about behavioral or emotional characteristics common to most victims of battering and to show that an individual or victim-witness has exhibited similar characteristics." *Commonwealth v. Goetzendanner*, 679 N.E. 2d 240 (1997).

- The Iowa Supreme Court allowed the use of expert testimony on BWS with respect to the victim's recantation. The expert did not offer an opinion on the specific victim's credibility but instead testified concerning the medical and psychological syndrome present in battered women generally. *State v. Griffin*, 564 N.W.2d 370 (Iowa 1997).

- BWS is admissible to bolster the credibility of a victim who recants their story. *People v. Morgan*, 58 Cal.App.4th 1210 (Cal. Ct. App.1997).

- The defendant was convicted in a jury trial in the circuit court, Miami-Dade County, of second-degree murder of her live-in boyfriend. The defendant appealed. On motion for rehearing, the District Court of Appeal held that the testimony of the victim's ex-wife that the victim never abused her in 29 years of marriage was relevant to battered woman's syndrome defense. *Gonzalez-Valdes v. State*, 834 So. 2d 933 (Fla. 3d DCA 2003).

BSS is Admissible as a Defense by Those Suffering from the Condition

- *State v. Hickson*, 630 So. 2d 172 (Fla. 1993).

- But see *Trice v. State*, 719 So. 2d 17 (Fla. 2d DCA 1998). There was no error in prohibiting BSS relating to the victim where the expert could not testify that the victim was suffering from such at the time of the homicide.

G. STATEMENTS BY WITNESSES: FLORIDA RULE OF CRIMINALPROCEDURE 3.220(B)(1)(B)

The State Must Disclose Prior Statements of Prosecution Witness

- The State's failure to disclose exculpatory statements made by the witness who testified to the contrary at trial was reversible error. *Roman v. State*, 528 So. 2d 1169 (Fla. 1988).

The State Must Disclose Defense Witness Statements.

  - *Sun v. State*, 627 So. 2d 1330 (Fla. 4th DCA 1993).

The Reference to "Statements" Is Limited to Written Statements or Contemporaneously Oral Statements.

- *Watson v. State*, 651 So. 2d 1159 (Fla. 1994).

- The expert's oral statement was not discoverable; however, the State must disclose a witness's oral statement if that statement materially alters a prior written or recorded statement previously provided to the defendant. *State v. Evans*, 770 So. 2d 1174 (Fla. 2000).

State Is Not Charged with Knowledge of Defendant's Statement to State Witness.

- "We agree with the trial court that none of the rules of criminal procedure relating to discovery require the State to disclose information which is not within the State's actual or constructive possession." *Sinclair v. State*, 657 So. 2d 1138 (Fla. 1995).

- *Limited by implication*: Where there was no evidence on the record that the State did not have knowledge before the trial of a witness's information; and where the State did not notify the defense of the witness's information before trial, the court is required to hold a Richardson hearing to determine whether the State had actual or constructive knowledge of the information before trial. The court found the State failed to inform the defense, thus triggering a reversal. *McCray v. State*, 640 So. 2d 1215 (Fla. 5th DCA 1994) (citing *Richardson v. State*, 246 So.2d 771 (Fla. 1971).

Prosecutor's Trial Preparation Notes, Work Product, Not Subject to Disclosure

Where the prosecutor's trial preparation notes did not reflect verbatim statements of any witness interviewed, had not been adopted or approved by the person to whom they were attributed, and included interpretation of remarks made by witnesses, they were not subject to disclosure. *Williamson v. Dugger*, 651 So. 2d 84 (Fla. 1994).

Expert Witness Testimony; Examined Using the *Daubert* Standard

- In 2019, the Florida Supreme Court adopted the *Daubert* standard when it amended §§ 90.702 and 90.704 of the Florida Evidence Code, replacing the *Frye* standard for admitting certain expert testimony. See *In re Amendments to Florida Evidence Code*, 278 So. 3d 551 (Fla. 2019), reh'g denied, SC19-107, (Fla. Aug. 30, 2019).

- The Court retreated from its prior rejection of the *Daubert* standard finding "the *Daubert* amendments remedy the deficiencies of the *Frye* standard." Id. at 6.

- "Whereas the *Frye* standard only applied to expert testimony based on new or novel scientific techniques and general acceptance, *Daubert* provides that 'the trial judge must ensure that any and all scientific testimony or evidence admitted is not only relevant, but reliable.'" Id. (citing *Daubert v. Merrell Dow Pharm., Inc.*, 509 U.S. 579 (1993)).

The test to determine the admissibility of an expert's opinion is codified under section 90.702 as follows:

- **"Testimony by experts**—If scientific, technical, or other specialized knowledge will assist the trier of fact in understanding the evidence or in determining a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education may testify about it in the form of an opinion or otherwise, if:

    - The testimony is based upon sufficient facts or data;

    - The testimony is the product of reliable principles and methods; and

    - The witness has applied the principles and methods reliably to the facts of the case." § 91.702.

- "Under *Daubert*, a trial judge has a gatekeeping role to 'ensure that any and all scientific testimony or evidence admitted is not only relevant but reliable.' The trial judge is charged with this gatekeeping function 'to ensure that speculative, unreliable expert testimony does not reach the jury' under the mantle of reliability that accompanies the appellation 'expert testimony." *Kemp v. State*, 280 So. 3d 81, 88 (Fla. 4th DCA 2019), review denied, SC19-1931, 2020 WL 1066018 (Fla. Mar. 5, 2020) (citation omitted).

- "[T]he test under *Daubert* is not the correctness of the expert's conclusions but the soundness of his methodology." *Daubert v. Merrell Dow Pharm., Inc.,* 43 F.3d 1311, 1318 (9th Cir. 1995).

- However, an expert's opinion must be based upon "knowledge," not merely "subjective belief or unsupported speculation." *Daubert*, 509 U.S. at 590, 113 S.Ct. 2786.

- "Nothing in *Daubert* requires a court 'to admit opinion evidence that is connected to existing data only by the *ipse dixit* of the expert,' and "[a] court may conclude that there is simply too great an analytical gap between the data and the opinion proffered." *Kemp v. State,* 280 So. 3d 81, 88 (Fla. 4th DCA 2019)

Basis of opinion testimony by experts - § 90.704

- "The facts or data upon which an expert bases an opinion or inference may be those perceived by, or made known to, the expert 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. Facts or data that are otherwise inadmissible may not be disclosed to the jury by the proponent of the opinion or inference unless the court determines that their probative value in assisting the jury to evaluate the expert's opinion substantially outweighs their prejudicial effect." § 90.704

- **Practice Note**: It is not necessary, however, for the proponent of an expert witness to show that the facts supporting the opinion of the witness are admissible in evidence. For example, the opinion of an expert witness can be based in part on hearsay evidence. The opinion is admissible even though the supporting hearsay evidence is not. § 19:10. Expert testimony, 5 Fla. Prac., Civil Practice § 19:10 (2020 ed.)

H. STATEMENTS BY VICTIMS

Reluctant v. Recanting Victim

- Fairness of Opposing Party and Counsel

    - A lawyer shall not unlawfully obstruct another party's access to evidence or otherwise unlawfully alter, destroy, or conceal a document or other material that the lawyer knows or reasonably should know is relevant to a pending or a reasonably foreseeable proceeding; nor counsel or assist another person to do any such act. Florida Rules of Professional Conduct Rule 4-3.4.

    - The State appealed an order dismissing a felony battery. An adversarial hearing occurred, but the state had neglected to subpoena the witnesses to the events. The victim was present and claimed that she instigated the argument and that the injuries she sustained were a result of her own actions, directly

contradicting the eyewitness account. The victim claimed she never wanted charges brought against the defendant. The judge dismissed the charges despite the state's objection. In relying on both Florida Rule of Criminal Procedure 3.133(b) and *State v. Hollie*, 736 So. 2d 96 (Fla. 4th DCA 1999), the Fourth District Court of Appeal held that because the hearing was an adversarial hearing, where the defendant never motioned the court for a dismissal, and because probable cause was clearly established, a dismissal was clearly in error. Judge Warner concurred in a separate opinion, finding that the lower court made an additional error in finding that consent to a battery is a defense. Consent is only a defense in cases of sexual battery, NOT domestic violence. *State v. Conley*, 799 So. 2d 400 (Fla. 4th DCA 2001).

