

APPENDIX A

Decision of Sixth District Court of Appeal

**SIXTH DISTRICT COURT OF APPEAL
STATE OF FLORIDA**

Case No. 6D23-212
Lower Tribunal No. CF18-9111-XX

RANDOLPH MAYA,

Appellant,

v.

STATE OF FLORIDA,

Appellee.

Appeal from the Circuit Court for Polk County.
Jalal A. Harb, Judge.

May 12, 2023

COHEN, J.

Randolph Maya¹ appeals his conviction of second-degree murder in the death of his wife, Jodi Maya.² He raises two grounds on appeal: 1) whether the trial court

¹ Because witnesses share a common last name, for purposes of clarity we will refer to Randolph Maya as Maya and the remaining family members by their first names.

² This case was transferred from the Second District Court of Appeal to this Court on January 1, 2023.

improperly allowed the State to present a witness's grand jury testimony, and 2) whether the trial court erred in overruling Maya's objection to the prosecution's closing argument containing an alleged misstatement of the law.

Jodi Maya died from strangulation. Her death at the hands of Maya was witnessed in part by their daughter Tia, who told law enforcement and the grand jury that she heard her mother screaming for help and saying that Maya was trying to kill her. Tia went to check on her mother and saw her parents in a bathroom, with her father's back toward her. She observed her father on top of her mother, "pressed against her." Tia called 911, and law enforcement responded to the scene. While Tia denied seeing what her father was doing, she did say that after the screaming stopped, she saw her mother lying motionless. The only individuals present at the time were Maya, Jodi, Tia, and Tia's older brother, Brandon.³

Jodi's death occurred on September 20, 2018. Maya's trial occurred in the first week of November 2021, over three years later. As the trial approached, fifteen-year-old Tia, who had lost her mother, faced the prospect that her testimony might result in losing her father to prison.⁴ In pre-trial discussions with the State and in a deposition, Tia expressed that she had very limited memory of the events leading to

³ When law enforcement arrived at the scene, Maya initially insisted that everything was fine and that nothing unusual had happened, although his wife was near death.

⁴ Tia expressed these sentiments at Maya's sentencing.

her mother's death. Efforts to "refresh her recollection" by showing her the statements she gave earlier were unavailing.

The State filed a pre-trial motion seeking to declare Tia unavailable "due to lack of memory" or, alternatively, to find that her loss of memory was feigned. The purpose of the motion was to allow the admission of her grand jury testimony.

The court deferred ruling until trial, allowing the judge to watch Tia testify and assess her credibility and apparent motivations. On the stand, Tia denied remembering much about the day in question. The court was also aware of a series of her text messages. One text she sent to her older sister, who no longer lived in the home, reiterated much of what Tia had told law enforcement. She wrote:

And she was screaming and saying he was going to kill her. And it stopped, and then Dad walked out of the house and I saw him smoking and talking to some dude like he didn't do anything.

Tia texted her cousin, "All I know was that he was choking her."

Before the trial her father told her to make sure she told the truth, "whatever the truth is." He also told her, "My lawyers are going to ask you questions anyways, whether you know this. That, do you remember? You know, hey I was 16 years old. I really don't remember that much, you know whatever." Her brother, Hunter, suggested she avoid the trial altogether.

Based on these events and on the judge's observations of Tia while testifying, the trial court found that Tia's "memory loss" was feigned, a finding not challenged

by Maya on appeal. The court allowed the State to read her grand jury testimony into evidence. Tia was cross-examined by Maya's counsel.

Maya argues that the admission of the grand jury testimony was prejudicial error, relying on *Morton v. State*, 689 So. 2d 259 (Fla. 1997). *Morton* disallowed the introduction of prior inconsistent statements that were "otherwise inadmissible" when the State called the witness for the primary purpose of impeaching the witness. Maya argues here that the State's primary purpose for calling Tia as a witness was to impeach her by use of her prior inconsistent statements given in her grand jury testimony.

"Except as provided by statute, hearsay evidence is inadmissible." § 90.802, Fla. Stat. (2021). "'Hearsay' is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." § 90.801(1)(c), Fla. Stat. (2021). A party may impeach a witness by introducing statements of the witness "which are inconsistent with the witness's present testimony" (commonly referred to as impeachment by "prior inconsistent statement"). § 90.608(1), Fla. Stat. (2021). Such a statement is not hearsay because the prior inconsistent statement is not offered for the truth of the matter asserted; it is offered merely to show that the witness made a different statement at a different time. If the statement is offered to prove the truth of the matter asserted, it is being

offered as substantive rather than impeachment evidence. In that event, its admission is subject to the rules governing the admissibility of hearsay.

Courts have recognized that a jury might find it difficult to properly apply the nuances of impeachment versus substantive evidence, leading to a significant danger that a prior inconsistent statement offered for impeachment might be improperly used as substantive evidence, even when the trial judge instructs otherwise. This recognition is one of the justifications for section 90.403, Florida Statutes. Under section 90.403, a court must exclude evidence if the court finds that the probative value of the evidence is substantially outweighed by the danger of unfair prejudice. This would include situations in which there is a high risk a jury will not confine its consideration of certain evidence to the purpose for which it is admitted.

