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FILLING THE VOID: ANOTHER LOOK AT FLORIDA'S APPROACH TO ENTRAPMENT

JOHN E. FENNELLY*

I. INTRODUCTION

IN Florida, accusatory statements by a nontestifying declarant have traditionally been classified as inadmissible hearsay.[1] Such statements have, therefore, been excluded even when arguably relevant to demonstrate a logical sequence of events or to demonstrate the basis for an officer's subsequent conduct.[2] A law enforcement officer, for example, may not testify that he went to a particular location because "X" told him that "Y" was selling drugs at that location. He may, however, testify that he went to that location "on information received."

Two early Florida cases, *Kirby v. State*[3] and *Collins v. State*,[4] form the doctrinal basis for what has been historically a per se rule of exclusion for this type of testimony. In *Kirby* the trial court allowed a witness to testify that he went to a location because "Miss Ives said to him that Kirby (defendant) had shot Ed."[5] The Florida Supreme Court reversed the conviction because, in the court's view, the testimony was offered for the truth of the matter asserted—i.e., that Kirby had, in fact, shot Ed[6]—and was, therefore, hearsay. The court then held that in such a situation the witness should simply state that he or she went to the location because of information received and should not repeat factual assertions of a nontestifying declarant.[7]

Fifty years later, *Collins* arguably cast the rule in stone. In *Collins* the trial court allowed the following testimony by the arresting officer:

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1. *See generally* CHARLES W. EHRHARDT, FLORIDA EVIDENCE §§ 401-403 (1992).
2. *Id.*
3. 32 So. 836 (Fla. 1902).
4. 65 So. 2d 61 (Fla. 1953).
5. *Kirby*, 32 So. at 838.
6. *Id.*
7. *Id.*

> Q. Did you have information that Frank Collins and Esma Collins were in this business (lottery) in this county?
> A. I did.
> Q. Did you have information that Frank Collins was collecting money . . . and delivering it to some other person?
> A. I did.[8]

The Florida Supreme Court, in reversing the conviction, observed that this testimony in effect told the jury "that an officer of the law had made inquiry and had been told by some one or other that the defendants were guilty."[9] In the court's view, the testimony was "obviously incompetent . . . [and] [p]lainly . . . hearsay."[10] Citing *Kirby*, the court again held that "[a]n officer may say what he did pursuant to information but he may not relate the information itself for such is hearsay."[11] These two cases created in Florida evidence law what has been characterized as a per se rule of exclusion for this type of testimony.

However, recent cases have engendered considerable uncertainty into this area of evidence law. In *State v. Baird* the Florida Supreme Court seems to have retreated from the per se rule of exclusion and chartered a new course for the treatment of this type of testimony.[12] Also, *Bauer v. State*, decided by the Second District Court of Appeal just two years before *Baird*, appears to conflict with this new course, especially when entrapment emerges as an issue in criminal cases.[13]

This Article will discuss the doctrinal implications of the *Baird* decision as they relate to accusatory statements made by nontestifying declarants. It will then trace the development of Florida's law regarding entrapment and evidence deemed appropriate to rebut the defense. The Article will examine the *Bauer* decision and its apparent conflict with established Florida evidence law, and will discuss the need to examine further the introduction of other criminal acts as evidence admissible to rebut an entrapment defense. Finally, the Article will conclude by suggesting that modifying the Florida Rules of Criminal Procedure could resolve the present uncertainty and ensure fairness to both the state and the defense.

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8. *Collins*, 65 So. 2d at 66.
9. *Id.*
10. *Id.*
11. *Id.* at 67 (citing Kirby v. State, 32 So. 836 (1902)). *Collins* also demonstrates that old cases, unlike old soldiers, don't always just fade away. In the recent case of State v. Baird, 572 So. 2d 904 (Fla. 1990), *Kirby* and *Collins* became the focal point. *Baird* and its impact will be discussed *infra* text accompanying notes 20-54.
12. 572 So. 2d 904 (Fla. 1990).
13. 528 So. 2d 6 (Fla. 2d DCA 1988).

II. *KIRBY* AND *COLLINS* REVISITED

Before discussing *Baird*, it might be helpful to examine *Kirby* and *Collins* from the perspective of the Florida Evidence Code ("the Code").[14] The Code defines hearsay statements as those "offered in evidence to prove the truth of the matter asserted,"[15] and mandates that hearsay is inadmissible unless certain specified circumstances exist.[16] Arguably, the statements in *Kirby* and *Collins* were not hearsay as defined by the Code because they were offered to show a basis for a particular officer's action and not to prove gambling or homicide.[17] However, under the Code, the determination whether to exclude certain evidence does not end with a hearsay classification. The Code also mandates, in all evidence questions, a second analytical step using section 90.403.[18] This section provides that "[r]elevant evidence is inadmissible if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of issues, misleading the jury, or needless presentation of cumulative evidence."[19] Therefore, applying the Code's two-step analysis could result in a determination that while the statements may not technically be hearsay, their probative value would be substantially outweighed by their unfair prejudice. So, under the Code, analysis would lead to exclusion by the route the court used in *Baird*, which is a different route from the hearsay classification the court used in *Kirby* and *Collins*.

In *Baird* the trial court allowed a Florida Department of Law Enforcement (FDLE) agent to testify that he "had received information that [Baird] was a major gambler and operating a major gambling operation in the Pensacola area."[20] The First District Court, relying on *Collins*, reversed.[21] Noting a conflict among the district courts of appeal, the Florida Supreme Court granted review.[22] In its analysis, the supreme court recognized that "*Collins* appears to set forth a blanket rule that an officer may explain what he did pursuant to information concerning the defendant, but under no circumstances may he relate the information itself because such is hearsay."[23] The court

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14. FLA. STAT. ch. 90 (1991).
15. *Id.* § 90.801(1)(c).
16. *Id.* §§ 90.802-.803.
17. *See id.* § 90.801(1)(c). *See also* State v. Baird, 572 So. 2d 904, 905 (Fla. 1990); Kirby v. State, 32 So. 836, 838 (Fla. 1902).
18. FLA. STAT. § 90.403 (1991).
19. *Id.*
20. 572 So. 2d at 905.
21. *Id.* at 906.
22. *Id.* at 905. The conflict arose between *Baird* and Harris v. State, 544 So. 2d 322 (Fla. 4th DCA 1989), which will be discussed *infra* text accompanying notes 32-46.
23. *Baird*, 572 So. 2d at 906.