Cross Examination of Victim; Fundamental Right

- The defendant, charged with aggravated stalking and violation of the restraining order, filed a writ of prohibition after the trial court denied his motion for disqualification. The Fourth District Court of Appeal granted the defendant's request and remanded the case back to the trial court for the assignment of a new judge. The appellate court held that the trial court's denial of the basic fundamental right of cross-examination of the victim would give a "reasonably prudent person a well-founded fear of judicial bias." The Fourth District Court of Appeal noted the fact that the state was allowed to use the victim's testimony in its opposition to the motion to reduce bond. *Zuchel v. State*, 824 So. 2d 1044 (Fla. 4th DCA 2002).

I. HEARSAY

Definition: A statement, other than the one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted. § 90.801(1)(c).

Conviction May Stand Solely on Hearsay

- "We decline to enunciate a blanket rule that no conviction can stand based solely on hearsay." *Anderson v. State*, 655 So. 2d 1118 (Fla.1995).

- When the Declarant Testifies During the Hearing and Is Subject to Cross-Examination, the Confrontation Clause is Satisfied.

- See *U.S. v. Owens*, 484 U.S. 554 (1988); *U.S. v. Spotted War Bonnett*, 933 F.2d 1471 (8th Cir.1991), *cert. denied*, 112 S.Ct. 1187 (1992).

Satisfaction of the Confrontation Clause Where the Declarant Does Not Testify

- If a hearsay statement is admissible under any of the hearsay exceptions included in the Evidence Code, with the exception of § 90.803(23) (hearsay exception;

statement of a child victim), admission of the statement will not infringe upon the defendant's confrontation rights. *Ehrhardt, 1 Fla. Prac., Evidence* § 802.2 (2019 ed.).

- Where a witness is unavailable to testify at a subsequent hearing, prior testimony is admissible, despite the confrontation clause, if the opponent can show that testimony was given under circumstances that indicate its content is probably true. *State v. Kleinfeld*, 587 So. 2d 592 (Fla. 4th DCA 1991).
    - But see *Mathieu v. State*, 552 So. 2d 1157 (Fla. 3d DCA 1989). The defendant's right to confrontation was violated when there was testimony from which an inescapable inference was drawn that two eye-witnesses who did not testify had identified the defendant as the person who committed the robbery.
        - See also *Crawford v. Washington*, 124 S.Ct. 1354 (2004), which, regarding "testimonial" hearsay, overruled the Roberts decision, which held that reliability could be inferred if the hearsay statement falls within a firmly-rooted exception or if there are particular guarantees of trustworthiness. *Ohio v. Roberts*, 448 U.S. 56 (1980).
        - **Note**: The *Crawford* opinion applies to "testimonial" hearsay, and *Roberts* analysis applies to "non-testimonial."
        - In *Crawford*, the U.S. Supreme Court held that when hearsay statements of an unavailable witness are "testimonial" in nature, the 6th amendment requires that the accused be afforded a prior opportunity to cross-examine the witness. *Crawford v. Washington*, 124 S.Ct. 1354 (2004). However, the Supreme Court did not set out a definition of "testimonial." *Id.*

J. HEARSAY EXCEPTIONS - § 90.803

Availability of Declarant Immaterial

- The provision of § 90.802 (hearsay rule) to the contrary notwithstanding, the following are admissible as evidence, even though the declarant is unavailable as a witness:
- **Spontaneous Statement** – § 90.803(1) A spontaneous statement describing or explaining an event or condition made while the declarant was perceiving the event or condition, or immediately thereafter, except when such statement is made under circumstances that indicate its lack of trustworthiness.
    - The spontaneity of the statement negates the likelihood of conscious misrepresentation by the declarant and provides the necessary circumstantial guarantee of trustworthiness to justify the introduction of the evidence. *Ehrhardt, 1 Fla. Prac., Evidence* § 803.1 (2019 Ed.).

- The defendant's companions' statement to the store manager should not have been admitted under spontaneous statement exception to hearsay rule. *Fratcher v. State*, 621 So. 2d 525 (Fla. 4th DCA 1993).

- The victim's statement to a friend immediately after a sexual battery incident was admissible. *McDonald v. State*, 578 So. 2d 371 (Fla. 1st DCA 1991), *review denied*, 587 So. 2d 1328 (Fla. 1991).

- The testimony was inadmissible where the record did not reflect that statements were spontaneous and made without engaging in reflective thought. *Sunn v. Colonial Penn Ins. Co.,* 556 So. 2d 1156 (Fla. 3d DCA 1990).

- "There was no error in permitting the investigating police officer to testify as to victim's spontaneous statements at the time of the incident." *Cadavid v. State*, 416 So. 2d 1156 (Fla. 3d DCA 1982).

- The spontaneity is lacking if more than a "slight lapse of time" has occurred between the event and the statement. *Cadavid v. State*, 416 So. 2d 1156 (Fla. 3d DCA 1982).

- The spontaneous statement by the two-and-one-half year old to the babysitter that the child's father had sexually molested her was not showing that the statement was made contemporaneously with the alleged act by the father. *State v. Jano*, 524 So. 2d 660 (Fla. 1988).

- The testimony by the police officer concerning the victim's version of aggravated assault, when the statement was made after the victim drove home and called the police, was not admissible. *Quiles v. State*, 523 So. 2d 1261 (Fla. 2d DCA 1988).

    - The undercover agent's statement as to whom the agent identified as a source of cocaine was not admissible under present sense impression exception to hearsay rule. *U.S. v. Cruz*, 765 F.2d 1020 (11th Cir. 1985).

- **Excited Utterance – § 90.803(2)** A statement or excited utterance relating to a startling event or condition made while the declarant was under the stress of excitement caused by the event or condition.

- **Excited utterance is an <u>exception</u> to the hearsay rule.**

    - The victim of a kidnapping had called witnesses while the offense was taking place. These were considered excited utterances, and the people who were called could testify about the content of the conversations. *Viglione v. State*, 861 So. 2d 511 (Fla. 5th DCA 2003).

    - The Supreme Court rejected the State's argument that statements of the victim to a witness were admissible under the excited utterance exception to

the hearsay rule where the proper predicate was not established by the state and where such a finding was not made by the trial court. An alternative argument that the witness's testimony was admissible under the state-of-mind exception to the hearsay rule was rejected because the victim's state of mind was not found to be relevant to any issue in the case. The Supreme Court also held it was an error to admit the victim's handwritten statement of a prior domestic violence case from the court record. *Stoll v. State*, 762 So. 2d 870 (Fla. 2000).

- **Elements**
  - There must be an event startling enough to cause nervous excitement;
  - The statement must have been made before there was time to contrive or misrepresent; and
  - The statement must have been made while the person was under the stress of excitement caused by the event. *State v. Jano*, 524 So. 2d 660 (Fla. 1988).
- **Time**
  - "Some out-of-court statements may be admitted as excited utterances even though they were not made contemporaneously or immediately after the event."
    - "The length of time between the event and the statement is pertinent in considering whether the statement may be admitted as an excited utterance."
    - "It would be an exceptional case in which a statement made more than several hours after the event could qualify as an excited utterance because it would be unlikely that the declarant would still be under the stress of excitement caused by the event." *State v. Jano*, 524 So. 2d 660 (Fla. 1988).
  - The lapse of time between the startling event and the statement is relevant but not dispositive. "[t]he immediacy of the statement is not a statutory requirement." *Henyard v. State*, 689 So. 2d 239 (Fla. 1997).
  - There is no bright-line rule of hours or minutes to determine whether the time interval between the event and the statement is long enough to permit reflective thought. *Werley v. State*, 814 So. 2d 1159 (Fla. 1st DCA 2002).
  - The fact that reflective thought may be possible does not automatically exclude a statement from being classified as an excited utterance. If the evidence establishes a lack of reflective thought, the predicate is satisfied. *Rogers v. State*, 660 So. 2d 237, 240 (Fla. 1995).

