FIRST DISTRICT COURT OF APPEAL
STATE OF FLORIDA

No. 1D16-5051

ALBON C. DIAMOND, III,

Appellant,

v.

STATE OF FLORIDA,

Appellee.

On appeal from the Circuit Court for Escambia County.
J. Scott Duncan, Judge.

June 7, 2018

PER CURIAM.

AFFIRMED.

ROBERTS, KELSEY, and M.K. THOMAS, JJ., concur.

Not final until disposition of any timely and authorized motion under Fla. R. App. P. 9.330 or 9.331.

Paul M. Hawkes and Mark V. Murray, Tallahassee, for Appellant.

Pamela Jo Bondi, Attorney General, and Sharon S. Traxler, Assistant Attorney General, Tallahassee, for Appellee.

IN THE CIRCUIT COURT OF THE FIRST JUDICIAL CIRCUIT IN AND FOR ESCAMBIA COUNTY, FLORIDA

STATE OF FLORIDA,

Plaintiff/Respondent,

v.

ALBON CURRY DIAMOND, III,

Defendant/Petitioner.

Case No.: 2009-CF-4625A

Division: "F"

ORDER DENYING DEFENDANT'S AMENDED MOTION FOR POSTCONVICTION RELIEF

THIS CAUSE comes before the Court on Defendant's "Amended Motion for Postconviction Relief Pursuant to Florida Rule of Criminal Procedure 3.850," filed by and through counsel on July 10, 2014. A limited evidentiary hearing was convened on March 21, 2016. After due consideration of the instant motion, record, evidence adduced at evidentiary hearing, and relevant legal authority, the Court finds that Defendant is not entitled to relief.

Relevant Factual and Procedural Background

Defendant was accused of committing various sex offenses in 2007 on his minor grand children, R.J.A. and M.B.A. R.J.A. and M.B.A. did not come forward

with these allegations until 2009. The majority of the abuse was alleged to have occurred to R.J.A. R.J.A. also indicated that some of the abuse he experience involved his minor friends, K.S. and T.H.

On July 1, 2010, Defendant was found guilty after jury trial of two counts of lewd and lascivious molestation (offender 18 years or older, victim less than 12 years of age) (counts one and two); three counts of sexual battery (offender 18 years or older, victim less than 12 years of age) (counts three, four, and six); one count of battery of child by throwing, tossing, projecting or expelling certain fluids or materials (count five); one count of lewd or lascivious battery (encourage or force or entice victim under 16 years of age) (count seven); one count of protection of minors from obscenity (count eight); and one count of lewd or lascivious conduct (count nine).[1] Defendant was adjudged guilty and sentenced as a sexual predator to a mandatory life sentence.[2] On July 13, 2010, Defendant filed a motion for new trial, which was denied by Order of this Court filed on July 23, 2010. Defendant appealed his judgment

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[1] *See* Attachment 1, Amended Information; *see* also Attachment 2, Verdict.

[2] Defendant was sentenced as follows: for counts three, four, and six, mandatory life, each counts to be served concurrently; for counts one and two, life, to be served concurrently to each other and concurrently to counts three, four, and six; for count five, five years, to be served concurrently to counts three, four, and six; for count seven, fifteen years, to be served concurrently with counts three, four, and six; for count eight, five years, to be served concurrently with counts three, four, and six; and for count nine, 15 years, to be served concurrently with counts three, four, and six. *See* Attachment 3, Judgment and Sentence, July 1, 2010.

and sentence, which were affirmed by The First District Court of Appeal via mandate and opinion filed with this court on January 5, 2012.

On January 3, 2014, Defendant filed his original motion for postconviction relief. On July 10, 2014, Defendant, through counsel, filed his amended motion that is now before the Court for consideration.

In the amended motion, Defendant alleges counsel was ineffective for: I) failing to present and admit evidence concerning Defendant's material sexual deficiencies through the testimony of A) an expert, B) Defendant's girlfriend, Elizabeth Weems, and C) Harry Coon and Dorthea "Sadie" Levins; II) failing to present at trial critical impeachment evidence; III) failing to challenge the admissibility of *Williams*[3] rule evidence; IV) failing to investigate and present T.H.'s testimony; V) failing to avoid or counter the State's suggestion of undue influence relating to the testimony of K.S. during Defendant's case in chief; VI) failing to properly prepare for trial as it relates to A) Defendant's computer and camera, B) the underwear, C) expert witnesses, D) preparing for witnesses, E) evidence that should have been excluded, and F) character evidence; VII) failing to raise numerous critical objections concerning A) child hearsay, B) the videotaped interview becoming a feature of the trial, C) the jury instruction regarding *Williams* rule evidence, D) motion for judgment of acquittal, E) testimony regarding other children staying the night, and F) testimony from Angela

[3] *Williams v. State*, 110 So. 2d 654 (Fla. 1959).

Atkinson; and VIII) failing to highlight numerous inconsistencies and deficiencies in the evidence submitted by the State.

The limited evidentiary hearing was scheduled as to grounds I A, I B, II, III, IV, VI A, VI B, and VI C. Defendant affirmatively dismissed grounds IV, VI A, and VI B at the evidentiary hearing. Defendant only presented evidence regarding grounds I A and VI C, therefore effectively abandoning grounds I B, II, and III in addition to grounds IV, VI A, and VI B.