then questioned the continued validity of *Collins* because the case was decided long before the Code was enacted.[24] The court noted that, under the Code, hearsay must involve

> a statement offered . . . to prove the truth of the matter asserted. It is clear that under Florida's Evidence Code, testimony such as that challenged in *Collins*, if offered for a purpose other than to prove the truth of the matter asserted, would not be considered hearsay and, if relevant to a material fact in issue, would generally be admissible unless its probative value was found to be *substantially outweighed by its prejudicial effect*.[25]

In such a case, the court reasoned that "any prejudicial effect generally can be limited by giving instructions cautioning the jury as to the limited use of the testimony."[26]

The court then applied the Code's conceptual methodology.[27] At trial, Baird's counsel indicated in opening statement the evidence would show the defendant was a victim of "selective prosecution."[28] Presumably, the defense's evidence would demonstrate that the officers were biased and, therefore, the evidence would relate to their credibility, a material issue. But introducing such evidence would also allow the State to rebut by showing that the law enforcement officials had a good-faith basis for initiating the investigation, e.g., knowledge of ongoing criminal activity.

However, the State introduced the testimony before the defense presented any evidence of the law enforcement officials' vindictive motive or bad faith.[29] Thus, while potentially relevant and material to the issue of vindictiveness, the testimony was admitted "prematurely."[30] The Florida Supreme Court then carefully noted that:

> when the only purpose for admitting testimony relating accusatory information received from an informant is to show a logical sequence of events leading up to an arrest, the need for the evidence is slight and the likelihood of misuse is great. In light of the inherently prejudicial effect of an out-of-court statement that the defendant engaged in the criminal activity for which he is being tried . . . the better practice is to allow the officer to state that he acted

24. *Id. Collins* was decided in 1953; the Florida Evidence Code was enacted in 1976.
25. *Id.* (emphasis added) (footnote omitted).
26. *Id.*
27. *Id.*
28. *Id.* at 906-07.
29. *Id.* at 907.
30. *Id.*

> upon a "tip" or "information received" without going into the details of the accusatory information.[31]

In reaching this conclusion, the court specifically adopted the approach developed by the Fourth District Court of Appeal in *Harris v. State*.[32]

In *Harris* the familiar *Collins* scenario occurred. The arresting officer was permitted to testify that an informant (declarant) had told him (the officer) that a Haitian male was selling cocaine at a particular location and that the same Haitian male was supplying him (declarant) with cocaine.[33] In reversing, the Fourth District Court identified "two . . . exceptions to the hearsay rule which have been applied in circumstances similar to, but distinguishable from, those present in this case."[34] According to the court, the first exception occurs in scenarios involving verbal acts.[35] Verbal acts, the court observed, are part of a transaction and serve to clarify acts that are incomplete or ambiguous in themselves.[36] For example, the words "pay me next Friday" clarify the simple exchange of money. The words demonstrate the intent of the actor and the character of the transaction—e.g., a loan as opposed to a gift.[37]

The second scenario involved admitting testimony necessary to show a logical sequence of events.[38] In that context, the statements were not part of the transaction,[39] but by filling gaps in a sequence of events, a witness could relate evidence that was not essential to establish the sequence and was "incriminating . . . against the accused."[40] The court stated that the exception to the hearsay rule for such statements extended to a witness's testimony that he or she had acted based on "something they were told by an informant,"[41] but not to the informant's actual accusatory remarks.[42]

The hearsay classification used by the court in *Harris* demonstrates the semantic quagmire into which reviewing courts routinely slip when confronted by this type of testimony. Throughout the opinion, the

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31. *Id.* at 908.
32. 544 So. 2d 322 (Fla. 4th DCA 1989).
33. *Id.* at 323.
34. *Id.*
35. *Id.*
36. *Id.*
37. *Id.*
38. *Id.* at 324.
39. *Id.*
40. *Id.*
41. *Id.*
42. *Id.*

court applied the Code's section 90.403 to balance the evidence's probative value versus its prejudicial effect in an attempt to avoid the hearsay label.[43] The court explained that "a fine line . . . must be drawn between a statement merely justifying or explaining such [law enforcement] presence or activity and one that includes incriminating (and usually unessential) details."[44] The court, therefore, felt that in such a situation the need for the testimony is slight and the likelihood of misuse is great.[45] Unfortunately, the court's conclusion slipped into pre-Code semantic labeling.[46]

In summary, the decision in *Baird* signaled a significant departure from previous Florida law. Accusatory statements about a defendant made by a nontestifying declarant are no longer excluded per se.[47] Instead, courts must employ a two-step approach.[48] The initial step requires evaluating the reason for which a given statement is offered.[49] If offered to prove the truth of the matter asserted, the statement is inadmissible as hearsay.[50] However, if offered for another purpose, exclusion on hearsay grounds is inappropriate and the court must apply the second step of the procedure.[51] The second, or section 90.403, test requires the court to determine to which issue the proffered testi-

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43. *Id.*

44. *Id.* (relying on MCCORMICK ON EVIDENCE (Edward W. Cleary ed., 3d ed. 1984)). *Harris* also demonstrates the truth of the adage that defining hearsay is like nailing down Jell-O. As noted, the court in *Harris* established that information offered solely to establish a logical connection is hearsay. *Harris* is correct under the Code because statements, if offered for *any reason* other than the truth of the matter asserted and if relevant (logically) to a material issue, are not hearsay. *See* State v. Baird, 572 So. 2d 904, 907 (Fla. 1990) (testimony offered to establish a logical sequence of events was deemed nonhearsay because it was offered to refute an entrapment defense and not to prove the defendant actually committed the acts in the statements). As noted, the *Harris* opinion quotes *McCormick on Evidence*, which states:

> [O]ne area of apparently widespread abuse should be noted. In criminal cases, an arresting or investigating officer should not be put in the false position of seeming just to have happened upon the scene; he should be allowed some explanation of his presence and conduct. His testimony that he acted "upon information received," or words to that effect, should be sufficient. Nevertheless, cases abound in which the officer is allowed to relate historical aspects of the case, replete with *hearsay statements* in the form of complaints and reports, on the ground that he was entitled to give the information upon which he acted. *The need for the evidence is slight, the likelihood of misuse great.*

Harris v. State, 544 So. 2d 323, 324 (Fla. 4th DCA 1989) (quoting MCCORMICK ON EVIDENCE) (emphasis added). Sadly, even the *Grand Muftis* of evidence find themselves impaled on the issue of hearsay versus nonhearsay.