- "As long as the excited state of mind is present when the statement is made, the statement is admissible if it meets the other requirements of § 90.803(2)." *Ehrhardt*, 1 Fla. Prac., Evidence § 803.2 (2019 Ed.). Cited by:
  - *Edwards v. State*, 763 So. 2d 549 (Fla. 3d DCA 2000). The was no error in admission as an excited utterance for a statement made by a bystander at an accident scene that she had been at a party with the defendant, that the defendant was drunk and had been told not to drive.
- Excited utterance does not violate the confrontation clause. *J .L.W. v. State*, 642 So. 2d 1198 (Fla. 2d DCA 1994).

911 Recordings

Generally, 911 tapes are admissible as excited utterance or spontaneous statement exceptions to the hearsay rule. *State v. Frazier*, 753 So. 2d 644 (Fla. 5th DCA 2000).

- The First District Court of Appeal affirmed the trial court's conviction of aggravated battery with a deadly weapon and held that the trial court did not abuse its discretion in admitting 911 tapes regardless of the fact that the victim did not call the police until an hour after the alleged battery occurred as she was shaken and visibly frightened when the police arrived. *Werley v. State*, 814 So. 2d 1159 (Fla. 1st DCA 2002).

- Jamie Coley appealed from his judgment and sentence for aggravated battery, arguing that the trial court erred in failing to redact portions of a 911 tape admitted into evidence, which referred to a nonexistent restraining order. The State argued that even if the reference to the restraining order should have been redacted from the tape, its admission into evidence was harmless. The test for harmless error requires the State to prove that there is no reasonable possibility that the error complained of contributed to the verdict. Here, the State did not meet its burden and, as a result, the court reversed and remanded the judgment. *Coley v. State*, 816 So. 2d 817 (Fla. 2d DCA 2002).

- The prosecutor allowed to read a transcript of a 911 call to the jury. *Sliney v. State*, 699 So. 2d 662 (Fla. 1997).

- A 911 audio recording of the victim's ten-year-old son's telephone call was admissible under excited utterance exception to hearsay rule. *Allison v. State*, 661 So. 2d 889 (Fla. 2d DCA 1995) *reversed on other grounds*, *affirmed* by *Sliney*, *supra*.

- The defendant's argument that the statements could not be admitted as evidence identifying the defendant as the killer was rejected by the court. *Evans v. State*, 854 A.2d 1158 (Del.Supr. 2004).

- However: The fact that a call is placed on a 911 line does not, standing alone, qualify it for admission as a hearsay exception, under § 90.803.

  - A tape of 911 call from an anonymous caller was not admissible. *Quinn v. State*, 692 So. 2d 988 (Fla. 5th DCA 1997).

  - A 911 call not admissible absent firsthand knowledge of the events described under present sense impression or excited utterance exceptions. *Bemis v. Edwards*, 45 F.3d 1369 (9th Cir. 1995).

  - A transcript of a 911 call was not admissible as present sense exception because the caller was not an eyewitness. *People v. Adkinson*, 215 A.D.2d 673 (N.Y. 2d Dept. 1995) *affirmed* as modified by *People v. Vasquez*, 670 N.E. 2d. 1328 (N.Y. 1996).

  - The concurring opinion pointed out that 911 tapes do not come in under business records exception. *Franzen v. State*, 746 So. 2d 473 (Fla. 2d DCA 1998).

Call to Third Party

- The court recognized the rule that a victim's telephone "calls for help" to third parties made while the victim was being held against his will and threatened during a kidnapping incident are admissible under the same excited utterance or spontaneous statement exception to the hearsay rule that would permit the admission of a victim's 911 calls. *Viglione v. State*, 861 So. 2d 511 (Fla. 5th DCA 2003).

- The officer's testimony that the victim stated "the guys in the car pointed a gun at me" was admissible. *J.L.W. v. State*, *supra*.

- The testimony that the victim yelled to her daughter to "call the police because Ernest picked up a knife[,]" was admissible as an excited utterance. *Wilcox v. State*, 770 So. 2d 733 (Fla. 4th DCA 2000).

- Excited utterances on their own are sufficient to deny a Judgment of Acquittal (JOA) motion and send a case to the jury.

  - Trial testimony which conflicts with excited utterance goes to the weight of the testimony; the jury has the choice of which statement to believe. *Williams v. State*, 714 So. 2d 462 (Fla. 3d DCA 1998).

  - These excited utterances were, on their own, sufficient to deny the defendant's motion's for JOA and to send the case to the jury.

  - Applies to violation of probation hearings. *Willis v. State*, 727 So. 2d 952 (Fla. 4th DCA 1998).

- But see *R.T.L. v. State*, 764 So. 2d 871 (Fla. 4th DCA 2000). It was an error to deny JOA where the only evidence of intent was a prior inconsistent statement from victim.

    - **Note**: This holding is no new revelation. The case law has always held that prior inconsistent statements cannot be used as substantive evidence. However, an excited utterance is not a prior inconsistent statement; it is an exception to hearsay and can supply the basis for a conviction. Controlling precedent has held that exited utterances on their own are sufficient to deny JOA motion and send cases to the jury.

Additional Case Law Regarding Excited Utterance

- A statement made to police by the wounded victim was admissible because, "her response was spontaneous, sprang from the stress, pain and excitement of the shootings and robberies, and was not the result of any premeditated design." *Garcia v. State*, 492 So. 2d 360 (Fla. 1986), *cert. denied*, 479 U.S. 1022 (1986).

- A bystander's hearsay statement to an officer, which described the assailant, was admissible because the bystander flagged down the officer and appeared visibly shaken. *Power v. State*, 605 So. 2d 856 (Fla. 1992).

- The fact that the declarant also testifies does not affect the admissibility of the excited utterance. Evidence that the victim identified the defendant to an investigating officer, which was properly admitted as an excited utterance, was sufficient to support a conviction. *Rodriguez v. State*, 696 So. 2d 533 (Fla. 3d DCA 1997).

- Although evidence was conflicting, the trial court was in the best position to weight the credibility of the witnesses. *Willis v. State*, 727 So. 2d 952 (Fla. 4th DCA 1998).

- Being stabbed and beaten was a sufficiently startling event. *Pope v. State*, 679 So. 2d 710, 713 (Fla. 1996).

- The statement was made to the police while the victim was still bleeding and in a distressed state. *Pedrosa v. State*, 781 So. 2d 470 (Fla. 3d DCA 2001).

Practical Points When Dealing with Excited Utterances

- Establish the victim's emotional condition and demeanor at the time of the statement.

- Establish whether the statement was made pursuant to detailed questioning (reflective thought), the product of a general "what happened question" or was it spontaneous.

Medical Statement – § 90.803(4).

Statements made for the purposes of medical diagnosis or treatment by a person seeking the diagnosis or treatment or made by an individual who has knowledge of the facts and is legally responsible for the person who is unable to communicate the facts, which statements describe the medical history, past or present symptoms, pain, or sensations, or the inception or general character of the cause or external source thereof, insofar, as reasonably pertinent to diagnosis or treatment. *White v. Illinois*, 502 U.S. 346 (1992).

- **Elements**:
    - The statements were made for the purpose of diagnosis or treatment; and
    - The individual making the statements knew the statements were being made for medical purposes. *Lazarowicz v. State*, 561 So. 2d 392 (Fla. 3d DCA 1990).
        - The victim's statements to physician may be admitted "only, if, and to the extent that it was knowingly made for the purpose of and was pertinent to diagnosis or treatment." *Reyes v. State*, 580 So. 2d 309 (Fla. 3d DCA 1991). See also *State v. Frazier*, 753 So. 2d 644 (Fla. 5th DCA 2000).
- Statements which are Not Necessary for Medical Diagnosis are Inadmissible.
    - In prosecution for armed burglary and sexual battery with a deadly weapon, a doctor could testify that the victim stated that she was orally, vaginally, and anally penetrated because it was reasonably pertinent to the diagnosis or treatment of the victim's wounds. However, the "assault at gunpoint" portion of the statement was inadmissible because it was not reasonably pertinent to medical diagnosis or treatment. *Conley v. State*, 620 So. 2d 180 (Fla. 1993).
    - Statements about the victim's medical state provided by a sexual abuse counselor were unsupported by any showing of purpose for medical diagnosis and, therefore, were inadmissible hearsay. *Begley v. State*, 483 So. 2d 70 (Fla. 4th DCA 1986).
    - *Allison v. State*, 661 So. 2d 889 (Fla. 2d DCA 1995).
        - Where the record does not show that the statement was elicited for the purpose of treatment as opposed to investigation, the statement is not within the medical diagnosis exception.
        - Where a four-year-old witnessed her father kill her mother, the child's statement to a psychologist, who was treating her for Post-Traumatic Stress (PTS), describing the killing is not admissible under the medical diagnosis exception.
        - In sexual battery prosecution, it was an error to admit the doctor's testimony concerning statements made by the victim which related the

"details of the crime", particularly those relating to a shotgun because the statements were not "reasonably pertinent to medical diagnosis or treatment." *Randolph v. State*, 624 So. 2d 328 (Fla. 1st DCA 1993).