Claims of Ineffective Assistance of Counsel

As a general principle, to prevail on a claim of ineffective assistance of counsel, a defendant must demonstrate that: 1) counsel's performance was deficient; and 2) there is a reasonable probability that the outcome of the proceeding would have been different had counsel not been deficient. *See Torres-Arboleda v. Dugger*, 636 So. 2d 1321, 1324 (Fla. 1994) (construing *Strickland v. Washington*, 466 U.S. 668, 687, 694, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984)). "The likelihood of a different result must be substantial, not just conceivable." *Harrington v. Richter*, 131 S.Ct. 770, 792 (2011). Thus, there is a two-part inquiry: Counsel's performance and prejudice.

In reviewing counsel's performance, the court must be highly deferential to counsel, and in assessing the performance, every effort must "be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and

to evaluate the conduct from counsel's perspective at the time."

Spencer v. State, 842 So. 2d 52, 61 (Fla. 2003) (quoting *Strickland*, 466 U.S. at 689).

Defendant bears the burden of showing that counsel's errors were "so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment." *Strickland*, 466 U.S. at 687. There is a "wide range of professionally competent assistance" that passes this constitutional muster. *Bertolotti v. State*, 534 So. 2d 386, 387 (Fla. 1988). Furthermore, there is a "strong presumption that counsel has rendered adequate assistance and made all significant decisions in the exercise of ***reasonable professional judgment*** with the burden on claimant to show otherwise." *Blanco v. Wainwright*, 507 So. 2d 1377, 1381 (Fla. 1987), quoted in *Bertolotti*, 534 So. 2d at 387 (emphasis added).

Even if Defendant's counsel fell below such standards, Defendant would not automatically prevail. Defendant must also meet the prejudice prong of the *Strickland* test.[4] For Defendant to prevail on this point, he must demonstrate that there is a "reasonable probability that, but for the deficiency, the result of the proceeding would have been different." *Spencer*, 842 So. 2d at 61. Moreover, a court considering a claim of

[4] There is no prescribed sequence for the *Strickland* analysis, but if a defendant does not carry his burden on one prong, then the Court need not consider the other prong. *Strickland*, 466 U.S. at 697.

ineffective assistance of counsel need not determine whether counsel's performance was deficient ***when it is clear the alleged deficiency was not prejudicial.*** *See Torres-Arboleda*, 636 So. 2d at 1324 (emphasis added). In other words, Defendant must demonstrate a "probability sufficient to undermine confidence in the outcome." *Spencer*, 842 So. 2d at 61. With these principles in mind, the Court will address Defendant's claims in the order in which they were alleged.

Ground I: Counsel was Ineffective for Failing to Present and Admit Evidence Concerning Defendant's Sexual Deficiencies

Defendant alleges he suffered a stroke in February 2007. The time frame in which the alleged sexual abuse took place in this case was from April 2007 to October 2007. Defendant alleges that as a result of the stroke he was unable to achieve and maintain an erection during the time frame in which the alleged abuse occurred. Defendant claims that counsel was ineffective for failing to present this evidence through the testimony of various witnesses.

A. Expert Testimony

Defendant alleges that counsel should have presented expert medical testimony regarding Defendant's inability to sexually function. Defendant asserts that he provided counsel with his complete medical records and also with the names and contact information for Defendant's treating

physicians. Defendant claims that counsel informed him he could only present the testimony of a physician that had specifically treated Defendant for his sexual issues. Defendant further alleges he relied upon this misinformation provided by counsel and therefore no expert was retained to perform a consultation. He also claims that if expert medical testimony had been introduced at trial, he would have been acquitted. Defendant asserts he has now found a physician, Dr. William Nathaniel Taylor, Jr., who is willing to testify that a person with Defendant's medical condition could not engage in the actions alleged by the State.

At evidentiary hearing, Defendant did not present the testimony of Dr. Taylor, but instead presented the testimony of Dr. David Bear, a neurologist who is employed with Emerald Coast Neurology.[5] Dr. Bear testified that after suffering a stroke, many men have problems with sexual function, but that it is not "100%" of the time.[6] Dr. Bear confirmed he has never met Defendant or examined Defendant.[7] Dr. Bear's testimony regarding Defendant's condition was based solely on the medical records provided to him; he had no knowledge as to whether the medical records provided were complete.[8]

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[5] *See* Transcript, Evidentiary Hearing, March 21, 2016, pp. 12-34.

[6] *See* Transcript, Evidentiary Hearing, March 21, 2016, p. 26.

[7] *See* Transcript, Evidentiary Hearing, March 21, 2016, pp. 27-28.

[8] *See* Transcript, Evidentiary Hearing, March 21, 2016, p. 28.