Under 90.403, motivation of the presenter is not a factor, only the effect of the evidence. *Morton* alters that principle slightly. The *Morton* court recognized the potential for abuse by a prosecutor who might call a witness the prosecutor expects to testify contrary to earlier statements, merely for the purpose of impeaching the witness by introducing the prior statements the prosecutor wants to get before the jury. The prosecutor's hope is that the jury will not limit its use of the evidence to impeachment but will use it also to substantively support the State's case. With that in mind, the *Morton* court held that when "a party knowingly calls a witness for the primary purpose of introducing a prior statement which otherwise would be

inadmissible, impeachment should ordinarily be excluded.” *Morton*, 689 So. 2d at 264.

In the present case, it is sensible to assume the State called Tia for the primary purpose of introducing her grand jury testimony; however, this did not violate the rule in *Morton*. *Morton* disallows evidence “otherwise inadmissible.” Unlike prior inconsistent statements that may be used only for impeachment, prior grand jury testimony is not hearsay and may be used as substantive evidence.⁵ § 90.801(2)(a), Fla. Stat. (2021); *Moore v. State*, 452 So. 2d 559, 562 (Fla. 1984).

Maya argues that the same policy considerations in *Morton* exist in his case, so the *Morton* rule should apply. We cannot agree. The policy *Morton* sought to

⁵ Section 90.801(2)(a) provides:

(2) A statement is not hearsay if the declarant testifies at the trial or hearing and is subject to cross-examination concerning the statement and the statement is:

(a) Inconsistent with the declarant's testimony and was given under oath subject to the penalty of perjury at a trial, hearing, or other proceeding or in a deposition[.]

A loss of memory is inconsistent with prior testimony if the loss of memory is feigned or contrived. *See Mitchum v. State*, 345 So. 3d 398, 402 (Fla. 1st DCA 2022); *see also Davis v. State*, 52 So. 3d 52, 54 (Fla. 1st DCA 2010) (holding a witness’s claimed loss of memory contradicts his prior statements when the loss of memory is fabricated); *United States v. Cisneros-Gutierrez*, 517 F.3d 751, 757–58 (5th Cir. 2008) (holding under the federal version of section 90.801(2)(a) that a witness’s prior statement, made under oath, can be substantively admissible if the witness feigns memory loss when testifying at trial).

enforce is that a jury is not permitted to use impeachment evidence as substantive evidence. Accordingly, the State should not be permitted to intentionally put before the jury testimony, inadmissible as substantive evidence, with the hope that the jury will not be capable of following the court's instructions that the evidence may be used solely for impeachment. In Maya's case, there is no danger the jury would be confused or improperly consider impeachment evidence as substantive evidence because the grand jury testimony was not offered as impeachment evidence; it was substantive evidence properly admitted under section 90.801(2)(a).

The second argument raised was whether the trial court erred in overruling Maya's objection when the prosecutor stated during her rebuttal closing argument, "And if you believe in your heart that the defendant is the one that did it and that it was a murder, he should be convicted." We agree with Maya that the State's comment was improper, and the trial court erred in overruling the objection. The determination of whether a juror has an abiding conviction of guilt is based upon a reasoned review of the evidence presented during the trial.

The question is whether the error was harmless. *See Cardona v. State*, 185 So. 3d 514, 520 (Fla. 2016). The harmless error "standard involves placing 'the burden on the state, as the beneficiary of the error, to prove beyond a reasonable doubt that the error complained of did not contribute to the verdict or, alternatively stated, that

there is no reasonable possibility that the error contributed to the conviction.” *Id.* (quoting *Ibar v. State*, 938 So. 2d 451, 466 (Fla. 2006)).

The prosecutor discussed the reasonable doubt standard during her initial closing argument and correctly articulated its burden. While the objection to the improper statement on rebuttal was overruled, the prosecutor paraphrased the jury instruction on abiding conviction of guilt immediately thereafter. This was consistent with the instruction on the law provided to the jury. We find that the isolated comment, while improper, was harmless. *See Torres-Matmoros v. State*, 34 So. 3d 83, 85 (Fla. 3d DCA 2010) (“The sole statement made by the prosecutor regarding reasonable doubt . . . was immediately corrected by the prosecutor, and, when viewed in context, was harmless beyond a reasonable doubt.”); *Covington v. State*, 842 So. 2d 170 (Fla. 3d DCA 2018) (holding that prosecutor’s isolated yet improper comment that was immediately clarified by a correct statement of the burden of proof was harmless).

For the foregoing reasons, the judgment is affirmed.

AFFIRMED.

STARGEL, J., concurs.

WHITE, J., concurs in result only, without opinion.

Howard L. "Rex" Dimmig, II, Public Defender, and Steven L. Bolotin, Assistant Public Defender, Bartow, for Appellant.

Ashley Moody, Attorney General, Tallahassee, and J. Wade Stidham, Assistant Attorney General, Tampa, for Appellee.