- A hearsay exception for statements made for purposes of medical diagnosis does not permit the admission of the victim's statement to a doctor that she was raped when she went to the doctor to determine if she was pregnant, not for treatment of injuries from the assault. *Bradley v. State*, 546 So. 2d 445 (Fla. 1st DCA 1989).

- Statements Regarding Circumstances Which Caused an Injury May be Admissible.
  - *Pridgeon v. State*, 809 So. 2d 102 (Fla. 1st DCA 2002).
  - *Allison v. State*, 661 So. 2d 889 (Fla. 2d DCA 1995).
- Statements describing the cause or inception of an illness are admissible, but statements of fault are not.
  - The testimony of a doctor who conducted a rape treatment examination that the victim stated that she was beaten with a show was admissible because the "information was pertinent to the treatment of her wounds." *Brown v. State*, 611 So. 2d 540 (Fla. 3d DCA 1992).
  - The victim's statement to a physician that "they had been touched in the genitalia by an adult male and had experienced some pain when that happened" was admissible. *State v. Ochoa*, 576 So. 2d 854 (Fla. 3d DCA 1991).
- Statements Need Not be Made to a Medical Doctor
  - The plaintiff's statement to an emergency room nurse that she fainted or passed out and fell was admissible under exception to hearsay for statements made for medical treatment or diagnosis. *Otis Elevator Co. v. Youngerman*, 636 So. 2d 166 (Fla. 4th DCA 1994).
- The Identity of the Perpetrator is Not Pertinent to a Diagnosis and, Therefore, Seldom Admissible.
  - The details of a violent crime may be reasonably pertinent to diagnosis or treatment, but the identity of the perpetrator would seldom, if ever, be admissible as not being pertinent to either diagnosis or treatment.
  - Statements made to a child protection team doctor by victims of child sexual abuse identifying their abuser are not admissible. *State v. Jones*, 625 So. 2d 821 (Fla. 1993).
  - In murder prosecution, a statement to a doctor that he was shot was admissible because it was reasonably pertinent to the diagnosis or treatment of his

wounds. But the statement that black people had tried to steal his medallion was not admissible, because it was a statement of fact "not reasonably pertinent in the medical treatment." *Torres-Arboledo v. State*, 524 So. 2d 403 (Fla. 1988), *cert. denied*, 488 U.S. 901 (1988).

- The Fifth District Court of Appeal upheld the ruling of the trial court where the victim's statements to her treating physician identifying the defendant as her assailant were not given for purposes of medical diagnosis or treatment and were therefore inadmissible and not excepted from the hearsay rule. The Fifth District Court of Appeal held, however, that those statements on the 911 tape identifying the defendant as her assailant may be admissible if the trial court determines on remand that the statements are hearsay but qualify as excited utterances. The statements on the 911 tape may be excluded as hearsay if the trial court determines that the statements are not excited utterances or admissible on some other grounds. The Fifth District Court of Appeal also held that statements on the 911 tape were also not inadmissible as violative of the defendant's right to confrontation, as such hearsay evidence is firmly rooted in the common law, and its reliability can be inferred. *State v. Frazier*, 753 So. 2d 644 (Fla. 5th DCA 2000).

- Statements by a child abuse victim describing the cause of an injury are admissible if reasonably pertinent to the diagnosis. A description about how the victim was assaulted is admissible. The identity of the defendant by the doctor as related by the victim was error. *Lages v. State*, 640 So. 2d 151 (Fla. 2d DCA 1994).

Former Testimony - § 90.803(22)

- Former testimony was given by the declarant in which the testimony was given as a witness at another hearing of the same or a different proceeding or in a deposition taken in compliance with the law in the course of the same or another proceeding, if the party against whom the testimony is now offered, or, in a civil action or proceeding, a predecessor in interest, or a person with similar interest, had an opportunity and similar motive to develop the testimony by direct, cross, or redirect examination; provided, however, the court finds that the testimony is not inadmissible pursuant to § 90.402 or § 90.403.

- The defendant's testimony in the first trial was admissible on retrial under the former testimony hearsay exception, where the defendant was the only surviving eyewitness of a homicide, the defendant voluntarily took the stand in his own defense at trial, and the testimony would not be cumulative, would not mislead the jury, and would not confuse the issues. *State v. Mosley*, 760 So. 2d 1129 (Fla. 5th DCA 2000).

  - But see *Price v. City of Boynton Beach*, 847 So. 2d 1051 (Fla. 4th DCA 2003). The psychiatrist's deposition testimony that the defendant had made threats, talked about guns, and was a danger was not admissible in a hearing on the city's motion for a temporary injunction for protection against the defendant

under a former testimony exception to rule against an admission of hearsay, where the deposition was not taken in the case but in the defendant's workers' compensation case involving different issues; the rule required that the party against whom the testimony was offered had the opportunity and motive to cross-examine the witness in the prior proceeding.

  - See also *Friedman v. Friedman*, 764 So. 2d 754 (Fla. 2d DCA 2000). The court held that the admissibility of a discovery deposition of a nonparty witness as substantive evidence continues to be governed by rule 1.330(a)(3), Florida Rule of Civil Procedure. "An attorney taking a discovery deposition does not approach the examination of a witness with the same motive as one taking a deposition for the same purpose of presenting testimony at trial."

- Former Testimony Statute, as Applied in Criminal Cases is Unconstitutional

  - "It is, therefore, clear that live testimony may not be constitutionally supplanted with former testimony in criminal cases absent a showing of unavailability." *Abreu v. State*, 804 So. 2d 442 (Fla. 4th DCA 2001).

  - The court specifically declined to adopt and approve an amendment made by the legislature, which would allow the admission of former testimony when the defendant is available as a witness. *In re: Amendments to the Florida Evidence Code*, 782 So. 2d 339 (Fla. 2000).

  - Although the court did not address the former testimony statute, it held that it was an error to admit the pretrial deposition of the victim as evidence in place of live testimony where the defendant was not personally present when the deposition was taken. *Brown v. State*, 721 So. 2d 814 (Fla. 4th DCA 1998).

Statement of Child Victim - § 90.803(23)(a)

- "Unless the source of information or the method or circumstances by which the statement is reported indicates a lack of trustworthiness, an out-of-court statement made by a child victim with a physical, mental, emotional, or developmental age of 16 or less describing any act of child abuse or neglect, any act of sexual abuse against a child, the offense of child abuse, the offense of aggravated child abuse, or any offense involving an unlawful sexual act, contact, intrusion, or penetration performed in the presence of, with, by, or on the declarant child, not otherwise admissible, is admissible in evidence in any civil or criminal proceeding if:

  - The court finds in a hearing conducted outside the presence of the jury that the time, content, and circumstances of the statement provide sufficient safeguards of reliability. In making its determination, the court may consider the mental and physical age and maturity of the child, the nature and duration of the abuse or offense, the relationship of the child to the offender, the

reliability of the assertion, the reliability of the child victim, and any other factor deemed appropriate, AND

- The child either testifies; OR
- Is unavailable as a witness, provided that there is other corroborative evidence of the abuse or offense. Unavailability shall include a finding by the court that the child's participation in the trial or proceeding would result in a substantial likelihood of severe emotional or mental harm, in addition to findings pursuant to s. 90.804(1)."