45. *Harris*, 544 So. 2d at 324.

46. *Id.* at 324-25.

47. *Baird*, 572 So. 2d 904.

48. *Id.* at 907-08.

49. *Id.* at 907.

50. *Id.*

51. *Id.*

mony relates and then to balance probative value against unfair prejudice.[52] Thus, the *Baird* approach envisions an evidentiary scalpel rather than a conceptual meat ax.[53]

Baird will assume even greater importance because of recent developments concerning the entrapment defense. As indicated previously,[54] a 1988 decision of the Second District Court of Appeal has created uncertainty about the admission of accusatory statements by a nontestifying declarant to rebut an entrapment defense. Therefore, it will be necessary to review the development of Florida law of entrapment and to examine appropriate methods to rebut that defense. Changes in the Florida Rules of Criminal Procedure may be necessary to ensure a more orderly and fair procedure when an entrapment defense is raised.

III. FLORIDA'S ENTRAPMENT LAW—THE EARLY YEARS

Entrapment has been recognized as a viable criminal defense for an extended period of time.[55] Initially, Florida courts adhered to what has been called subjective entrapment, which focuses on a defendant to determine whether government actions enticed or lured him or her into committing an offense. If the enticement caused the defendant to commit an offense he or she would not otherwise have committed, then entrapment is a complete defense. However, to determine entrapment, the defendant's predisposition to commit the offense becomes relevant because demonstrated predisposition of a defendant rebuts

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52. *Id.*

53. In a subsequent case, Hodges v. State, 595 So. 2d 929 (Fla. 1992), the court seemed to stray from the *Baird* analysis. Hodges was tried and convicted for first-degree murder. During the guilt phase the trial court allowed officers to testify that before the murder the victim intended to press charges against Hodges for indecent exposure. The court classified this testimony as hearsay and found it harmless error because it was cumulative. *Id.* at 932-33. Arguably, the evidence was not admissible for the truth of the matter asserted. However, it was arguably relevant to motive and therefore premeditation, i.e., a statement of a person's intention to show subsequent action under § 90.803(3)(a)2., *Florida Statutes*. Without analysis, the court rejected this argument. In a more recent case, Pardo v. State, 596 So. 2d 665 (Fla. 1992), the court returned to the *Baird* analysis to resolve the admissibility of prior consistent statements of a victim of child abuse. These statements of the victim are repeated by non-declarants, i.e., witnesses. The court cautioned that even if the statements are admissible under § 90.803(23), "a trial court must weigh the reliability and the probative value of a child victim's hearsay statement against the danger that the statement will unfairly prejudice the defendant, confuse the issues at trial, mislead the jury, or result in the presentation of needlessly cumulative evidence." *Id.* at 668. This approach is completely consistent with that in *Baird*. *See also* Anderson v. State, 598 So. 2d 276, 277 (Fla. 1st DCA 1992) (Zehmer, J., dissenting) (giving an excellent discussion of the balancing test envisioned in *Baird*).

54. *See supra* text accompanying note 13.

55. *See* EHRHARDT, *supra* note 1, § 404.15.

entrapment. *Langford v. State*,[56] an early case, is illustrative. In *Langford* the Florida Supreme Court noted:

> In determining whether or not an entrapment may be sufficient to constitute a defense, the distinction to be observed is the difference between cases where in one it is shown that officers, in order to establish the basis for a prosecution, entice one who is not engaged in a criminal enterprise to commit an offense *mala prohibita*, when otherwise the person so enticed would not have engaged in such enterprise, and in the other it is shown that one engaged in an unlawful enterprise is enticed to do an act which may be used as direct evidence of his guilt.[57]

Early Florida entrapment cases adhered closely to the rationale applied in *Sorrells v. United States*, a U.S. Supreme Court decision that also focused on a defendant's subjective predisposition to commit an offense.[58]

The early cases recognized that predisposition could be established through evidence of both real and suspected criminal activity by the defendant.[59] *Story v. State*,[60] an early and influential case, recognized the foregoing principle of relevance. Story appealed his conviction for possession and sale of heroin.[61] On appeal, he challenged the sufficiency of the state's evidence of his predisposition to commit the crime in response to his entrapment defense.[62] In rejecting this challenge, the court noted that:

> [o]nce the evidence is introduced which suggests the possibility of entrapment, the State must prove that the defendant was predisposed to commit the offense charged. This will typically be done through the introduction of evidence of the defendant's prior convictions or of the defendant's reputation for engaging in certain illicit activities.[63]

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56. 149 So. 570 (Fla. 1933).

57. *Id.* at 571 (emphasis added).

58. 287 U.S. 435 (1932). *See also* State v. Dickinson, 370 So. 2d 762, 763 (Fla. 1979) ("The essential element of the defense of entrapment is the absence of a predisposition of the defendant to commit the offense."); Lashley v. State, 67 So. 2d 648, 649 (Fla. 1953) ("One who is investigated, induced, or lured by an officer of the law or other person, for the purpose of prosecution, into the commission of a crime *which he had otherwise no intention of committing* may avail himself of the defense of 'entrapment.'") (emphasis in original).

59. *See, e.g.*, Story v. State, 355 So. 2d 1213 (Fla. 4th DCA 1978).

60. *Id.*

61. *Id.* at 1214.

62. *Id.*

63. *Id.* at 1215 (citing Sherman v. United States, 356 U.S. 369 (1958); United States v. Cooper, 321 F.2d 456 (6th Cir. 1963); Marion v. State, 287 So. 2d 419, 422 (Fla. 4th DCA 1974); State v. Nelsen, 228 N.W.2d 143 (S.D. 1975)).