NOT FINAL UNTIL TIME EXPIRES TO FILE MOTION FOR REHEARING
AND DISPOSITION THEREOF IF TIMELY FILED

CERTIFICATE OF SERVICE

I certify that a copy has been e-mailed to Assistant Attorney General J. Wade Stidham at CrimappTPA@myfloridalegal.com, on this 28th day of June, 2023.

CERTIFICATION OF COMPLIANCE

I hereby certify that this document was generated by computer using Microsoft Word with Bookman Old Style 14-point font in compliance with Fla. R. App. P. 9.210(a)(2).

Respectfully submitted,

/s/ Steven L. Bolotin

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Tenth Judicial Circuit
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SLB/kas

APPENDIX B

**Decision of Florida Supreme Court denying
review, and order denying rehearing.**

Supreme Court of Florida

WEDNESDAY, OCTOBER 25, 2023

Randolph Maya,
Petitioner(s)

v.

State of Florida,
Respondent(s)

SC2023-0928

Lower Tribunal No(s).:

6D2023-212;

532018CF009111A000XX

This cause having heretofore been submitted to the Court on jurisdictional briefs and portions of the record deemed necessary to reflect jurisdiction under Article V, Section 3(b), Florida Constitution, and the Court having determined that it should decline to accept jurisdiction, it is ordered that the petition for review is denied.

No motion for rehearing will be entertained by the Court. See Fla. R. App. P. 9.330(d)(2).

CANADY, LABARGA, COURIEL, FRANCIS, and SASSO, JJ., concur.

A True Copy

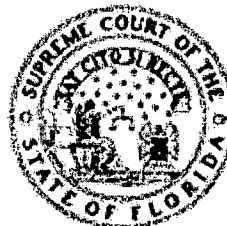
Test:

SC2023-0928 10/25/2023

John A. Tomasino

Clerk, Supreme Court

SC2023-0928 10/25/2023



KS

Served:

APPENDIX C

Trial Transcripts

23, 109, 117, 118, 119, 120, 121, 575, 581,
588, 594, 57, 598, 600, 601, 602, 603, 604,
605, 606, 822, 823

EXECUTED IN THE CIRCUIT/COUNTY COURT OF THE TENTH JUDICIAL
 LOCATION South County Jail CIRCUIT AND IN AND FOR POLK COUNTY

10 MONTH 02 DAY 2018 YEAR 1544 hours TIME

Grady Judd - Sheriff, Polk County, Florida

" Det Such 2048
 DEPUTY SHERIFF MEMBER #

CASE # 2018-45864

OBITS #

BOOKING #

CLERK # 53-2018CF-000111-A000-JXX

ARREST WARRANT

In the name of the State of Florida:

TO: All and singular, the Sheriffs of Florida and other authorized law enforcement officers.
 WHEREAS the court has found probable cause from sworn complaint affidavit or other testimony under oath to believe that the person named below committed the offense(s) listed below;

YOU ARE HEREBY COMMANDED to arrest, instantly, the person named below for the offense(s) described below for which bond and conditions thereof are set as indicated, and to bring said person before the Court to be dealt with according to the law.

1. 1st Degree Murder	F.S.S. or C.O. 762.04(1) (a)	Class: CF
# of Counts: 1	BAIL IS SET AT: None	Per Count
2.	F.S.S. or C.O.	Class:
# of Counts:	BAIL IS SET AT:	Per Count
3.	F.S.S. or C.O.	Class:
# of Counts:	BAIL IS SET AT:	Per Count
4.	F.S.S. or C.O.	Class:
# of Counts:	BAIL IS SET AT:	Per Count
5.	F.S.S. or C.O.	Class:
# of Counts:	BAIL IS SET AT:	Per Count
6.	F.S.S. or C.O.	Class:
# of Counts:	BAIL IS SET AT:	Per Count
7.	F.S.S. or C.O.	Class:
# of Counts:	BAIL IS SET AT:	Per Count
8.	F.S.S. or C.O.	Class:
# of Counts:	BAIL IS SET AT:	Per Count
9.	F.S.S. or C.O.	Class:
# of Counts:	BAIL IS SET AT:	Per Count
10.	F.S.S. or C.O.	Class:
# of Counts:	BAIL IS SET AT:	Per Count

DEFENDANT NAME: Randolph Maya

ADDRESS: 308 Dixie Hwy, Auburndale, FL 33823

RACE/SEX: WM HGT: 5-05 WGT: 165

SSN: 691-09-3946

POB: CA

MARITAL STATUS: Married

EMPLOYER: Self Employed

ALIAS: UK

PHONE: 352-233-1005

DOB: 07/29/1968

HAIR: Black

EYES: Brown

DL: M000-720-68-268-0

SCARS: UK

COMPLEXION: Medium

OCCUPATION: Window Tinting

2.13 PRIOR INCONSISTENT STATEMENT AS IMPEACHMENT

The evidence that a witness may have made a prior statement that is inconsistent with his or her testimony in court should be considered only for the purpose of weighing the credibility of the witness's testimony and should not be considered as evidence or proof of the truth of the prior statement or for any other purpose.