Statement of an Elderly Person or a Disabled Adult - § 90.803(24)

- "Unless the source of information or the method or circumstances by which the statement is reported indicates a lack of trustworthiness, an out-of-court statement made by an elderly person or disabled adult describing any act of abuse or neglect, any act of exploitation, the offense of battery or aggravated battery or assault or aggravated assault or sexual battery, or any other violent act on the declarant elderly person or disabled adult, not otherwise admissible, is admissible in evidence in any civil or criminal proceeding if:

  1. The court finds in a hearing conducted outside the presence of the jury that the time, content, and circumstances of the statement provide sufficient safeguards of reliability. In making its determination, the court may consider the mental and physical age and maturity of the elderly person or disabled adult, the nature and duration of the abuse or offense, the relationship of the victim to the offender, the reliability of the assertion, the reliability of the elderly person or disabled adult, and any other factor deemed appropriate; AND

  2. The elderly person or disabled adult either: testifies or is unavailable as a witness, provided that there is corroborative evidence of the abuse or offense. Unavailability shall include a finding by the court that the elderly person's or disabled adult's participation in the trial or proceeding would result in a substantial likelihood of severe emotional, mental, or physical harm, in addition to findings pursuant to § 90.804(1)."

Statements of Family History and Relationships are Admissible as an Exception to the Hearsay Rule.

- *Brown v. State*, 473 So. 2d 1260 (Fla. 1985). See also *Cruz v. State*, 557 So. 2d 668 (Fla. 5th DCA 1990).
- Providing the identity of the victim is a material element of the proof at trial.
- The identity of the victim could not be established through "inadmissible hearsay."

- *Cruz* does not identify what is inadmissible hearsay.

Statements Admissible as Substantive Evidence are Exceptions to Hearsay.

- Exceptions to hearsay are substantive evidence. *J.L.W. v. State*, 642 So. 2d 1198 (Fla. 2d DCA 1994). An officer's testimony that the victim stated "the guys in the car pointed a gun at me" was admissible as substantive evidence.

- Impeachment testimony cannot be used as substantive evidence.

    - Allowing a deputy, on direct examination by the prosecutor, to read a specific question from the Domestic Violence Threat Level Assessment checklist and the victim's affirmative answers in order to impeach the victim's testimony at the hearing was permissible to show the victim's motivation to testify untruthfully about her husband's crime and was not an abuse of the court's discretion. *Izquierdo v. State*, 890 So. 2d 1263 (Fla. 5th DCA 2005).

    - The victim's recanted original statement could be used as impeachment but not as substantive evidence. *Santiago v. State*, 652 So. 2d 485 (Fla. 5th DCA 1995).

- In a criminal prosecution, a prior inconsistent statement standing alone is insufficient as a matter of law to prove guilt beyond a reasonable doubt.

    - Criminal depositions pursuant to Florida's Rule of Criminal Procedure 3.220 are inadmissible as substantive evidence. *State v. Green*, 667 So. 2d 756 (Fla. 1995).

    - *However*: A prior inconsistent statement introduced pursuant to § 90.801(2)(a) is admissible as substantive evidence.

        - "Under § 90.801(2)(a), (1981), the prior inconsistent statement of a witness at a criminal trial, if given under oath before a grand jury, is excluded from the definition of hearsay and may be admitted into evidence not only for impeachment purposes but also as substantive evidence on material issues of fact." *Moore v. State*, 452 So. 2d 559 (Fla. 1984).

        - Depositions to perpetuate testimony taken pursuant to Florida Rule of Criminal Procedure 3.190(j) are admissible as substantive evidence. *State v. Green*, 667 So. 2d 756 (Fla. 1995).

        - § 90.801(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 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. (Note: Depositions referred to are those taken pursuant to Rule 3.190(j). *Green*, *supra*.)

- Discovery depositions may not be used as substantive evidence in a criminal trial.
    - *State v. Green*, 667 So. 2d 756 (Fla. 1995).
    - *State v. James*, 402 So. 2d 1169, 1171 (Fla. 1981).

K. NON-HEARSAY (EXCLUDED FROM DEFINITION OF HEARSAY)

§ 90.801(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:

- Inconsistent with the declarant's testimony and was given under oath subject to the penalty of perjury at trial, hearing, or other proceeding or in a deposition;
- Consistent with the declarant's testimony and is offered to rebut an express or implied charge against the declarant of improper influence, motive, or recent fabrication; OR
- One of identification of a person made after perceiving the person.

Statements of Identification – Non-hearsay:

- Statements of identification made by a witness made after the witness has perceived the individual, which identify an individual before a trial, are excluded from the definition of hearsay. *Ehrhardt, 1 Fla. Prac., Evidence* § 801.9 (2019 ed.).
    - "An identification made shortly after the crime is inherently more reliable than a later identification in court." "The fact that the witness could identify the respondent when the incident was still fresh in her mind is of obvious probative value." *State v. Freber*, 366 So. 2d 426 (Fla. 1978).
- Statements of Identification May be Admissible as Substantive Evidence.
    - "Testimony of prior extrajudicial identification is admissible as substantive evidence of identity if identifying witness testifies to fact that prior identification was made." *State v. Freber*, 366 So. 2d 426 (Fla. 1978).
        - But see *Rockerman v. State*, 773 So. 2d 602 (Fla. 1st DCA 2000). Affirmative defense cannot rest on evidence of prior inconsistent identifying statements adduced for impeachment purposes only.
- Failure of the witness to repeat the identification in court does not affect the admissibility of evidence of the prior identification:

- Evidence of prior identification was admissible even though the witness denied making the prior identification and testified at trial that the defendant did not commit the crime. *Brown v. State*, 413 So. 2d 414 (Fla. 5th DCA 1982).

- A prior identification is also admissible as a prior inconsistent statement to impeach the victim's recantation of the identification at trial.

  - Where the witness identified the defendant in photo-spread after the crime was committed and at trial denied making the identification, an FBI agent could testify at trial that the witness had made the pretrial identification. *U.S. v. Jarrad*, 754 F.2d 1451 (9th Cir. 1985), *cert. denied*, 474 U.S. 830 (1985).

- It Must be a Statement of Identification to be Admissible.

  - A robbery victim's description of a suspect to the police was not a statement of identification, and, thus, the police officer's testimony as to the victim's description was not admissible under statute providing that the statement of identification of a person after perceiving him is non-hearsay when the declarant testifies and is subject to cross examination. *Puryear v. State*, 810 So. 2d 901 (Fla. 2002).

- A Witness Must Testify for Identifying Statement to be Admissible.

  - An individual who made an out-of-court identifying statement must testify during the trial for the statement to be admissible. *Valley v. State*, 860 So. 2d 464 (Fla. 4th DCA 2003).

- The statement of identification need not be made to a police officer; it may be made to a family member or other non-law enforcement person.

  - See *Henry v. State*, 383 So. 2d 320 (Fla. 5th DCA 1980). The testimony of the father who was present when his daughter identified the victim at a chance encounter.

Caller-ID Readout: Non-hearsay

- "The caller ID display and the pager readouts are not statements generated by a person, so they are not hearsay within the meaning of subsection 90.801(1)(c)." *Bowe v. State*, 785 So. 2d 531 (Fla. 4th DCA 2001).

- "Only statements made by persons fall within the definition of hearsay." Id.

  - But see *Schmidt v. Hunter*, 788 So. 2d 322 (Fla. 2d DCA 2001) (Polygraph results incorrectly admitted).

Statements of Defendant: Non-hearsay

- Police questioning of the defendant at a domestic violence crime scene does not normally require the reading of Miranda warnings in that the questioning does not involve custodial interrogations.

    - Miranda warnings are not required of a defendant questioned in the defendant's home. *Morris v. State*, 557 So. 2d 27 (Fla. 1990).

    - An admission to killing his wife to the police in response to a "what happened" type question at the crime scene found not to violate Miranda. *Melero v. State*, 306 So. 2d 603 (Fla. 3d DCA 1975).

    - Where the defendant was not "in custody" during an interview in his home, based on the presence of mitigating factors and the absence of aggravating factors, Miranda warnings were not required, and the decision granting the motion to suppress inculpated statements made by the appellant was reversed. *U.S. v. Axsom*, 289 F.3d 496 (8th Cir. 2002).

- False statements of the defendant are admissible in the State's case-in-chief as substantive evidence to prove guilt.

    - A jury instruction as to this issue should not be given. *Simpson v. State*, 562 So. 2d 742 (Fla. 1st DCA 1990).

    - False statements may be used as both impeachment and substantive evidence to prove guilt. *Brown v. State*, 391 So. 2d 729 (Fla. 3d DCA 1980).