Dr. Bear testified that based on his review of the records, Defendant suffered a stroke in his brain stem on February 13, 2007.[9] Dr. Bear explained that even a small stroke can cause devastating physical findings in the brain stem, where the same size stroke in the cortex would be minimal or might not even be noticed.[10] In February 2007 after the stroke, Defendant had significant motor weakness and required assistance with walking.[11] Defendant's upper extremity weakness was even greater than his lower extremity weakness at this time.[12] Upon discharge from the hospital on March 7, 2007, Defendant continued to remain challenged by experiencing left-upper extremity weakness, decreased range of motion in the left-lower extremity, and also left-lower extremity weakness.[13] According to a medical note from April 10, 2007, made during Defendant's outpatient rehabilitative care, Defendant was still having some issues with his upper extremity motor strength mainly on the left-side.[14]

Dr. Bear testified that in reviewing the medical notes, he did not believe it would have been

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[9] *See* Transcript, Evidentiary Hearing, March 21, 2016, p. 15.

[10] *See* Transcript, Evidentiary Hearing, March 21, 2016, p. 16.

[11] *See* Transcript, Evidentiary Hearing, March 21, 2016, pp. 16-17.

[12] *See* Transcript, Evidentiary Hearing, March 21, 2016, p. 17.

[13] *See* Transcript, Evidentiary Hearing, March 21, 2016, p. 19.

[14] *See* Transcript, Evidentiary Hearing, March 21, 2016, pp. 19-22.

physically possible for Defendant to hold himself up on his hands and knees, contrary to R.J.A.'s testimony at trial that Defendant had sex with the victim while Defendant was on his hands and knees.[15] Dr. Bear further testified that the medical notes from Defendant's treatment showed Defendant had been diagnosed with diabetes, hypertension, and peripheral neuropathy.[16] Dr. Bear testified that these conditions are the most common risk factors for erectile dysfunction; however, these factors did not mean Defendant absolutely experienced issues after the stroke with functioning sexually.[17] Dr. Bear testified there is a test that could have been performed to determine if Defendant was truly experiencing erectile dysfunction.[18] Dr. Bear further confirmed that he was practicing medicine in Pensacola in 2007, when Defendant first had his stroke.[19]

However, Dr. Bear also testified that even with the conditions documented in Defendant's medical records, Defendant would have been able to commit all of the crimes with which Defendant

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[15] *See* Transcript, Evidentiary Hearing, March 21, 2016, pp. 24-25.

[16] *See* Transcript, Evidentiary Hearing, March 21, 2016, p. 25.

[17] *See* Transcript, Evidentiary Hearing, March 21, 2016, pp. 25-26.

[18] *See* Transcript, Evidentiary Hearing, March 21, 2016, pp. 26-27

[19] *See* Transcript, Evidentiary Hearing, March 21, 2016, p. 27.

was charged.[20] Specifically, Dr. Bear testified Defendant would have been capable of intentionally touching, in a lewd and lascivious manner, the breast, genital area, genitals, buttocks or clothing covering them, of a person less than 12 years of age.[21] Defendant would have been able to intentionally force or entice a person under 12 years of age to touch Defendant in a lewd or lascivious manner, his genital or the genital area, or buttocks or clothing covering them.[22] Defendant, within a reasonable degree of medical probability, could have committed a sexual battery on a person of 12 years of age by placing his mouth over the penis of that individual.[23] Defendant could have also enticed another person to place that person's mouth over Defendant's penis[24] and entice a child to suck the penis of another child while Defendant was taking photographs, videos or movies of the act.[25] Defendant could have also caused a person to come into contact with blood, seminal fluid, urine or feces by throwing, tossing, projecting or

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[20] *See* Transcript, Evidentiary Hearing, March 21, 2016, pp. 28-31.

[21] *See* Transcript, Evidentiary Hearing, March 21, 2016, p. 28.

[22] *See* Transcript, Evidentiary Hearing, March 21, 2016, pp. 28-29.

[23] *See* Transcript, Evidentiary Hearing, March 21, 2016, p. 29.

[24] *See* Transcript, Evidentiary Hearing, March 21, 2016, p. 29.

[25] *See* Transcript, Evidentiary Hearing, March 21, 2016, p. 30.

expelling such material by ways of ejaculation.[26] Defendant would have also been physically capable of soliciting another individual to expose that person's genitals to Defendant.[27] Dr. Bear also testified that he believed if another medical professional had analyzed Defendant's medical records and history he would have come to the same conclusion: Defendant could have still committed the crimes alleged even after his stroke.[28] The Court finds Dr. Bear's testimony credible.

Defendant's trial counsel, Gene Mitchell, also testified regarding this claim. Counsel remembered that he talked to Defendant about strategy as it related to Defendant's health.[29] Counsel testified that an important part of the reason he sought and obtained Defendant's release from jail pending the trial was so Defendant could obtain information regarding his medical condition that might help in trial preparation.[30] Counsel had conversations with Defendant in which he told him that rarely will a doctor say exactly what you would like him to say.[31] Similar to the testimony

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[26] *See* Transcript, Evidentiary Hearing, March 21, 2016, pp. 29-30.

[27] *See* Transcript, Evidentiary Hearing, March 21, 2016, p. 31.

[28] *See* Transcript, Evidentiary Hearing, March 21, 2016, pp. 33-34.

[29] *See* Transcript, Evidentiary Hearing, March 21, 2016, p. 37.

[30] *See* Transcript, Evidentiary Hearing, March 21, 2016, p. 37.