However, the grand jury testimony of Tia Maya has been admitted into evidence not only for impeachment purposes but also as substantive evidence and should be considered as evidence in this case.

Jury Question during Deliberation

Question Number: 1

Date 11/05/21 Time of Question: 12:15 pm

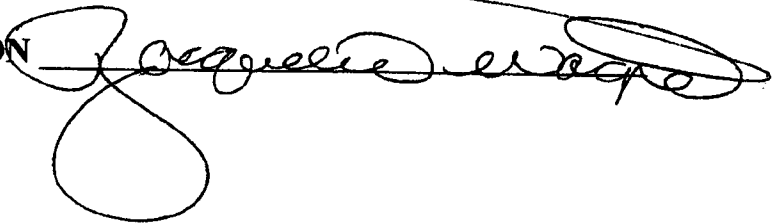
Can we have a copy of text message
between Tia and Alyssa?

Answer to question #1
Members of the jury,
your verdict must be based on
the evidence presented during the
trial and the law that I
gave you. The copy of the

text message is not in evidence.
Judge. Hark

11/5/21

JURY FOREPERSON



Jury Question during Deliberation

Question Number: 2

Date 11/10/21 Time of Question: 1:00

Can we have the recording of the
calls between Tia and Mr. Maize?

Answer to question #2

Members of the jury,

Your verdict must be based on the
evidence presented during the trial and
the law that I gave you.

The requested calls are not in
evidence.

Judge Harb
11/5/21

JURY FOREPERSON

Jacqueline Moore

IN THE CIRCUIT COURT OF THE TENTH JUDICIAL
CIRCUIT OF FLORIDA, IN AND FOR POLK COUNTY

STATE OF FLORIDA,

Plaintiff,

vs.

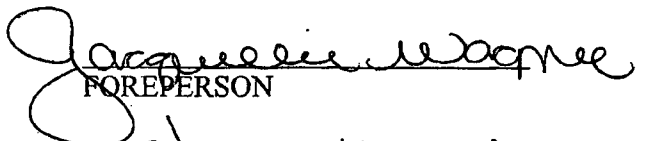
CASE NO: CF18-009111-XX

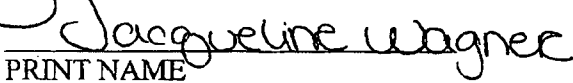
RANDOLPH MAYA

We, the jury, find as follows, as to the defendant in this case: (check only one)

- ☐ a. The defendant is guilty of First Degree Murder.
- ☒ b. The defendant is guilty of Second Degree Murder (a lesser included offense).
- ☐ c. The defendant is guilty of Manslaughter (a lesser included offense).
- ☐ d. The defendant is not guilty.

So say we all this 5th day of November, 2021.


FOREPERSON


PRINT NAME

IN THE CIRCUIT/COUNTY COURT, CRIMINAL DIVISION
POLK COUNTY, FLORIDA

COURT PROGRESS REPORT

STATE OF FLORIDA
Vs.

CASE NUMBER (S): 18CF-9111-XX
CHARGES: 1. FIRST DEGREE MURDER 2.
ATT DV FIRSG DEGREE MURDER

RANDOLPH MAYA
Defendant

TYPE OF COURT: JURY NON-JURY HEARING

DATE: 11/5/2021

JUDGE: JALAL HARB

ATTORNEY FOR STATE:
LAUREN PERRY

ATTORNEY FOR DEFENSE:
SHIOBHAN OLIVERO

WITNESSES FOR STATE

WITNESSES FOR DEFENSE

STATE RESTS @: 11/4/21 @ 10:42 AM
10:42 AM

DEFENSE RESTS @: 11/4/21 @

JURY RETIRES @: 11/5/21 @ 11:44 AM
3:01 PM

JURY RETURNS @: 11/5/21 @

BAILIFF: DANIEL LACAPRA

CLERK: LETESKI JOHNSON

VERDICT: GUILTY

Panel ID# 12728

MEMO OF SENTENCE IN THE CIRCUIT/COUNTY COURT OF POLK, COUNTY FLORIDA / CRIMINAL DIVISION

Division: F9 JTRL

Book in # 1843100

Date: 11/05/2021

Bondsman:

Defendant Location: JAIL

Case#: 2018CF-009111-A000-XX

STATE VS: MAYA RANDOLPH

Courts:

Bond Surety/Cash:

P 1 FIRST DEGREE MURDER

I 2 ATTEMPT DOMESTIC VIOLENCE FIRST DEGREE MURDER

If additional charges apply to this case, see affidavit/information

JUDGE: JALAL HARB

State Attorney: PERRY LAUREN M

Electronic Court Reporter/Continued Prior to Court

Court Reporter:

DEFENDANT

- ☒ Present without Attorney
☒ Present with Attorney
☐ Counsel Present
☐ Interpreter Present
☐ Defendant's Presence Waived
☐ Failed to Appear
☐ Capias / Warrant Ordered
☐ Bond Set \$ _____ Cash/Surety
☐ Each Count / ☐ Bond Estreature set aside
☐ Bond Forfeited
☐ Bond Changed to \$ _____ Cash/Surety
☐ If Bonds Supervised by Pre-Trial Release
☐ Bonds Discharged
☐ Bonds Reinstated
☐ Capias / Warrant Withdrawn
☐ Public Defender (PD) Appointed
☐ Affidavit of Indigent Status Submitted
☐ Information Filed in Open Court

PLEA

- ☐ Not Guilty
☐ Guilty
☐ Nolo Contendere
☐ Negotiated Plea
☐ Open plea to court
☐ Plea Not Guilty Withdrawn
☐ Waived Counsel
☐ Waived Speedy / ☐ Waived Jury Trial
☐ Referred for Pre-Sentence Investigation
☐ Waived Pre-Sentence Investigation
☐ Referred for Pre-Disposition Report (Juv)
☐ Waived Pre-Disposition Report (Juv)
☐ Refer to Diversion
☐ Admits VOP/Community Control
☐ Denies VOP/Community Control
☐ Condition _____

ADJUDICATION

- ☒ Guilty
☐ Not Guilty
☐ Withheld
☒ Withheld Pending Disposition
☐ Special Hearing Set
☐ Arraignment @ 8:15
☐ Status Conference @ 8:30
☐ Pretrial @ 8:30
☐ Mandatory Docketing @ 8:29
☐ Jury Selection/Trial @ 8:30
☐ Violation Arraignment @ 8:30
☐ Plea/Disposition @ 10:00
☐ Status/Review Hearing @
☐ Other @
Copies: ☒ Defendant / ☒ State Attorney
☒ Private Attorney / ☒ Probation
☐ PD / ☐ Regional Counsel / ☐ Jail
☐ Notify: _____

Defendant Placed On: ☐ Community Control / ☐ Drug Offender Probation / ☐ Probation / ☐ Sex Offender Probation / ☐ Sex Predator Probation
As to Counts: _____
For a period of: _____ (See page ☐ 2/ ☐ 3 for conditions)

To run concurrent/consecutive with _____

*A lesser 2nd Degree Murder

☐ All Conditions of Supervision in case _____ to apply to this case

FINAL DISPOSITION: ☐ Acquitted / ☐ Dismissed / ☐ No Bill / ☐ Nolle Prose / ☐ Written / ☐ Oral: count _____

☐ Probation / ☐ Community Control: ☐ Revoked / ☐ Restored / ☐ Modified / ☐ Terminated

Sentenced as a: ☐ Sex Offender -counts: _____ / ☐ Sex Predator -counts: _____

Driver License Suspension: count _____ / period of _____

FINE / COURT COST IMPOSED:

- ☐ Payment Due Date _____
☐ Judgment Lien for Fines, Costs, Fees / ☐ State Attorney to Prepare Restitution Lien

COMMITMENT:

☒ Defendant is Remanded Into Custody / Bond Set \$ no bond, no cash

IT IS THE JUDGMENT OF THE COURT AND SENTENCE OF THE LAW that the above named defendant is to be confined in the

☐ Polk County Jail / ☐ Florida State Prison / ☐ Therapeutic Consequence / ☐ Youthful Offender

_____ days/months/years count # _____ to run concurrent/consecutive with _____ min/mand

_____ days/months/years count # _____ to run concurrent/consecutive with _____ min/mand

_____ days/months/years count # _____ to run concurrent/consecutive with _____ min/mand

_____ days/months/years count # _____ to run concurrent/consecutive with _____ min/mand

☐ Weekend Work Release to begin _____ at 7:45 AM / ☐ Saturday Only / ☐ Sunday Only / ☐ Weekday (Monday through Friday)

☐ To Be Given Credit for _____ (ALL / DAYS / MONTHS) Time Served

☐ Defendant To Be Released This Case Only / ☐ Released on Own Recognizance / ☐ Pretrial Release

☐ DNA taken

In witness thereof, I hereby certify that the foregoing was entered by the Court on this date: 11/05/2021

Stacy M. Butterfield CPA, Clerk of the Circuit and County Courts

Deputy Clerk: _____

ORIGINAL (COURT FILE)

1 change any of the State's position as far as moving
2 forward as to this motion? And of course, we'll talk
3 about the trial next. So - -

4 MS PERRY: Your Honor - -

5 THE COURT: - - we started - - at the last status,
6 it was mentioned when the trial was continued that that
7 would give the State a chance to call Miss Maya for the
8 hearing on the motion. But anyway, go ahead, ma'am.

9 MS PERRY: Your Honor, I think that I can go ahead
10 and make arguments today based on her unavailability.
11 And then if she shows up at trial and then she has a
12 memory, of course, we'll let the Court know. And we'll
13 put her on the stand, and we'll deal with it from there.