    - False exculpatory statements are admissible as consciousness of guilt evidence. *Mackiewicz v. State*, 114 So. 2d 684 (Fla. 1959).

Admissions: Non-hearsay

- Statements that are made against a party and are his own statements are admissions and therefore an exception to the prohibition against hearsay. § 90.803(18)(a). *Ehrhardt, 1 Fla. Prac., Evidence* § 803.18(a), (2019 ed.).

- The statement needs not be against the interest of the party-opponent either at the time the statement was made or at the time it is offered.

- Husband-wife evidentiary privilege does not apply to criminal acts by one spouse on the other.

- A corrections department's Sexual Abuse Treatment Program (SATP) does not violate an inmate's Fifth Amendment right against self-incrimination, and the SATP's admission of responsibility requirement does not violate the right to free exercise of religion. *Searcy v. Simmons*, 299 F.3d 1220 (10th Cir. August 19, 2002).

Impeachment Testimony: § 90.608(1) Allows a Party to Impeach His Own Witness

- Limitations:
  - The party (State) cannot call a witness solely to impeach. *London v. State*, 541 So. 2d 119 (Fla. 4th DCA 1989).
  - An impeachment testimony cannot be used as substantive evidence. *State v. Smith*, 573 So. 2d 306 (Fla. 1990).
  - The victim's recanted original statement could be used as impeachment but not as substantive evidence. *Santiago v. State*, 652 So. 2d 485 (Fla. 5th DCA 1995).
- The impeaching party must be prepared to provide the disputed evidence prior to asking the question. This concept is based on the idea that for the party to ask the question in good faith, he must be prepared to provide the answer.
  - *Marrero v. State*, 478 So. 2d 1155 (Fla. 3d DCA 1985).
    - Criticized by: *Ehrhardt, 1 Fla. Prac., Evidence* § 608.4 (2019 Edition).
      - "The logical result of the restrictive decisions is to limit any cross-examination regarding credibility to situations in which counsel has a witness-room full of witnesses prepared to give backup testimony. Such an approach would unduly inhibit impeachment by imposing overwhelming burdens, delays, and expenses on showing good faith."
      - See also *Greenfield v. State*, 336 So. 2d 1205 (Fla. 4th DCA 1976). Requiring counsel to demonstrate to the court by a "professional statement to the court" or through other evidence that counsel's belief is well-founded.
- There is no requirement that a prior inconsistent statement be reduced to writing in order to be used for impeachment.
  - *Kimble v. State*, 537 So. 2d 1094 (Fla. 2d DCA 1989).
  - "The prior inconsistent statement may be oral and unsworn and may be drawn out on cross-examination of the witness himself and, if on cross-examination the witness denies, or fails to remember making such a statement, the fact that the statement was made may be proven by another witness." *Williams v. State*, 472 So. 2d 1350 (Fla. 2d DCA 1985).
  - The court did not err in granting the State's motion in limine excluding evidence that the defendant had filed two petitions for domestic violence injunctions against the victim after the criminal incident. *Nelson v. State*, 704 So. 2d 752 (Fla. 5th DCA 1998).

- By testifying that he had never been violent with the victim or anyone else, the defendant opened the door to the admission of impeachment evidence that the defendant had engaged in acts of domestic violence against another girlfriend. *Simmons v. State*, 790 So. 2d 1177 (Fla. 3d DCA 2001).

- The defendant alleged, *inter alia*, that the trial court erred by allowing the State to elicit testimony regarding alleged prior acts of violence committed by the defendant. The court held that the trial court did not err in allowing the cross examination of defense witnesses on other crimes evidence as Athe evidence was admissible to explain and modify direct testimony, was relevant and probative, and its probative value was not outweighed by the prejudicial effect. *Butler v. State*, 842 So. 817 (Fla. 2003).

- *Mills v. State*, 816 So. 2d 170 (Fla. 3d DCA 2002). The respondent appealed from a judgment of conviction for aggravated battery. The Third District Court of Appeal affirmed the lower court's decision concluding that the domestic violence final injunction and the arrest warrant issued, based upon alleged violations of the injunction, were admissible under § 90.402 and not Williams' rule of evidence. The court held that evidence of uncharged crimes, which are inseparable from the crime charged, is not Williams' rule of evidence and is admissible if it is a relevant and inseparable part of the act, which is in issue. "It is necessary to admit the evidence to adequately describe the deed." *Coolen v. State*, 696 So. 2d 738, 742-43 (Fla. 1997), (quoting *Griffin v. State*, 639 So. 2d 966, 968 (Fla. 1994)).

- The First District Court of Appeal affirmed the trial court's conviction of aggravated battery with a deadly weapon and held evidence of prior convictions was admissible pursuant to § 90.806(1) for the purpose of impeaching statements (made by the defendant) but offered by the wife but through her testimony, and the court found that the statement made by the wife was "exculpatory hearsay" offered for the truth of the matter. *Werley v. State*, 814 So. 2d 1159 (Fla. 1st DCA 2002).

Statements from Radio dispatch: Non-hearsay

- The police may testify that they arrived on the scene because of a statement made to them. *Harris v. State*, 544 So. 2d 322 (Fla. 4th DCA 1989) (*en banc*), *affirmed in*: *Conley v. State*, 620 So. 2d 180 (Fla. 1993).

  - HOWEVER: The contents of the statement are inadmissible especially where they are accusatory.

    - The inherently prejudicial effect of admitting into evidence an out-of-court statement relating accusatory information only to establish the logical sequence of events outweighs the probative value of such evidence.

    - *Conley v. State*, 620 So. 2d 180 (Fla. 1993). Police dispatch is hearsay.

- *State v. Baird*, 572 So. 2d 904 (Fla. 1990).

- *Harris v. State*, *supra*, expressly receding from: *Freemen v. State*, 494 So. 2d 270 (Fla. 4th DCA 1986).

L. EXCULPATORY EVIDENCE (BRADY VIOLATION)

The State Cannot Suppress Material Evidence

- "We now hold that the suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material to either guilt or punishment. . ." *Brady v. Maryland*, 373 U.S. 83, 87 (1963). See also *White v. State*, 664 So. 2d 242 (Fla. 1995).

- *Material Evidence* means: "The evidence is material only if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different. A 'reasonable probability' is a probability sufficient to undermine confidence in the outcome."

  - *U.S. v. Bagley*, 473 U.S. 667, 682 (1995).

  - *Kyles v. Whitley*, 514 U.S. 419 (1995).

- In order to establish a *Brady* violation, the defendant must prove that the State possessed evidence favorable to the defense, that the defendant did not have the evidence, nor could have obtained it through the exercise of reasonable diligence, that the State suppressed the evidence, and that a reasonable probability exists that had the evidence been disclosed, the outcome would have been different. *Cherry v. State*, 659 So. 2d 1069 (Fla. 1995), *Hegwood v. State*, 575 So. 2d 170,172 (Fla. 1991). See also *Hildwin v. Dugger*, 654 So. 2d 107 (Fla. 1995) (Here, the defendant failed to establish such a violation where the State made its entire file available to the defense).

  - **TEST**: The test "is whether there is a reasonable probability that 'had the evidence been disclosed to the defense, the result of the proceeding would have been different.'" *Duest v. Dugger*, 555 So. 2d 849, 851 (Fla. 1990), quoting, *U.S. v. Bagley*, 473 U.S. 667, 682 (1985); *Cherry v. State*, 659 So. 2d 1069 (Fla. 1995).

Searches: Exigent Circumstances which Could Justify Entry of Home

- An officer's belief that a potential emergency was justified and their entry onto the defendant's porch was proper after a 911 hang-up call. *People v. Greene*, 289 Ill.App.3d 796, 682 N.E. 2d 354 (Ill. App.2d Dist. 1997).

- Where the victim, who had visible signs of injury, answered the door upset and crying and told police that the suspect was not there, the police were justified in

making a warrantless entry of home for the safety of the victim. *State v. Gilbert*, 942 P.2d 660 (Kan. Ct.App. 1997).

- Law enforcement officials may conduct a limited, warrantless search of a private residence in response to an emergency situation reported by an anonymous 911 caller, where exigent circumstances (particularly if there is a danger to human life) demand an immediate response; any evidence in plain view is properly seized. *U.S. v. Holloway*, 290 F.3d 1331 (11th Cir. May 10, 2002).