[31] *See* Transcript, Evidentiary Hearing, March 21, 2016, p. 37.

from the doctor at evidentiary hearing, counsel believed he would not be able to get a doctor to testify, with certainty, that Defendant could not achieve an erection.[32] Counsel also discussed with Defendant that one of his concerns was that a prosecutor might argue to the jury that Defendant might be unable to have an erection in some circumstances but able to have an erection in these circumstances because of various stimuli.[33] Counsel further testified that he was relying on Defendant to provide him with the medical records that might say Defendant could not have an erection at the time these incidents were to have taken place.[34] Counsel indicated that while Defendant probably provided him with medical records, he never presented counsel with information that one of Defendant's doctors was going to come into court and testify that the crimes did not happen because Defendant was not physically able to commit the crimes.[35] Counsel testified that at the time of Defendant's trial, Defendant visually appeared to be weak, which was persuasive that Defendant might not be someone healthy enough to commit the crimes alleged.[36] Counsel could see someone on the jury feeling it was an improbability for

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[32] *See* Transcript, Evidentiary Hearing, March 21, 2016, pp. 37-38.

[33] *See* Transcript, Evidentiary Hearing, March 21, 2016, pp. 38-39.

[34] *See* Transcript, Evidentiary Hearing, March 21, 2016, p. 38.

[35] *See* Transcript, Evidentiary Hearing, March 21, 2016, pp. 43.

[36] *See* Transcript, Evidentiary Hearing, March 21, 2016, pp. 38;41-42.

Defendant to have committed these crimes just by viewing Defendant's appearance.[37] Counsel confirmed it was a good summary of his conversations with Defendant that they discussed the possibilities of providing medical testimony at trial; counsel concluded such testimony might cause as much damage as it could have helped; however, if Defendant felt the medical testimony was necessary, counsel left it to Defendant to obtain medical records or assistance that Defendant thought might be helpful, and then counsel would make a recommendation on strategy based on those records.[38] The Court finds trial counsel's testimony credible.

After reviewing the evidence submitted at evidentiary hearing and the record, the Court finds that counsel neither acted deficiently nor was Defendant prejudiced by counsel's failure to present medical testimony at trial regarding Defendant's alleged inability to perform sexually. The record shows that Defendant was accused of committing the crimes alleged between April 1, 2007, and October 31, 2007.[39] It was not until August 3, 2009,[40] that Defendant was accused of committing the crimes alleged. Consequently, counsel would have been unable to obtain a new physician that could have definitively stated that Defendant was unable to obtain or maintain an erection during the time frame of the alleged abuse. As evidenced by

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[37] *See* Transcript, Evidentiary Hearing, March 21, 2016, p. 42.

[38] *See* Transcript, Evidentiary Hearing, March 21, 2016, p. 39.

[39] *See* Attachment 1, Amended Information.

[40] *See* Attachment 4, Transcript, Trial, Vol. I, p. 169.

Defendant's own witness at evidentiary hearing, Dr. Bear was unable to state with certainty, based on Defendant's medical records that spanned all the way to April 2007, that Defendant would have been unable to obtain an erection. Dr. Bear also testified credibly that based on his review of Defendant's medical records, Defendant could have committed all of the crimes alleged. Dr. Bear further testified that if another medical professional had analyzed Defendant's medical records and history, he believed he would have come to the same conclusion: Defendant could have still committed the crimes alleged even after his stroke. Dr. Bear's testimony illustrates trial counsel's theory that a physician would have been unable to testify with certainty that Defendant could not engage in the crimes alleged. Dr. Bear's testimony also demonstrates that trial counsel was correct that a doctor's testimony could do more harm than good. The Court finds that it was sound trial strategy for counsel to rely on the poor physical appearance of Defendant at the time of trial instead of presenting testimony from an expert declaring that Defendant was physically capable to have committed the crimes alleged. Defendant has failed to demonstrate that counsel acted deficiently or that he was prejudiced by counsel's failure to present medical testimony regarding his alleged inability to obtain an erection. Defendant is not entitled to relief as to this claim.

B. <u>Testimony from Defendant's Girlfriend, Elizabeth Weems</u>

Defendant also alleges that counsel was ineffective for failing to argue that the testimony of Defendant's girlfriend, Elizabeth Weems, was permissible as an exception to the hearsay rule pursuant to section 90.803(3), Florida Statutes, as "a statement of then-existing state of mind, emotion, or physical sensation, including a statement of intent, plan, motive, design mental feeling, pain, or bodily health." Ms. Weems testimony was disallowed at trial as hearsay. Defendant alleges that if counsel had argued her statement was admissible, there is a reasonable probability the Court would have permitted Ms. Weems to testify about Defendant's inability to achieve and maintain an erection after his stroke.

This claim was scheduled for evidentiary hearing. However, Defendant chose not to present any evidence regarding this claim. Consequently, the Court finds that this sub claim is abandoned.[41] This portion of Defendant's claim is denied. *See Boivert v. State*, 693 So. 2d 652 (Fla. 5th DCA 1997); *Thomas v. State*, 206 So. 2d 475 (Fla. 2d DCA 1968).

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[41] Even if this claim had not been abandoned, Defendant's claim that Ms. Weems' testimony would have been permitted pursuant to section 90.803(3), Florida Statutes, would have been denied. *See* discussion, *supra*, contained in section I C of this order.