14 But at this point, I think it's pretty obvious that
15 she's going to say she doesn't remember because she's
16 already done it both to me and my investigator, and under
17 oath during a deposition that's attached. So, I think at
18 this point, we can continue to argue this motion in front
19 of the Court.

20 Now, as far as the trial goes, I think we're going
21 to need some more information.

22 THE COURT: Yeah, I'm not sure they can be
23 separated. So - -

24 MS PERRY: And, Your Honor, I understand. That's
25 part of the reason I brought her in for - - was going to

1 week?" She replied: "I'm not sure yet."

2 Q And is that the total extent of the information we
3 have at this point as to her whereabouts and condition?

4 A Yes.

5 THE COURT: Any questions by the Defense?

6 MS OLIVERO: No, Your Honor.

7 THE COURT: Okay.

8 Thank you, sir. If you'll just step outside.

9 THE WITNESS: Yes, sir.

10 THE COURT: I'm sure Miss Perry will be with you
11 shortly.

12 THE WITNESS: Yes, sir.

13 (WITNESS TEMPORARILY EXCUSED.)

14 THE COURT: As far as the trial is concerned, and
15 we'll come back to the motion, is the State still ready
16 for trial on Monday?

17 MS PERRY: Your Honor, I'm ready if Miss Maya is
18 available. If she is not, then the State will not be
19 ready because she is a critical witness even though we're
20 arguing about whether or not she is - - has memory loss.
21 She is still a critical witness. She was present during
22 the homicide, Your Honor. So even though she has memory
23 loss as to the event itself, there's still surrounding
24 events that she is a critical witness for.

25 So, Your Honor, at this point, I was going to

1 may not be the judge trying the case. Provisions can be
2 made or can be addressed to remedy that. But at this
3 point, if this case is not to go to trial next week, or
4 during the month of November, or this year, I may not be
5 the judge trying this case, so - - but that's not
6 definitive.

7 So, I just want to put the resources to use, whether
8 it's your time, the Court's time, and everybody else's
9 time, and make sure that we - - would be the safest thing
10 just to go through this. And try to finalize this as
11 much as we can.

12 But the answer - - you may not get the answer until
13 it's determined whether she's going to be here at trial
14 or not. So, I mean, that's - - it's very important. And
15 we all know if - - I mean, clearly the State's theory is
16 that she does not want to cooperate with the State. One
17 could conclude that. That's the State's belief based on
18 what's been presented, what's been argued, and what's
19 been included in the State's motion. Now, whether that's
20 the case or not, I have not idea whether - - you know, I
21 mean, she may show up and cooperate fully with the State,
22 with the Defense, and so forth. That's a maybe, I have
23 no idea.

24 So, having said all that, we'll move forward. I'll
25 give the State a chance to complete it's presentation.

1 Your Honor, I just spoke to my investigator. Miss
2 Maya has confirmed that there were no complications with
3 her delivery, so we should be able to get started Monday.
4 We may need to call her later in the week or potentially
5 the beginning of the second week. But we should be able
6 to get started Monday and do the trial as scheduled.

7 THE COURT: Okay. Alright. So, do you have an
8 understanding, Miss Perry, as to when she'll be
9 discharged from the hospital? Will that be today or do
10 you know?

11 MS PERRY: We don't have that, Your Honor.

12 THE COURT: Okay.

13 MS PERRY: We just know that there were no
14 complications with the delivery.

15 THE COURT: Alright. By way of evidence and to
16 rebut the State's presentation, anything from the
17 Defense?

18 MS OLIVERO: No, Your Honor.

19 THE COURT: Alright.

20 Argument, State. Like I said, I've read your motion
21 and the case that was referenced primarily, Moore v.
22 State. I've read that too. And I've read that Moore was
23 further decided on other issues subsequent to that by the
24 Florida Supreme Court.
25 But, anyway, go ahead, Miss Perry.

1 it'll be better financially, and things of that nature.

2 And especially considering the fact now that we know
3 that she's had a baby. I think, Your Honor, that she is
4 in a position where it would make her life easier if she
5 had her father around to provide this financial support
6 that he talks to her about.

7 And so, Your Honor, I think the fact that she's in
8 contact communication with her dad, that he talks about
9 providing her financial support. And then she's getting
10 actual pressure from her older brother, who we know that
11 her father had told her she could go live with. We know
12 that she's receiving actual pressure from him to just not
13 come at all, based on that email that we have attached to
14 the motion.

15 I think there's clear evidence here, Your Honor,
16 that there's feign memory loss due to the - - both the
17 emotional ties to her father and feelings of loyalty
18 based on their relationship, and the pressure she's
19 receiving from Hunter Maya.

20 So, the State would argue, Your Honor, that based on
21 that evidence that's presented today that the Court could
22 make factual finding that the memory loss is feigned.
23 And if Court makes that finding that the memory loss is
24 feigned, then that memory loss can be treated as an
25 inconsistent statement. Because, Your Honor, under the

1 §90.801(2)(a), you can use prior inconsistent statements
2 as substantive evidence under certain conditions.