    - But see *Espiet v. State*, 797 So. 2d 598 (Fla. 5th DCA 2001). The courts generally agree that a law enforcement officer may not make a warrantless entry into a person's home to arrest the person for a misdemeanor offense. The provisions of § 901.15(7), which allow a law enforcement officer to arrest a person for an act of domestic violence without a warrant, do not permit the forcible entry into the person's home to effectuate the arrest based on a misdemeanor offense. The decision of the trial court was reversed and remanded.

Photographs

- To be admissible, photographs must be a fair and accurate depiction of that which it purports to be:

    - Computer generated animation. *Pierce v. State*, 718 So. 2d 806 (Fla. 4th DCA 1997).

    - Videotape admission. *Paramore v. State*, 229 So. 2d 855 (Fla. 1969), *vacated as to sentence only*, 408 U.S. 935 (1972); *Bryant v. State*, 810 So. 2d 532 (Fla. 1st DCA 2002).

    - Motion picture. *Grant v. State*, 171 So. 2d 361 (Fla. 1965), *cert. denied*, 384 U.S. 1014 (1966).

- Two methods of authenticating photographic evidence. *Dolan v. State*, 743 So. 2d 544 (Fla. 4th DCA 1999) (computer enhanced process).

    - First, the "pictorial testimony" method requires the testimony of a witness to establish that, based upon personal knowledge, the photographs fairly and accurately reflect the event or scene.

    - Second, the "silent witness" method provides that the evidence may be admitted upon proof of the reliability of the process which produced the tape or photo.

- The trial court's admission of autopsy photographs was held to be in the sound discretion of the trial judge in all of the following cases:

    - *Gudinas v. State*, 693 So. 2d 953 (Fla. 1997).

- *Olivera v. State*, 719 So. 2d 341 (Fla. 3d DCA 1998).

- The fact that photographs were taken at a medical examiner's office rather than at the scene of the crime did not affect their admissibility. *Maret v. State*, 605 So. 2d 949 (Fla. 3d DCA 1992).

- Photograph of post evisceration view of empty chest cavity. *Russell v. State*, 454 So. 2d 778 (Fla. 4th DCA 1984),

- Morgue photographs were admissible even though the manner of death was not in dispute; however, repetitious photographs should be excluded. *Mordenti v. State*, 630 So. 2d 1080 (Fla. 1994).

- The following cases held that photographs which corroborated testimony were properly admitted.

  - Photographs of victim's charred remains. *Jackson v. State*, 545 So. 2d 260 (Fla. 1989).

  - Color photographs of homicide victim's skeletal remains. *Brumbley v. State*, 453 So. 2d 381 (Fla. 1984).

  - Entry and exit gunshot wounds. *Edwards v. State*, 414 So. 3d 1174 (Fla. 5th DCA 1982).

  - Color photograph of the deceased victim's face in the early state of decomposition. *Carvajal v. State*, 470 So. 2d 73 (Fla. 3d DCA 1985).

  - Notwithstanding the defendant's offer to stipulate to murder, position of body, etc., photographs were relevant in that they corroborated testimony of certain witnesses. *Zamora v. State*, 361 So. 2d 776 (Fla. 3d DCA 1978).

- Photographs which assisted the medical examiner in explaining wounds found on murder victim are admissible.

  - Held that the trial court did not err in admitting 12" x 15" black-and-white glossy photographs of murder victim lying dead on the floor of the murder scene, taken within one hour of the commission of the crime, though bloodstain appeared, where the photograph accurately portrayed the setting and served to illustrate or explain the testimony of the witnesses. *Pressley v. State*, 261 So. 2d 522 (Fla. 3d DCA 1972).

- The test for admissibility of photographs is relevancy rather than necessity. (The fact that other witnesses can or will testify to that which is depicted in the various photographs does not make those photographs inadmissible.)

    - *Pope v. State*, 679 So. 2d 710, 713 (Fla. 1996).

        - *Nixon v. State*, 572 So. 2d 1336 (Fla. 1990).

    - The Court rejected the defense's argument that, since the cause and nature of death had been clearly established, there were no circumstances that necessitated the introduction of the seven photographs of the victim's charred remains. *Affirmed* on this point in Jones v. State, 648 So. 2d 669, 679 (Fla. 1994).

    - Photographs, although "extremely gruesome", were not "so shocking in nature" as to outweigh their relevancy. *Pope v. State*, *supra*; *Gudinas v. State*, 693 So. 2d 953, 963 (Fla. 1997). Six slides of the victim's body in the alley, two slides which showed the stick protruding from the victim's vagina, and several slides of the body in the morgue were relevant.

    - The Court reaffirmed its position that gruesome and inflammatory photographs are admissible if relevant to any issues required to be proven in a case. Relevancy is to be determined in the normal manner without regard to any special characterization of the proffered evidence. *Bush v. State*, 461 So. 2d 936, 941 (Fla. 1984).

- Admission of photographs appears to be reversible error only when the photographs have little or no relevance or the photographs are so shocking in nature as to outweigh their relevance.

    - The admission, during the penalty phase of a murder trial, of a 2' x 3' blowup showing in detail the bloody and disfigured head and upper torso of the victim was reversible error. *Ruiz v. State*, 743 So. 2d 1 (Fla. 1999).

    - Photographs of victim's body, which had been ravaged by dogs and was in a severely decomposed condition, should not have been admitted. *Czuback v. State*, 570 So. 2d 925 (Fla. 1990).

    - Admission of a photograph of the victim's blood-splattered body, which depicted the results of emergency procedures performed after the stabbing, was an error. *Rosa v. State*, 412 So. 2d 891 (Fla. 3d DCA 1982).

    - Polygraph exam results were incorrectly admitted at a contempt hearing for the violation of domestic violence injunction. *Schmidt v. Hunter*, 788 So. 2d 322 (Fla. 2d DCA 2001).

        - Evidence of the respondent's character and previous criminal convictions was admitted,

            - The respondent's arrest for violating an earlier injunction not involving the petitioner, and

- A letter that the respondent wrote to an old girlfriend apologizing for an incident that lead to charges being filed.

M. WILLIAMS RULE/SIMILAR FACT EVIDENCE

Prior Bad Acts, Wrongs, or Crimes Committed by the Accused are Admissible Into Evidence if They are Relevant to Prove Some Material Fact In Issue.*

- See *Williams v. State*, 110 So. 2d 654 (Fla. 1959); § 90.404(2).
- **NOTE:** § 90.404(2)(b)(1) provides an exception to the use of Williams Rule Evidence being admissible only if the evidence is relevant and used to prove a material fact at issue. Pursuant § 90.404(2)(b)(1):
  - "In a criminal case in which the defendant is charged with a crime involving child molestation, evidence of the defendant's commission of other crimes, wrongs, or acts of child molestation is admissible and may be considered for its bearing on any matter to which it is relevant."
  - This distinction can only be applied in child molestation and sexual offense cases. *See* Florida Standard Jury Instruction in Criminal Cases 2.4
    - "To be given at the time the evidence is admitted, if requested.
    - The evidence you are about to receive concerning other crimes, wrongs, or acts allegedly committed by the defendant will be considered by you for the limited purpose of [proving [motive] [opportunity] [intent] [preparation] [plan] [knowledge] [identity] [the absence of mistake or accident]] [(other relevant factor)] [corroborating the testimony of (victim)]* and you shall consider it only as it relates to [that] [those] issue[s].
    - However, the defendant is not on trial for a crime, wrong, or act that is not included in the [information] [indictment].
    - Editors' Notes
    - COMMENTS
    - **Evidence that is admitted in order to corroborate the testimony of a victim is allowed only in child molestation and sexual offense cases.** *See* section 90.404(2)(b), Fla. Stat., effective July 1, 2001, in child molestation cases. See 90.404(2)(c) Fla. Stat., effective July 1, 2011, for cases involving sexual offenses." FL ST CR JURY INST 2.4 (emphasis added).

- **To Prove Lack of Consent**: Testimony concerning the abusive nature of the defendant's relationship with the victim, including the defendant's prior "bad acts," was relevant to prove the sexual battery victim's lack of consent and to explain why the victim did not immediately contact the police. *Boroughs v. State*, 684 So. 2d 274 (Fla. 5th DCA 1996).