The court further held that a defendant's predisposition "can be established by evidence of the officer's 'reasonable suspicion' that the defendant was engaged in illegal activities.[64] . . . This will frequently be established through the tip of a reliable informant."[65] The approach outlined in *Story* gained wide acceptance in Florida appellate courts and has been uniformly followed.[66]

Interestingly enough, the decision in *Story* appears to be partially consistent with the evidentiary methodology outlined in *Baird*. Once a defendant raised entrapment as a defense, predisposition becomes a material issue in the case. Under *Story*, that issue may be demonstrated by an officer's reasonable suspicion based on an informant's tip.[67] Therefore, the evidence is not offered for its truth, but rather as circumstantial or indirect evidence of predisposition. Consequently, step one of the *Baird* test requiring the evidence be classified as nonhearsay before it will be admissible would seem to be satisfied. Unfortunately, these early decisions written before the Code was enacted do not address the second, section 90.403, issue: probative value versus prejudicial effect.

IV. ENTRAPMENT EXPANDS—THE OBJECTIVE STAGE

The Florida Supreme Court expanded the scope of the entrapment defense in *Cruz v. State*.[68] The expansion consisted of recognizing objective entrapment as a viable defense in criminal prosecutions.[69] Objective entrapment, unlike its subjective counterpart, focuses on the actions of law enforcement.[70] As defined by the supreme court, objective entrapment focuses on "police conduct" that "falls below standards, to which common feelings respond, for the proper use of governmental power."[71] The court gave further content to this rather indefinite and nebulous standard by stating that "[e]ntrapment has not occurred as a matter of law where police activity (1) has as its end

64. Story v. State, 355 So. 2d 1213, 1215 (Fla. 4th DCA 1978) (citing State v. Burow, 514 S.W.2d 585 (Mo. 1974)).

65. *Id.* (citing Brosi v. State, 263 So. 2d 849 (Fla. 3d DCA 1972)).

66. *See, e.g.*, State v. Sokos, 426 So. 2d 1044, 1045 (Fla. 2d DCA 1983) (state may show predisposition by prior criminal activity, reasonable suspicion of such activity, or ready acquiescence in crime to defend against entrapment); State v. Casper, 417 So. 2d 263, 265 (Fla. 1st DCA 1982) ("State may demonstrate predisposition by proof of the defendant's prior criminal activities, his reputation for such activities, reasonable suspicion of his involvement in such activity, or his ready acquiescence in the commission of the crime.").

67. *Story*, 355 So. 2d at 1215.

68. 465 So. 2d 516 (Fla. 1985).

69. *Id.* at 520.

70. *Id.* at 521.

71. *Id.* (citing Sherman v. United States, 356 U.S. 369, 382 (1958)).

the interruption of a specific ongoing criminal activity; and (2) utilizes means reasonably tailored to apprehend those involved in the ongoing criminal activity."[72] Objective entrapment is unlike subjective entrapment in another material respect: It presents a question of law for the court. In contrast, subjective entrapment is a factual issue determined by the ultimate fact-finder.

Subsequently, in *State v. Wheeler*[73] the supreme court analyzed the state's burden of proof when subjective entrapment becomes an issue in a case. The court stated that:

> The defendant has the initial burden of establishing a *prima facie* case of entrapment . . . . If the defendant has not made a *prima facie* case, the defense of entrapment does not go to the jury. If, however, a *prima facie* case is made, the issue of entrapment is submitted to the jury with appropriate instruction . . . . The burden lies with the state to disprove entrapment, which is usually done by proving the predisposition of the defendant beyond a reasonable doubt . . . [usually] by showing that the defendant had prior convictions or a reputation for engaging in similar illicit acts, by showing that the investigating officers had a reasonable suspicion that the defendant was engaging in such acts, or by showing the defendant's "ready acquiescence."[74]

Baird, *Cruz*, and *Wheeler* seemingly reaffirm the continued vitality of *Story*. As indicated previously,[75] step one of *Baird* is clearly satisfied. However, the Second District's decision in *Bauer v. State*[76] seems to cast doubt and generate uncertainty over what appeared to be a settled issue.

V. *BAUER*: HEARSAY LABELS AND MATERIAL ISSUES—A CONFLICT DEVELOPS

Bauer was convicted of seven counts of dealing in stolen property.[77] The appellate record reflects that during cross-examination of a state witness, the defense "posed certain questions designed to establish the defense of entrapment."[78] On redirect, the State attempted to demonstrate predisposition using the following question and answer:

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72. *Id.* at 522.
73. 468 So. 2d 978 (Fla. 1985).
74. *Id.* at 981 (emphasis added) (citations omitted).
75. *See supra* Section III.
76. 528 So. 2d 6 (Fla. 2d DCA 1988).
77. *Id.* at 7.
78. *Id.*

> Q. Why did you seek introduction to Mr. Scaglione and Mr. Bauer and start your undercover investigation to begin with in this case?
> A. I was given information by a confidential source that there were activities going on in the particular restaurant involving Mr. Scaglione and Mr. Bauer to the fact that dealing and selling of stolen property was occurring within that particular establishment involving those two particular individuals, Mr. Scaglione and Mr. Bauer.[79]

It would appear that, unlike *Baird*, subjective entrapment was clearly an issue in the case when the testimony was elicited.[80] Thus rebuttal evidence designed to demonstrate predisposition was arguably appropriate.[81] Writing for the majority, Judge Schoonover began his analysis by observing that "[w]hen, as here, the defense of subjective entrapment is properly raised, the state has the burden of proving that the accused had the predisposition to commit the offense charged."[82] The State could demonstrate predisposition by "showing that a defendant has prior convictions or a reputation for committing similar crimes, that law enforcement had a reasonable suspicion that the defendant was engaged in similar crimes, or the defendant showed ready acquiescence to commit the crime suggested by law enforcement."[83]

Nonetheless, the majority held that "[a]ny reasonable interpretation of Agent Chouinard's testimony leads to the conclusion that it was introduced by the state to prove the truth of the words spoken by the confidential informant, i.e., that the appellant was dealing in and selling stolen property prior to Agent Chouinard's investigation."[84] The majority then cited *Collins* and reiterated the standard pre-*Baird* language that although a law enforcement officer "may testify as to what action he took pursuant to information received from a confidential informant, his testimony regarding the content of such information constitutes hearsay."[85] While the court recognized that the State could establish predisposition by evidence of a defendant's reputation for committing similar criminal acts, the court classified the reputation testimony given as inadmissible hearsay.