3 Now, generally, memory loss is not found to be one
4 of those prior - - memory loss generally is not found to
5 be a prior inconsistent statement, but for, if the Court
6 makes the factual determination that the memory loss is
7 feigned. Under that situation, that is when the State
8 can use prior testimony as a - - as substantive evidence
9 in Moore v. State, as Your Honor knows, is where it was
10 established that grand jury testimony can be prior - -
11 can be considered a prior statement.

12 Now, Your Honor, I know that the Defense is going to
13 talk about the ability to cross in Crawford. However,
14 it's the State's full intention for us to supply Tia Maya
15 at trial so that she is subject to cross examination. So
16 that we can quell any issues that would be caused by
17 Crawford.

18 So, Your Honor, I would just ask based on the
19 testimony that has been put forward today as well as the
20 attachments to my motion, it's clear to the State that
21 she's going to come in and say that she doesn't remember
22 the facts of the homicide itself. She did say in her
23 deposition she remembered being home, who was home, that
24 she knows she didn't do it, that she knows her brother
25 didn't do. But other than that, she wouldn't relay any

1 purposes of that. So, I think it would be the grand jury
2 testimony would be the only testimony that we could enter
3 under either of those exceptions.

4 THE COURT: Alright.

5 Miss Olivero.

6 MS OLIVERO: Thank you, Your Honor.

7 ARGUMENT

8 BY MS OLIVERO:

9 And I believe under arguments that I've already said
10 to the Court, but I'll go into them a little bit further.
11 That the Court should deny the State's motion in finding
12 Tia Maya unavailable. Specifically, as Miss Perry stated
13 is that they are wanting to rely on Tia's prior
14 statements in that she observed the homicide. And in
15 relying on those statements, they provided the Court, of
16 course, transcripts.

17 So, I'm going to bring some things to the Court's
18 attention. Specifically, Exhibit A to the State's motion
19 on page 5 and 6 to that statement. And I'm looking at
20 the bottom, and Detective Fulcher is talking to Tia and
21 he says:

22 "So, the door was cracked and what did you see at
23 that time?"

24 Tia says:

25 "Their back, my dad's back and he was like in

1 between her legs on top of her.

2 "Where was she at?

3 "Sitting on the toilet."

4 Notably, on page 6: .

5 "Could you see what he was doing?

6 "No.

7 "Could you see his hands?

8 "No.

9 "Could you see his arms?

10 "No."

11 Page 9 of that transcript, 9 of 14, Detective Fulcher,
12 about mid-way through, just above mid-way:

13 "And have you ever seen anything happen when anybody
14 would hit somebody?"

15 Tia says:

16 "Yes.

17 "Tell me about that.

18 "I don't remember.

19 "Who have you seen hit who?

20 "My brother has hit dad, and dad has hit my brother.

21 "Have you ever seen your mom get hit?

22 "No."

23 Page 11 of 14, about mid-way through, Detective Fulcher
24 says:

25 "Do you know what that was for?

1 "Arguing, they kept fighting.

2 "Who is that?

3 "Mom, dad and brother. They were fighting.

4 "Mom, dad and brother?"

5 Tia says:

6 "No, just dad and brother.

7 "And how often do they do that?

8 "Not that often."

9 Page 12 of 14, Detective Fulcher asks her, one, two,
10 three, four, five, six, seven, eight lines down:

11 "Do you know of anything thing that would have
12 occurred that would have caused this?

13 "No."

14 Page 13 of 14, from the - - oh, sorry. Bottom of page
15 12:

16 "Where was she sitting?

17 "On the toilet.

18 "Could you see her?

19 "No

20 "Could you see any of her?

21 "Only her legs."

22 Exhibit B is her second statement, which notably
23 doesn't ask her again about anything she saw between Jodi
24 Maya and Randolph Maya. She does give, on page 3, a
25 statement where she then goes further into detail about

1 seeing - - closer to the top:

2 "My brother and dad were fighting, at the time, to
3 get them to come over. After the police called,
4 they had finished fighting. I saw my brother on top
5 of my dad."

6 That is the only new information. He doesn't
7 actually follow-up with her on anything she may have seen
8 in the bathroom between her mom and her dad. Actually, I
9 apologize. Go down further on that same page:

10 "What did you see when you came out of your room?

11 "My dad on top of my mom in the bathroom."

12 And that's when she called 9-1-1. That is really
13 the only thing in the second statement regarding that
14 incident. So, the State relying on these prior test - -
15 these prior statements to state that now she's saying she
16 doesn't remember, or she doesn't recall isn't a feigned
17 testimony or a feigned memory.

18 I think these statements coincide with the fact that
19 she didn't see anything. There's nothing for her to
20 remember regarding the specific allegations that they're
21 making that she observed the homicide. Where they are
22 making allegation that she actually observed Mr. Maya
23 choking Jodi Maya, these statements say differently.

24 Notably, as far as the grand jury testimony, on page
25 13, they are talking to her about a prior incident, which

1 if the Court allows this in, we'll have different
2 arguments about things in the grand jury testimony that
3 needs to be excluded. However, for purposes of this
4 hearing:

5 "What had been going on that required them" - -
6 He's referencing the police:

7 - - "to come to your house?"