C. Testimony of Harry Coon and Dorthea "Sadie" Levins

Defendant claims he told both Harry Coon and Dorthea "Sadie" Levins that he was unable to achieve and maintain an erection and perform sexually. Defendant alleges counsel was ineffective for not proffering the testimony of Mr. Coon and Ms. Levins or making any attempt to present their testimony, as their statements would have been allegedly admissible under section 90.803(3), Florida Statutes, as a statement of then-existing physical sensation or bodily health.

Defendant's claim is refuted by the record. Counsel in fact ***did*** proffer Mr. Coon's testimony at trial.[42] Mr. Coon said nothing in his proffered testimony regarding Defendant telling him he could not obtain and maintain an erection.[43] Mr. Coon's testimony would not have been admissible under section 90.803(3), Florida Statutes, as it did not include a statement of then-existing physical sensation or bodily health. Defendant is not entitled to relief as to this portion of his claim.

In regard to Ms. Levin's testimony, the record shows that her testimony was not proffered; however, based on Defendant's allegations regarding the substance of Ms. Levin's proposed testimony and the record, Defendant is unable to demonstrate that counsel was prejudiced by failing to proffer Ms. Levin's testimony. At trial it was

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[42] *See* Attachment 4, Transcript, Jury Trial, Vol. II, pp. 376-387.

[43] *See* Attachment 4, Transcript, Jury Trial, Vol. II, pp. 376-382.

discussed whether Ms. Weems, another proposed defense witness, would be permitted to testify that Defendant had told her he could not maintain an erection and perform sexually. The substance of Ms. Weems' proposed testimony is identical to Ms. Levin's proposed testimony (according to Defendant's allegations). At trial it was determined that Ms. Weems would not be permitted to testify regarding Defendant's statements about his condition because she did not witness Defendant's inability to have an erection. The Court sustained the State's objection on the basis that Ms. Weems' testimony would be considered self-serving hearsay. If counsel had presented Ms. Levin's proposed testimony, it is reasonably probable that the Court would not have permitted Ms. Levin to testify regarding Defendant's impotence. If counsel had proffered the testimony and then argued it was admissible pursuant to section 90.803(3), Florida Statutes, this argument would have failed. In order for a statement to be admissible pursuant to the section 90.803(3), Florida Statutes exception, the "hearsay statement must be made contemporaneously with the physical feeling and describe the feeling." C. Erhardt, Florida Evidence §803.3 (2015 Edition). *See Bedford v. State*, 589 So. 2d 245, 252 (Fla. 1991); *Taylor v. State*, 640 So. 2d 1127, 1138 (Fla. 1st DCA 1994). As Defendant has not alleged or shown that Defendant's statement to Ms. Levin was made contemporaneously with his inability to obtain and maintain an erection, Ms. Levin's purported testimony would not have been admissible pursuant to section 90.803(3), Florida Statutes.

> Even if Ms. Levin's testimony were deemed admissible pursuant to section 903.803(3), Defendant would still not be entitled to relief. At trial, Defendant himself testified that he was unable to obtain and maintain an erection. The jury obviously considered this information and still chose to convict Defendant. Defendant has failed to show that Ms. Levin testifying to the same information that was disregarded by the jury would have made a difference in the outcome of Defendant's trial. Defendant is not entitled to relief as to this claim.

Ground II: Trial Counsel was Ineffective for Failing to Present at Trial Critical Impeachment Evidence

Defendant alleges that counsel was ineffective in failing to call Harry Coon as a witness, who could have offered testimony which would have impeached Angela Atkinson's testimony. Defendant asserts that even though Mr. Coon's testimony was proffered into evidence and deemed admissible,[44] counsel failed to call Mr. Coon as a witness at trial. Defendant further alleges there is a reasonable probability the results of the trial would have been different if Mr. Coon's testimony had been presented at trial. As a subpart to this claim, Defendant alleges that Mr. Coon and Susan Coon (Harry's wife) could have testified to Defendant's

[44] Defendant is incorrect that Mr. Coon's testimony was deemed admissible. The record shows the Court sustained the State's objection to Harry Coon's testimony. *See* Attachment 4, Transcript, Jury Trial, Vol. II, pp. 376-383.

physical limitations which would have rebutted Ms. Atkinson's trial testimony.

This claim was scheduled for evidentiary hearing. However, Defendant chose not to present any evidence regarding this claim. Consequently, the Court finds that this claim is abandoned and denied. *See Boivert v. State*, 693 So. 2d 652 (Fla. 5th DCA 1997); *Thomas v.* State, 206 So. 2d 475 (Fla. 2d DCA 1968).

Ground III: Trial Counsel was Ineffective for Failing to Challenge the Admissibility of the *Williams* Rule Evidence

Defendant next alleges that counsel should have challenged the State's ability to present evidence that Defendant had engaged in direct sexual activity with two other male minors (T.H. and K.S.). This claim was scheduled for evidentiary hearing. However, Defendant chose not to present any evidence regarding this claim. Consequently, the Court finds that this claim is abandoned and denied. *See Boivert v. State*, 693 So. 2d 652 (Fla. 5th DCA 1997); *Thomas v.* State, 206 So. 2d 475 (Fla. 2d DCA 1968).