In reaching this conclusion, the majority in *Bauer* relied principally on two cases, *Morris v. State*[86] and *United States v. Webster*.[87] In

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79. *Id.*
80. *See id.* at 7-8.
81. *Id.*
82. *Id.* at 8.
83. *Id.*
84. *Id.* at 7.
85. *Id.*
86. 487 So. 2d 291 (Fla. 1986).
87. 649 F.2d 346 (5th Cir. 1981).

Morris the trial court excluded evidence of statements made by a critical state informant to a defense witness.[88] In those statements, the informant indicated that he intended to set up Morris.[89] In reversing, the court found the statements were admissible as evidence of the informant's state of mind offered to show his subsequent conduct.[90] Thus, the *Bauer* majority's reliance on *Morris* appears misplaced. The statements in *Morris* were hearsay because they were offered to establish the truth of the matter asserted—that the informant did in fact subsequently set up Morris[91]—but were admissible as *exceptions* to the hearsay rule.[92] In *Bauer*, on the other hand, the statements were not hearsay because they were not offered to establish the truth of the matter asserted, but rather to show the defendant's predisposition.[93] Arguably, the *Bauer* majority fell into the tautological semantic trap that *Baird* should have eliminated. Further, the majority's conclusion in *Bauer* is also totally inconsistent with the *Story*, *Cruz*, and *Wheeler* decisions approving admission of such testimony for the precise reason the majority in *Bauer* rejected it.

As indicated,[94] the majority in *Bauer* also relied on *United States v. Webster*, a Fifth Circuit opinion written by Senior Judge Hill.[95] Webster was convicted of possessing and distributing cocaine and a principal issue in his trial was the question of entrapment.[96] To demonstrate predisposition, the government permitted a Drug Enforcement Agency (DEA) agent to testify that a reliable informant told him of several occasions where the defendant sold him cocaine.[97] First, Judge Hill recognized that in entrapment cases "the focal point of the inquiry is on the predisposition of the defendant."[98] Predisposition, he wrote, must be proven in accordance with applicable evidence law which "frowns upon attempts to prove facts by statements made outside the courtroom."[99] Thus, statements made by an informant to a law enforcement officer about a defendant's criminal reputation, about specific instances in which the defendant engaged in criminal activity, or statements about the defendant by various sources re-

88. 487 So. 2d at 292.
89. *Id.*
90. *Id.* at 293.
91. *Id.*
92. *See* FLA. STAT. § 90.803(3)(a)2. (1991).
93. Bauer v. State, 528 So. 2d 6, 7 (Fla. 2d DCA 1988).
94. *See supra* text accompanying note 87.
95. 649 F.2d 346 (5th Cir. 1981).
96. *Id.*
97. *Id.*
98. *Id.* (footnote omitted).
99. *Id.* at 349.

corded in police reports are clearly hearsay when offered to prove predisposition.[100] Judge Hill then turned to a section 90.403 balancing test.[101] The statements offered to demonstrate Webster's predisposition were in his view "gross hearsay,"[102] and, therefore, he was "hard pressed to envision a situation where the disparity between the probative value and prejudicial effect of evidence is greater."[103]

Webster is the prevailing view in federal courts concerning this type of testimony.[104] However, as Judge Campbell forcefully argued in his dissent to the *Bauer* opinion, the applicability of the *Webster* rationale is tenuous at best.[105] Judge Campbell argued that the *Bauer* majority violated *Hoffman v. Jones*[106] by ignoring established Florida precedent as expressed in *Cruz* and *Wheeler*.[107] This appears to be a telling argument. As indicated previously, *Cruz* and *Wheeler* explicitly reaffirmed the continuing vitality of *Story*, thus allowing the State to prove predisposition by evidence of the investigating officer's reasonable suspicion of the defendant's involvement in criminal activity similar to the offense charged. *Baird* strengthened the conclusion that, under the Code, the evidence is simply not hearsay because it is directed to the material issue of predisposition. In addition, Florida apparently still recognizes objective, as well as subjective, entrapment.[108]

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100. *Id.*

101. *Id.* at 350-51.

102. *Id.* at 350.

103. *Id.* Judge Hill was also troubled by the possible use of a government agent's testimony to show reputation or character. This testimony, even if relevant to show predisposition, came from a witness who "[a]lmost always is not qualified to speak on behalf of the community, testifies as to what the informant told him about the defendant's reputation, and the informant's statements are themselves based on information from other sources." *Id.* at 350 n.7.

In my view, this concern points out the differences between federal and state law enforcement. While it is certainly plausible that federal agents may not have street smarts attuned to local operators because of frequent transfers and service in areas with which they are unfamiliar, the opposite is true of local law enforcement. The "locals" are immersed in street culture and most assuredly are familiar with the "word" on the street. In my view, this illustrates why state courts should be wary of leaping on the federal bandwagon and why the federal system should recognize that state courts operate in a totally different milieu.

104. *See* United States v. McClain, 531 F.2d 431 (9th Cir.), *cert. denied*, 429 U.S. 835 (1976); United States v. Ambrose, 483 F.2d 742 (6th Cir. 1973); United States v. Johnston, 426 F.2d 112 (7th Cir. 1970); United States v. Catanzaro, 407 F.2d 998 (3d Cir. 1969); Whiting v. United States, 296 F.2d 512 (1st Cir. 1961).

105. *See* Bauer v. State, 528 So. 2d 6, 10 (Fla. 2d DCA 1988) (Campbell, J., dissenting).

106. 280 So. 2d 431 (Fla. 1973). *Hoffman* stands for the proposition that district courts of appeal are bound by the Florida Supreme Court's decisions. *Id.* Therefore, the *Bauer* majority's reliance on *Morris* as authority "which requires us to reverse," *Bauer*, 528 So. 2d at 9, is tenuous at best.