- **To Prove Premeditation/Motive**:

  - Evidence was that the defendant threatened the ex-wife (victim) on a prior occasion. "[W]e hold that the prior act of aggressive conduct and the accompanying verbal statements were admissible because they were relevant to the issue of intent which is an essential element of premeditated murder." *Goldstein v. State*, 447 So. 2d 903 (Fla. 4th DCA 1984).

  - The defendant argued inter alia that the trial court erred in allowing the admission of testimony establishing that the defendant's wife prior to the shooting had obtained an order restraining the defendant from bothering, threatening, or harming her. "Before any testimony was given regarding the restraining order, the wife testified without objection concerning an occasion when her husband hit her." "The evidence was relevant to the issue of premeditation. One of defendant's defenses at trial was lack of premeditation." *Hyer v. State*, 462 So. 2d 488 (Fla. 2d DCA 1984).

    - See also *King v. State*, 436 So. 2d 50 (Fla. 1983). Evidence that the defendant severely beat the victim twenty-three days before killing her was relevant to premeditation. *Wooten v. State*, 398 So. 2d 963 (Fla. 1st DCA 1981). Evidence that the defendant previously beat or physically mistreated the one-year-old murder victim or the victim's two-year-old sister was properly admissible.

  - Although no facts were given, the court held that evidence of prior incidents of domestic violence by the defendant against the victim was properly admitted in order to prove motive, intent, and premeditation in an attempted first-degree murder/armed burglary trial. *Burgal v. State*, 740 So. 2d 82 (Fla. 3d DCA 1999).

    - But see *Robertson v. State*, 829 So. 2d 901 (Fla. 2002). Landmark collateral crimes domestic violence case; it is reversible error "as a matter of law" to allow evidence "a prior threat six years earlier against a different victim and involving a different weapon" as *Williams* rule evidence to prove the absence of mistake or accident. The Supreme Court noted it was "unable to find...any cases in Florida where a prior threat against a different victim was admitted under the Williams rule to prove the absence of mistake or accident of the present offense." The court did cite with apparent approval cases allowing "prior crimes against the same victim as the charged offense."

- To prove motive, intent, and the absence of mistake

    - The testimony regarding a prior incident was admissible. The defendant appealed his conviction and sentence for second-degree murder with a deadly weapon. He argued that the trial court erred in admitting witness testimony regarding a collateral, uncharged crime because, during the trial, the victim's best friend testified about a possible domestic violence incident that had occurred between the victim and the defendant. The trial judge had given the jury specific directions on how to interpret the evidence based upon *Williams v. State*, 110 So. 2d 654 (Fla.1959), and the appellate court found that the trial court did not abuse its discretion and that the testimony of prior incidents was admissible to prove motive, intent, and the absence of mistake or accident based upon § 90.404(2)(a). The court affirmed the conviction and sentence. *Aguiluz v. State*, 43 So. 3d 800 (Fla. 3d DCA 2010).

Prior Bad Acts Admitted Once Defense "Opened the Door"

- The Fourth District Court of Appeal reversed the trial court's judgment convicting the defendant of the second-degree murder of his girlfriend. Prior to the trial, the court granted the defendant's motion in limine to preclude evidence regarding the defendant's prior assault on his girlfriend. At trial, the court allowed the State to introduce evidence of the assault on the theory that the defense had "opened the door" by presenting evidence of a 10-year-old domestic violence incident involving the girlfriend's former husband. The District Court of Appeal reversed and held that in order for prior bad acts to be admitted under the "opening the door" argument, the defense must first present misleading testimony or a factual assertion which the State would have a right to correct. *Fiddemon v. State*, 858 So. 2d 1100 (Fla. 4th DCA 2003).

    - **Note**: The court did go on to discuss in a footnote that evidence of prior violence or assaults may be relevant to establish motive or intent.

- Proper and Improper use of Prior Bad Acts in Trial for Resisting Arrest

    - While responding to a domestic violence call, the defendant struggled with the officers as they intended to arrest him. The domestic battery charge was not filed. During his trial for resisting arrest with violence, the officers testified in detail about the domestic violence offense. This was error, and the defendant was entitled to a new trial. *Burgos v. State*, 865 So. 2d 622 (Fla. 3d DCA 2004).

    - It was proper to enter an injunction for protection against domestic violence into evidence on resisting with violence charge where the defendant/respondent battered law enforcement officer when trying to serve injunction. *Logan v. State*, 705 So. 2d 140 (Fla. 3d DCA 1998

Pre-requisites to Introduce Similar Fact Evidence

- There must be sufficient similarity between the crime charged and the evidence introduced. The evidence introduced must be relevant to a fact in issue, and the evidence must not be relevant solely to prove bad character. *Crowell v. State*, 528 So. 2d 535 (Fla. 5th DCA 1988).

Evidence is Inadmissible if Solely Relevant to Prove Bad Character or Propensity to Commit the Crime

- It was improper to admit prior bad act evidence where the purpose was to show that, because of propensities, the defendant very likely did the acts for which he was charged. *Paquette v. State*, 528 So. 2d 995 (Fla. 5th DCA 1988).

- The Fifth District Court of Appeal reversed the lower court's decision to enter a final injunction for repeat violence against the respondent on the grounds that the court erred in admitting certain evidence regarding the respondent's character and previous criminal convictions. At the original hearing, the court allowed the petitioner's attorney to "1) show that LaMarr had been arrested for violating an earlier injunction not involving Lang; 2) introduce a letter that LaMarr wrote to an old girlfriend apologizing for an incident that apparently leads to charges being filed against him; 3) question LaMarr regarding prior injunctions filed against him by other people." The Fifth District Court of Appeal held that this was improper for the lower court to admit this evidence pursuant to the *Williams* rule regarding collateral evidence. Relying on *Pastor v. State*, 792 So. 2d 627 (Fla. 4th DCA 2001), the court commented that collateral crimes evidence is not admissible when its relevance goes only to prove a respondent's propensity. *LaMarr v. Lang*, 796 So. 2d 1208 (Fla. 5th DCA 2001).

    - See also *Rodriguez v. State*, 842 So. 2d 1053 (Fla. 3d DCA 2003). The trial court improperly permitted the victim's testimony regarding a restraining order she obtained subsequent to an argument she and the defendant had that resulted in the defendant's charge of aggravated assault with a deadly weapon against the victim. The Third District Court of Appeal held that the testimony should not have been admitted as it bolstered the victim's credibility.

Collateral Crime Evidence

- Evidence of a Collateral Crime May be Admitted to Establish the Context Out of Which the Criminal Conduct Arose:

    - The collateral offenses must not only be strikingly similar, but they must also share some unique characteristics or combination of characteristics which sets them apart from other offenses. See *Crowell v. State*, 528 So. 2d 535 (Fla. 5th DCA 1988).

    - The evidence must be relevant to a material fact in issue. See *Crowell v. State*, *supra*.

- ***Reverse Williams Rule***: When the State seeks to introduce Williams rule evidence, the defendant should have the same right to question the alleged collateral victim about the circumstances surrounding the collateral crime as he would have in questioning the alleged victim in a crime for which he stands accused. *Gutierrez v. State*, 705 So. 2d 660 (Fla. 2d DCA 1998).

- Inseparable Crime Evidence

  - Inseparable crime evidence or inextricably intertwined evidence is admissible because it is relevant and necessary to adequately describe the events leading up to the crime and/or the entire context out of which the criminal conduct arose or occurred.

    - *Smith v. State*, 365 So. 2d 704, 707 (Fla. 1978).

    - *Osborne v. State*, 743 So. 2d 602 (Fla. 4th DCA 1999).

  - Evidence of uncharged crimes which are inseparable from the crime charged, or evidence which is inextricably intertwined with the crime charged, is admissible under § 90.402 because "it is relevant and inseparable part of the act which is in issue." See *Osborne v. State*, 743 So. 2d 602 (Fla. 4th DCA 1999); *Coolen v. State*, 696 So. 2d 738 (Fla. 1997).

  - Inseparable crime evidence explains or throws light upon the crime being prosecuted. "Under this view, inseparable crime evidence is admissible under § 90.402 because it is relevant rather than being admitted under 90.402(2)(a). There is no need to comply with the ten (10) day notice provision." *Tumulty v. State*, 489 So. 2d 150 (Fla. 4th DCA 1986).