Ground IV: Trial Counsel was Ineffective for Failing to Investigate and Present T.H.'s Testimony

Defendant alleges that trial counsel was ineffective for failing to investigate, interview, and present a trial the testimony of T.H., who would have supported Defendant's version of events that Defendant did not

engage in the conduct alleged. This ground was scheduled for evidentiary hearing. However, Defendant, by and through postconviction counsel, chose to affirmatively dismiss this ground without presenting evidence. Consequently, this ground is dismissed with prejudice.

Ground V: Trial Counsel was Ineffective for Failing to Avoid or Counter the State's Suggestion of Undue Influence Relation to the Testimony of K.S. during Defendant's Case in Chief

Defendant alleges that counsel was ineffective for failing to object to K.S.'s parents being in the courtroom while K.S. was testifying at trial. Defendant claims that counsel should have instructed the parents to remain outside of the courtroom or should have listed the parents as defense witnesses, considering "The Rule" had been invoked. Further, Defendant alleges that counsel failed to ask K.S. during his testimony whether his parents had influenced him to testify, and he failed to call K.S.'s parents as witnesses to ask whether they had influenced K.S.'s testimony. Defendant further alleges that counsel should have bolstered K.S.'s testimony with one or more of his prior consistent statements because K.S.'s credibility was being attacked based on undue influence. Defendant alleges that had the State's suggestion of undue influence been avoided or properly addressed, there is a reasonable probability that the outcome of the trial would have been different.

Defendant has failed to demonstrate that counsel was deficient or that the results of the trial would have been different if counsel had kept K.S.'s parents out of the courtroom. Contrary to Defendant's allegations, counsel ***did*** list K.S.'s parents as defense witnesses. However, because of the Court's motion in limine rulings, counsel felt he was prevented from calling K.S.'s parents to testify on Defendant's behalf.[45] The fact that counsel was honest when he informed the Court that K.S.'s parents wished to be present when their son testified and the rule of sequestration would not prevent them from doing so does not amount to deficient performance.

Additionally, the record shows that K.S. was only eleven years old at the time he testified in this case.[46] The Court determined pursuant to section 918.16, Florida Statutes, that K.S.'s parents were permitted to stay in the courtroom during his testimony, over the State's objection.[47] Defendant fails to proffer a valid reason that counsel should have argued to keep K.S.'s parents out of the courtroom over the Court's ruling.

The record also shows that while the State questioned K.S. about whether his parents were present every time he had been questioned regarding Defendant, the State did not attack K.S.'s testimony by asking if K.S.'s testimony had been influenced by his

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[45] *See* Attachment 4, Transcript, Jury Trial, Vol. II, p. 342.

[46] *See* Attachment 4, Transcript, Jury Trial, Vol. II, p. 345.

[47] *See* Attachment 4, Transcript, Jury Trial, Vol. II, pp. 342-345.

parents.[48] As such, counsel asking K.S. if his testimony had been influenced by his parents, or calling K.S.'s parents to testify they had not influenced K.S. to testify falsely likely would not have been permitted. If such testimony had been permitted it is reasonably probable the testimony would have highlighted the issue of possible influence and have been detrimental to the overall effect of K.S.'s testimony which was largely favorable to the defense.[49] Defendant has failed to demonstrate how his counsel was deficient or how the results of his trial would have been different; he is not entitled to relief as to this claim.

Ground VI: Counsel was Ineffective by Failing to Properly Prepare for Trial

Defendant next alleges that counsel was ineffective by failing to properly prepare for trial as it relates to the following topics.

A. Defendant's Computer and Camera

Defendant claims that counsel was ineffective for failing to investigate and present evidence that Defendant did not have any pornography on his computer. Defendant further claims that counsel was ineffective for failing to investigate and present evidence that he never owned a camera

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[48] *See* Attachment 4, Transcript, Jury Trial, Vol. II, pp. 358-359.

[49] *See* Attachment 4, Transcript, Jury Trial, Vol. II, pp. 350-362.

matching the description of the camera testified to by R.J.A. Defendant additionally claims that counsel was ineffective for failing to have a forensic examination performed on Defendant's camera that was seized by law enforcement to show it did not contain any inappropriate photographs, including any photos that had been deleted.

An evidentiary hearing was scheduled regarding this claim. Defendant, by and through postconviction counsel, chose to affirmatively dismiss this ground without presenting evidence. Consequently, this ground is dismissed with prejudice.

B. <u>The Underwear</u>

Defendant next alleges that counsel was ineffective for failing to either purchase an identical pair of underwear to that which Defendant purchased for R.J.A. and M.B.A. or to at least show a picture of the underwear for the witnesses to identify. Defendant alleges that if counsel had done either of these things it would have discounted the testimony depicting the underwear as inappropriate.

An evidentiary hearing was scheduled regarding this claim. Defendant, by and through postconviction counsel, chose to affirmatively dismiss this ground without presenting evidence. Consequently, this ground is dismissed with prejudice.