107. *See Bauer*, 528 So. 2d at 9.

108. Any doubt concerning the continuing vitality of objective entrapment seems to have been put to rest in State v. Hunter, 586 So. 2d 319 (Fla. 1991). In *Hunter* the supreme court held

Thus, in Florida, unlike in the federal courts, the evidence is relevant in determining whether the police engaged in impermissible virtue testing.

Judge Campbell's dissent, like Judge Hill's opinion, also slips into a section 90.403 balancing test. "This type of testimony," he argues:

> [I]s not so prejudicial as the *Webster* majority states because it is allowed in solely to rebut the defense of entrapment that has been affirmatively raised by the defendant. Entrapment is something akin to a plea of confession and avoidance. The defendant admits the offense, but seeks to avoid the consequences of it because, the defense alleges, the state induced him to perform the act. Normally, the severe prejudice of allowing testimony concerning prior similar conduct by a defendant comes about because it may influence a jury to believe that because a defendant may have done such a thing in the past, he might therefore be guilty of *doing the act* with which he is charged. Because in an entrapment case the issue is not *whether* a defendant committed an act, but *why*, the possible prejudicial effect on a jury by the use of such prior act testimony is simply not present.[109]

VI. *BAIRD* AND *BAUER*—THE LIMITS OF LABELS

The conflict over hearsay versus nonhearsay in the use of reputation testimony demonstrates the limitations of conceptual labels. Indeed,

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that "[b]y focusing on police conduct, this objective entrapment standard includes due process considerations." *Id.* at 322. *See also* Ricardo v. State, 591 So. 2d 1002 (Fla. 4th DCA 1991). See also Krajewski v. State, 589 So. 2d 254 (1991), where the supreme court quashed the Fourth District Court of Appeal's holding that objective entrapment would not be recognized as a defense in that judicial district and remanded the case to the Fourth District Court of Appeal. On remand, the Fourth District held that Krajewski had not been entrapped, Krajewski v. State, 597 So. 2d 814 (Fla. 4th DCA 1992), and the Florida Supreme Court has granted review of the case. Lewis v. State, 597 So. 2d 842 (Fla. 3d DCA 1992).

In any event, unlike subjective entrapment, objective entrapment is a purely legal defense to be decided by the court. Presumably, under the *Baird* rationale, a court could hear evidence on the issue of impermissible targeting or methods to determine that issue. The same evidence could then be excluded on a section 90.403 basis when offered to show predisposition on the part of the defendant. The central concern of this Article is subjective entrapment, which presents unique procedural and evidentiary problems that will be the subject of further discussion in this Article. *See also* Herrera v. State, 594 So. 2d 275 (Fla. 1992) (Kogan, J., concurring).

109. Bauer v. State, 528 So. 2d 6, 14 (Fla. 2d DCA 1988). In *Herrera* the supreme court seemed to accept Judge Campbell's analysis of the entrapment defense. Justice McDonald, writing for the court, observed "entrapment is an affirmative defense and, as such, is in the nature of an avoidance of the charges." *Herrera*, 594 So. 2d at 277. Justice McDonald continued by concluding that:

> [P]redisposition to commit a crime, however, is not the same as the intent to commit that crime. As explained by the New Jersey Supreme Court in its consideration of this issue, "predisposition is not the same as *mens rea*. The former involves the defendant's character and criminal inclinations; the latter involves the defendant's state of mind while carrying out the allegedly criminal act."

Id. at 278 (quoting State v. Rockholt, 476 A.2d 1236, 1242 (N.J. 1984)).

both Judge Hill and Judge Campbell, while valiantly attempting to avoid it themselves, slipped into the conceptual quagmire. *Baird*, in my view, represents the proper analysis envisioned by the Evidence Code. Close examination of both judges' opinions reveals that the real bone of contention is probative value versus prejudicial effect of reputation evidence. Under the Code, even if the evidence is not objectionable on hearsay grounds, it must satisfy other Code provisions to be admissible. Section 90.401 defines relevant evidence as "evidence tending to prove or disprove a material fact."[110] This is the threshold test of logical probative value. Section 90.402 provides that "[a]ll relevant evidence is admissible, except as provided by law."[111] This provision announces a broad rule of admission subject to limits imposed by law. Arguably, this could include both statutory and judicial limitations. The next provision, section 90.403,[112] is the heart of the evidentiary equation.

Section 90.403's "safety valve" or "cut-off switch" is designed to prevent evidentiary overload. Under this provision, admittedly relevant evidence is excluded "if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of issues, misleading the jury, or needless presentation of cumulative evidence."[113] One noted commentator observed that the valve serves to prevent decisions founded on an improper basis.[114] This section tests evidence on a legal versus logical basis. Given the obvious impact of "bad guy" evidence, one can argue, as did Judge Hill, that uncorroborated street gossip is simply too prejudicial even in an entrapment scenario. As Professor Charles W. Ehrhardt notes, "[i]n weighing the probative value against the unfair prejudice, it is proper for the court to consider the need for the evidence [and] the tendency of the evidence to suggest an improper basis to the jury for resolving the matter, e.g., an emotional basis."[115]

Like any other material fact, predisposition can be decided on an improper basis if unreliable evidence is used. Given present procedure, it is virtually impossible for a trial court to do an adequate *Baird*-type balancing procedure. In addition, the present use of "suspicion" and "reputation" evidence ignores the requirements of another critical provision of the Evidence Code, section 90.404.[116]

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110. FLA. STAT. § 90.401 (1991).
111. *Id.* § 90.402.
112. *Id.* § 90.403.
113. *Id.*
114. EHRHARDT, *supra* note 1, § 403.
115. *Id.*
116. FLA. STAT. § 90.404 (1991).

VII. ENTRAPMENT, PREDISPOSITION, AND THE "WILLIAMS RULE"—THE BLACK HOLES IN FLORIDA EVIDENCE AND PROCEDURE

As Judge Campbell noted, subjective entrapment is an affirmative defense.[117] The defendant admits the actions giving rise to the charge but alleges that he lacks criminal inclination and was lured into the offense. It is a defense of confession and avoidance. Under present procedure, however, the defense need not be raised in the pleadings.[118] Thus, in my experience, it is not unusual for the defense to first surface at the charge conference when the defense requests an instruction on the issue. *Weaver v. State*[119] illustrates the problems that routinely occur when entrapment surfaces for the first time at trial.