8 She says:

9 "I don't remember."

10 On page 14, she's asked:

11 "You don't remember why you called?"

12 "No.

13 "Did somebody ask you to call?"

14 "I'm not sure."

15 Again, nothing inconsistent or about what her testimony
16 has been thus far.

17 Page 19 is where he starts to get into this incident
18 with her. On the top of page 19:

19 "So his back is towards the door and you don't see
20 his face?"

21 She says:

22 "Yeah.

23 "And he's standing right there where the toilet is
24 in the bathroom?"

25 She says:

1 "Yes.

2 "Is your mom seated on the toilet?

3 "Yes.

4 "Could you see what your father was doing?

5 "No."

6 THE COURT: Let me make sure, you're still on the
7 grand jury - -

8 MS OLIVERO: I'm on the grand jury testimony, page
9 19 on that.

10 THE COURT: Correct.

11 MS OLIVERO: Yes.

12 ARGUMENT - continued

13 BY MS OLIVERO:

14 Beyond that, Your Honor, my argument to the grand
15 jury testimony is at that point it is the prosecutor
16 relaying facts; essentially crossing and leading her,
17 which of course is allowed in grand jury. But that is
18 why, as we know, typically grand jury testimony is not
19 allowed in trials because it held leading and in
20 misconstrued they can be. So, of course, it's highly
21 prejudicial that that comes in.

22 On top of the other arguments that I have, Your
23 Honor, as you said you read Moore vs State, that the
24 State is relying on to allow grand jury testimony. But
25 as I stated in the beginning of this, that is grand jury

1 testimony in being allowed under §90.801. And that is
2 not what State is asking for that to do. And I would
3 agree that under that case law it does say grand jury can
4 come in then as substantive evidence to impeach a witness
5 based on their testimony.

6 However, there is plenty of case law, and I have the
7 case law for the Court if you'd like it. But I know the
8 Court is familiar with it, that says the State cannot
9 call a witness solely for the purpose of impeachment.
10 And then try to get into a substantive - - to a
11 substantive statement.

12 And I'm looking at Bleich, B-as in boy, L-E-I-C-H
13 vs. State, 108 So.3d 1132. It's from the Fifth DCA from
14 2013. And in that opinion, the Court states:

15 "If a party knowingly calls a witness for the
16 primary purpose of introducing a prior statement,
17 which otherwise would be inadmissible, impeachment
18 should be excluded. In determining whether a
19 witness is called for the primary purpose of
20 introducing a prior inconsistent statement that is
21 otherwise inadmissible, the Court may consider
22 several factors; including, whether the witness's
23 testimony surprised the calling party, whether the
24 witness's testimony affirmatively harmed the calling
25 party, and whether the impeachment of the witness

1 testimony as well being hearsay, so my objection
2 hasn't changed for that aspect of it.

3 I'm still -- if I can go back for a minute.
4 I'm asking that no reference to CPI be mentioned at
5 all. I just think --

6 THE COURT: We'll get that -- get that
7 accomplished.

8 MS. OLIVERO: Okay. Okay.

9 THE COURT: Okay? So, yeah, I mean, that's why
10 the offer to have Sergeant Fulcher come and just
11 make sure that it's not repeated, but the State is
12 very comfortable that that issue is --

13 MS. PERRY: It should not come up again.

14 THE COURT: -- water under the bridge at this
15 point.

16 MS. OLIVERO: Well, I just want to make sure he
17 knows not to even say the words "CPI," and I don't
18 think that he knows that. That was why --

19 THE COURT: Okay.

20 (The Court stepped away from the sidebar.)

21 THE COURT: Sergeant Fulcher, could we have you
22 join us at sidebar, please, if you would just come
23 around.

24 (The Court and witness returned to sidebar.)

25 THE COURT: All right. Sergeant, we just

1 needed to make sure that you do not mention the fact
2 that this photograph was taken by a CPI.

3 THE WITNESS: Okay.

4 THE COURT: So that's to be -- nobody is going
5 to be asking you questions that would elicit such a
6 response, so who took the photograph, at this point,
7 is irrelevant, so just -- just stay away from
8 mentioning the word "CPI".

9 THE WITNESS: Okay.

10 THE COURT: Thank you very much.

11 (The witness returned to the witness stand.)

12 THE COURT: Okay. Now, the State is planning
13 -- it sounded like the State was surprised that this
14 photo was taken from Alexa's phone versus Tia's
15 phone.

16 MS. PERRY: Yes, Your Honor.

17 THE COURT: Yes.

18 MS. PERRY: Well, they did a download of Tia's
19 phone and they have the photo, too, so one came from
20 her phone and came from Alexa's phone, but that's
21 the photo from Alexa's phone.

22 THE COURT: Okay. And this is State Exhibit
23 Number 99. Is the State planning on introducing
24 State Exhibit 99 into evidence?

25 MS. PERRY: And, Your Honor, I -- I am, and if