C. Expert Witnesses

1. Medical Expert regarding Defendant's Physical Condition

Defendant alleges that his counsel was ineffective for failing to call a medical expert witness to testify about Defendant's physical (not just his sexual capabilities) in 2007. Specifically, Defendant alleges that a physician would have testified that Defendant could not have gotten on his hands and knees to support himself, especially with the child victim on his back. Defendant asserts that he paid $1,000.00 for an evaluation and review of his medical records by a physician secured by counsel, but the medical doctor was not called at trial.

The topic of this sub claim was addressed at evidentiary hearing. While Dr. Bear testified he doubted Defendant would be physically able to hold himself up on his hands and knees,[50] Dr. Bear also testified that he believed Defendant was physically capable of performing all of the acts alleged in the information.[51] When considering the strength of R.J.A.'s testimony at trial,[52] coupled with Dr. Bear's inconsistent evidentiary hearing testimony on this topic, it is reasonably probable that the results of Defendant's trial would not have been any different if a physician would have offered such testimony at trial. Additionally, as

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[50] *See* Transcript, Evidentiary Hearing, March 21, 2016, pp. 24-25.

[51] *See* Transcript, Evidentiary Hearing, March 21, 2016, pp. 28-31.

[52] *See* Attachment 4, Transcript, Jury Trial, Vol. II, pp. 222-252; 280-330.

stated previously, the Court finds that it was sound trial strategy for counsel to rely on Defendant's poor physical appearance instead of presenting possibly inconsistent testimony from an expert regarding Defendant's physical capabilities at the time of the incidents.

Consequently, Defendant has failed to show that counsel was deficient or that he was prejudiced by counsel's failure to have a physician testify regarding Defendant's physical condition during the time frame of the alleged offenses. Defendant is not entitled to relief as to this claim.

2. Medical or Psychological Expert regarding Symptoms of Sexually Abused Children

Defendant alleges that counsel was ineffective for failing to present expert testimony regarding the symptoms normally exhibited by child victims of sexual abuse, especially those who have been subject to repeated anal sex. Defendant claims that such testimony would have demonstrated that R.J.A. did not exhibit any of the normal symptoms or behaviors of a child who had undergone the abuse alleged. Defendant further alleges the expert would have been able to testify that R.J.A.'s sudden disclosure two years after the incident was inconsistent with normal disclosure in this situation, thus making the child victim's allegations of abuse highly questionable.

This claim was scheduled for evidentiary hearing. However, Defendant chose not to present any evidence related to this specific sub claim.

Consequently, the Court finds that this sub claim is abandoned. This portion of Defendant's claim is denied. *See Boivert v. State*, 693 So. 2d 652 (Fla. 5th DCA 1997); *Thomas v. State*, 206 So. 2d 475 (Fla. 2d DCA 1968).

3. Expert to Testify that Abusers were Commonly Sexually Abused as Children

Defendant next alleges counsel was ineffective for failing to have an expert testify that abusers were commonly sexually abused as children. Defendant alleges this testimony would have supported the defense theory implicating the victim's father, who was abused as a child, as the person who committed the crimes. Defendant argues further that if an expert had testified that commonly abusers were sexually abused as children, counsel would have been successful in his attempt to admit reverse *Williams* rule evidence that the victim's father had been accused of molesting another child (Defendant's daughter). Defendant asserts that if this expert testimony had been presented at trial, there is a reasonable probability that the outcome of the trial would have been different.

This claim was scheduled for evidentiary hearing. However, Defendant chose not to present any evidence related to this specific sub claim. Consequently, the Court finds that this sub claim is abandoned. This portion of Defendant's claim is denied. *See Boivert v. State*, 693 So. 2d 652 (Fla. 5th DCA 1997); *Thomas v. State*, 206 So. 2d 475 (Fla. 2d DCA 1968).

D. Preparing for Witnesses

Defendant alleges that counsel was ineffective by not being adequately prepared to question Angela Atkinson and K.S's parents.

1. Angela Atkinson

Defendant alleges that counsel was ineffective for failing to elicit from Ms. Atkinson how R.J.A. was acting in 2007. Defendant asserts that Ms. Atkinson would have testified that the child was outgoing, happy, and adjusted in 2007 just as he was in 2009. Defendant further contends that there were no indications that R.J.A. was being abused in 2007, contrary to Ms. Atkinson's testimony that some days the child victim fell apart. Defendant further claims that R.J.A.'s actions from 2007-2009 were inconsistent with a child who had undergone sexual abuse. Defendant again alleges an expert could have testified regarding the demeanor of a person who had undergone sexual abuse.[53] Defendant further alleges that Ms. Atkinson could have testified that the child victim did not have rectal bleeding or other physical symptoms of abuse.

Defendant offers no facts to support his conclusory allegations that if counsel had asked more pointed questions regarding R.J.A.'s behavior in 2007 that Ms. Atkinson would have testified any

[53] As discussed *infra*, because Defendant failed to present evidence on this claim when given the opportunity at evidentiary hearing, Defendant's claim regarding the expert is denied.

differently from what she already testified at trial.[54] Defendant essentially seems to allege that if his counsel had asked a question differently, then Ms. Atkinson would have changed her testimony to say R.J.A. acted absolutely normal instead of having days in 2007 when he fell apart. Just because Defendant does not like the answer of a witness does not mean his counsel acted deficiently in the manner in which he questioned Ms. Atkinson. Additionally, there is no indication that Ms. Atkinson should have been aware whether her ten year old son was experiencing rectal bleeding or any physical symptoms of abuse as it would seem R.J.A. was old enough to handle his own personal hygiene in 2007, and Defendant alleges no facts to the contrary.