In *Weaver* the defendant was convicted of possession of heroin with intent to distribute.[120] Trial evidence indicated that when the defendant became the target of a narcotics investigation, police enlisted the assistance of his girlfriend.[121] At the time of her conversion to good citizenship, she was incarcerated on drug charges and secured her release by agreeing to serve as a confidential informant in the investigation.[122] The evidence further revealed that, over a four-day period, the girlfriend/confidential informant repeatedly requested that the defendant obtain heroin for her.[123] Finally, at a party arranged by the defendant—complete with birthday greetings, flowers, champagne, and candy—she once more requested heroin after ensuring the defendant was in the right "mood."[124] The defendant did not delay. Undoubtedly smitten, surely hopeful, and no doubt completely unaware, he obtained the drugs, and his arrest, trial, and conviction followed with equal alacrity.[125]

These facts were developed on cross-examination and the defendant elected not to testify.[126] At the charge conference, defense counsel requested an entrapment instruction, which was denied.[127] The Fourth District reversed Weaver's conviction but noted that "[w]e foresee problems in this and other future cases when the defendant relies solely on cross-examination of State witnesses to support a defense of

117. *See supra* note 109 and accompanying text.
118. *See* FLA. R. CIV. P. 1.110 (1991).
119. 370 So. 2d 1189 (Fla. 4th DCA 1979).
120. *Id.* at 1190.
121. *Id.*
122. *Id.*
123. *Id.*
124. *Id.*
125. *Id.* at 1190-91.
126. *Id.* at 1191.
127. *Id.*

entrapment. Here, the defendant filed nothing before trial giving notice of his intent to rely on entrapment."[128] The court observed that defense counsel "waived opening statement and defendant did not take the stand and offered no evidence. It was thus not until *the charge conference* that the State knew defendant was relying on entrapment."[129] Thus, the State was effectively precluded from offering evidence of predisposition in rebuttal.[130] The court held that in such circumstances, the requested instruction should be given but the State should be allowed to reopen and present rebuttal evidence.[131] This procedure is now generally followed.[132]

While facially appealing, the solution is fraught with procedural and practical difficulties. Procedurally, under Florida Rule of Criminal Procedure 3.220, discovery is closed once the trial begins.[133] Additional witnesses or evidence would arguably require a full-blown "Richardson" hearing.[134] At that hearing, the State could face significant obstacles to introduction of new evidence. From a practical standpoint, the State would probably be hard-pressed to locate predisposition evidence of any kind. Given the astronomical caseloads at present, the attendant delays should be avoided if other procedural remedies can be utilized.

Also, the present procedure seemingly fails to comport with section 90.404(2)(a), *Florida Statutes*, the "Williams Rule" provision.[135] This section provides that:

> [s]imilar fact evidence of other crimes, wrongs, or acts is admissible when relevant to prove a material fact in issue, such as proof of motive, opportunity, *intent*, preparation, plan, knowledge, identity, or absence of mistake or accident, but it is inadmissible when the evidence is relevant solely to prove bad character or propensity.[136]

Section 90.404(2)(b) requires:

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128. *Id.* To paraphrase a venerable law enforcement metaphor, the rules in entrapment are like the rules in a knife fight: There ain't no rules.

129. *Id.* (emphasis added).

130. *Id.*

131. *Id.*

132. *See, e.g.*, Joiner v. State, 382 So. 2d 1357, 1358 (Fla. 1st DCA 1980).

133. FLA. R. CRIM. P. 3.220 (1991).

134. Richardson v. State, 246 So. 2d 771, 774-75 (Fla. 1971). *Richardson* requires the court to determine if non-disclosure was willful or inadvertent, trivial or substantial, and what effect it had on the ability of the other party to prepare for trial.

135. Williams v. State, 110 So. 2d 654 (Fla. 1959). *Williams* allows the presentation of evidence that could be used to prove predisposition if such evidence is offered in compliance with section 90.404(2)(a) of the Code.

136. FLA. STAT. § 90.404(2)(a) (1991) (emphasis added).

> When the state . . . intends to offer evidence of other criminal offenses under paragraph (a), no fewer than 10 days before trial, the state shall furnish to the accused a written statement of the acts or offenses it intends to offer, describing them with the particularity required of an indictment or information. No notice is required for evidence of offenses used for impeachment or on rebuttal.[137]

"Williams Rule" evidence is admissible to show predisposition and thus prove that criminal intent originated with the accused. Given the present procedure, limitations placed on "Williams Rule" evidence are largely ignored.[138] Thus, procedural safeguards are not utilized to prevent the use of unreliable information, such as the types described by Judge Hill. While the present procedure does not require notice for rebuttal in the entrapment scenario, it certainly does not, in my view, envision that section 90.404(2)(a) also be ignored. The present procedure employed in Florida trial courts simply does not provide adequate compliance with the stringent requirements concerning use of this type of testimony.

VIII. PRESENT PROBLEMS; A PROPOSED RESOLUTION

The present procedure in entrapment cases encourages the sort of ambush tactics the Florida Rules of Criminal Procedure are designed to prevent. As the Fourth District Court noted in *Weaver*, the defense, with full advantage of Florida's liberal discovery rules, can literally lie in wait and spring the entrapment defense after the close of the evidence.[139] The State can also wait and argue that because of defense tactics it should be allowed to use evidence of questionable reliability. This results in use of evidence that is often nothing more than suspicion, rumor, and street gossip received from questionable sources. Or, as Judge Hill diplomatically noted, persons "whose motivations may be less than honorable."[140] In such a situation, a trial court can neither use section 90.403 properly nor ensure that section 90.404 is followed.[141]

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137. *Id.* § 90.404(2)(b).

138. *See* EHRHARDT, *supra* note 1, §§ 404.9-.20. In summary, other crime evidence must be both logically and legally relevant. In addition, there must not be overkill; the evidence of the crimes must not become a central feature of the trial. Our present procedures, or rather lack thereof, make it hard for the trial court to conduct the critical section 90.403 balancing test mandated by *Baird* and envisioned by the Code. *See* United States v. Webster, 649 F.2d 346, 350 (5th Cir. 1981).

139. Weaver v. State, 370 So. 2d 1189, 1191 (Fla. 4th DCA 1979).

140. *Webster*, 649 F.2d at 350.

141. *Id.*

At present, Florida does not require defendants to provide notice of their intent to rely on an entrapment defense. In *Webster*, Judge Hill, writing for the Fifth Circuit, noted the potential problem when he stated:

> We are not unaware that our holding today may cause . . . some difficulties in future trials. Often the government will have no reason to believe prior to the trial that the defendant intends to raise an entrapment defense. If the defendant waits until the trial is under way to raise the defense, the government may find itself in the difficult position of having quickly to locate and prepare witnesses it did not believe would be needed. We in no way wish to encourage tactics that impede the proper administration of trials. To avoid this problem, the district courts may, by local rule, require defendants to disclose their intention to raise the defense prior to trial.[142]

Expanding Florida Rule of Criminal Procedure 3.200 to require notice of the intent to rely on an entrapment defense would eliminate the foregoing problems for the State. The *quid pro quo* from the defense standpoint would be to require that the State comply with section 90.404(2)(b) in entrapment cases. This provision would prevent the use of unreliable, uncorroborated evidence. It would also require compliance with substantive requirements concerning use of "Williams Rule" testimony. Finally, the proposed changes would allow trial courts to adequately fulfill their responsibilities of properly balancing the probative value of predisposition evidence offered by the State in accordance with section 90.403. A proper balance would ensure that the type of inflammatory and unreliable evidence described by Judge Hill would not reach the fact-finder.[143] A notice requirement used in conjunction with available pretrial procedures would alleviate many problems in this area.[144]

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142. *Id.* at 351 (citations omitted).

143. Florida Rule of Criminal Procedure 3.220(f), (k), (p) gives trial judges extensive authority over case management. The provisions allow trial judges to schedule pretrial conferences, alter times for discovery and even order additional discovery. A trial judge, alerted by a notice of entrapment, can easily use these tools to remedy the problems outlined by the court in *Weaver*. This would increase pretrial work, but would be preferable to the present unstructured approach.

144. The following proposal is currently being considered by the Rules Committee of the Criminal Law Section of The Florida Bar. If approved, it will be submitted to the Florida Supreme Court for its approval:

NOTICE OF ENTRAPMENT

PROPOSED RULE OF CRIMINAL PROCEDURE:

Upon the written demand of the State Attorney, a Defendant who intends to offer evidence of entrapment shall not less than ten days before trial or such other time as

In conclusion, the issue of how to properly prove predisposition when faced with the question of entrapment presents multidimensional issues in the trial context. These issues, which include pleading procedure and substantive evidence, have become more immediate because of the *Baird* and *Bauer* decisions. As indicated, *Baird* will require trial courts to utilize section 90.403 more discriminately and to rely less on conceptual labels. This will require procedural adjustments when entrapment is an issue. As an affirmative defense, entrapment should be pled like insanity or alibi as required by the reciprocal notice requirements of the proposed rule change. The notice requirements of section 90.404(2)(b) should be applied to state evidence intended to demonstrate predisposition to allow the trial judge to

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the Court may direct, file and serve upon such prosecuting attorney notice of his intention to claim such entrapment. Such notice shall contain a statement of particulars showing the nature of the entrapment the Defendant expects to show and the names and addresses of the witnesses by whom he expects to show such entrapment. Not more than five days after receipt of such notice or at such other time as the Court may direct, the prosecuting attorney shall file and serve upon the Defendant the names and addresses, (as particularly as are known to the prosecuting attorney), of the witnesses the State proposes to offer in rebuttal to discredit the Defendant's entrapment defense at trial. The state shall also, in conformity with F.S. 90.404(2)(a)(b), disclose evidence of such other crimes, wrongs, or acts upon which it proposes to offer to further rebut the defense. Both the Defendant and the State shall be under a continuing duty to promptly disclose the names and addresses of additional witnesses which come to the attention of either party subsequent to filing their respective witness lists as provided in this rule. The prosecuting attorney shall be under a continuing duty to disclose additional evidence of crimes, wrongs or acts which come to his attention and which he proposes to offer to rebut the defense of entrapment. If a Defendant fails to file and serve a copy of such notice as herein required, the Court may exclude evidence offered by such Defendant for the purpose of demonstrating entrapment, except the testimony of the Defendant. If such notice is given by the Defendant, the Court may exclude testimony of any witness for the purpose of demonstrating entrapment. If the prosecuting attorney fails to file and serve on the Defendant a list of witnesses or such other crimes, wrongs, or acts as herein provided, the Court may exclude evidence offered by the State to rebut the Defendant's entrapment defense. For good cause shown, the Court may waive the requirements of this rule.

COMMITTEE NOTE

Florida, at present, has no rule governing the entrapment defense. Entrapment, an affirmative defense much like alibi or insanity, often involves use of what would otherwise be Williams Rule evidence offered by the State to demonstrate predisposition of the Defendant. In many instances, the Court is unaware of a Defendant's intent to rely on such a defense until the charge conference. The State is then allowed, at present, to reopen to rebut the defense. This rule is intended to implement the suggestion offered by Senior Judge James Hill of the Eleventh Circuit in *United States v. Webster*. It is further intended to ensure that the Court will be afforded an opportunity to prevent use of collateral crimes evidence that is unreliable or unduly prejudicial, F.S. 90.403. Use of the notice requirements of F.S. 90.404 will effectuate prompt notice and orderly, fair procedure.

Draft, Rules Committee, Criminal Law Section, The Florida Bar (undated) (on file with committee).

properly apply the section 90.403 balancing test. It will ensure that what is in fact "Williams Rule" evidence will be admitted or excluded in accordance with established standards. Finally, trial judges must effectively utilize the procedural and evidentiary notice requirements in conjunction with pretrial procedures. This multidimensional, systemic approach can alleviate the existing evidentiary and procedural shortcomings when dealing with hearsay.