Even if counsel had elicited such testimony from Ms. Atkinson, that in 2007 the child victim's demeanor was that of an adjusted child who gave no signs of being abused, this testimony would have done nothing to change the outcome of the trial. The proposed testimony would not have refuted the weighty evidence of the child victim's testimony, giving a detailed account of the abuse he underwent at Defendant's hand.[55] Defendant has failed to show that his counsel acted deficiently or that he was prejudiced by counsel's failure to elicit additional testimony from Ms.

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[54] *See* Attachment 4, Transcript, Jury Trial, Vol. I, pp. 163-181; 195-204.

[55] *See* Attachment 4, Transcript, Jury Trial, Vol. II, pp. 222-252; 280-330.

Atkinson regarding R.J.A. in 2007. Defendant is not entitled to relief as to this claim.

2. K.S.'s Parents

Defendant alleges that counsel was ineffective for failing to call K.S.'s parents to testify as to whether K.S. was exhibiting any behavior or any physical symptoms of abuse in 2007. Defendant claims that if counsel had asked K.S.'s parents these questions during trial, they would have testified that K.S. did not show any symptoms thus supporting K.S.'s testimony that the abuse did not happen. Defendant alleges the results of his trial would have been different if K.S.'s parents had testified.

Defendant has failed to show that counsel was deficient or he was prejudiced by counsel's failure to call K.S.'s parents to testify regarding K.S.'s demeanor and physical symptoms in 2007.[56] As admitted by Defendant, K.S. testified at trial that he was not abused by Defendant. K.S.'s parents testifying they did not notice any issues with K.S.'s demeanor or any physical symptoms would not have

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[56] The Court notes that trial counsel in fact argued for K.S.'s parents to be able to testify regarding their opinion as to whether Defendant had abused K.S. Part of the proffer at the motion in limine was that K.S.'s parents were going to testify that "If [Defendant] had ever done anything inappropriate, we would know about it." Trial counsel was not permitted to present this testimony by order of the Court. Defendant's allegation that trial counsel should have called K.S.'s parents to testify regarding K.S.'s demeanor and absence of physical symptoms of abuse in 2007 treads ever closely to the Court's directive that such evidence could not be presented. *See* Attachment 5, Transcript, Motion in Limine hearing, June 18, 2010, pp. 4-10.

been definitive in proving Defendant's guilt or innocence regarding the allegations alleged. It is common knowledge that people have different reactions to different types of events. Whether K.S.'s parents noticed anything does not prove or disprove that K.S.'s testimony was credible. Additionally, the crimes that concerned K.S. were few. Defendant was convicted of abusing R.J.A. and M.B.A., not K.S. Consequently, any testimony from K.S.'s parents regarding this topic would not have changed the results of Defendant's trial. He is not entitled to relief as to this claim.

E. Evidence that should have been Excluded

Defendant next claims that portions of the video-taped interview of child victim R.J.A. contained several inadmissible points that defense counsel was ineffective in failing to challenge. Defendant alleges the video-taped interview contained *Williams* rule evidence which was inappropriate to present via child hearsay. Defendant further alleges that R.J.A.'s references to K.S.'s statement was double hearsay and inadmissible.

Defendant further alleges that evidence regarding M.B.A. in the video, specifically videotaped statements made by R.J.A. and Keri Arnold-Harms were outside the scope of the State's notice and proffer of the child hearsay hearing, to which counsel should have objected. Additionally, Defendant alleges that trial counsel should have objected to Ms. Arnold-Harms'

testimony summarizing R.J.A.'s mannerisms he exhibited in the videotaped interview based on the best evidence rule. Lastly, Defendant alleges trial counsel should have filed a motion in limine to prevent testimony that indicated Defendant mostly taught boys, he preferred to "hang out" with boys, and he would only babysit boys on the basis that the probative value outweighed potential prejudice.

Defendant is not entitled to relief as to this claim. Initially, the Court notes that the issue of whether trial counsel was ineffective as it relates to *Williams* rule evidence was scheduled for evidentiary hearing but abandoned by Defendant. Defendant's allegation regarding R.J.A.'s reference to K.S.'s statement as being double hearsay would not have rendered the reference inadmissible. The Court found R.J.A.'s statements regarding K.S. and T.H. to be admissible based on the fact that these references included in R.J.A.'s videotaped interview were inextricably intertwined with the State's evidence.

As to R.J.A.'s and Ms. Arnold-Harms' videotaped statements regarding what M.B.A. said about his abuse, any error in failing to object to these statements as being outside the scope was harmless. Even if the portion of the videotape containing R.J.A.'s and Ms. Arnold-Harms' statements regarding M.B.A. had been disallowed after objection, M.B.A. testified at trial consistently with the statements offered by R.J.A. and Ms.

Arnold-Harms.[57] The deletion of R.J.A.'s and Ms. Arnold Harms' statements regarding what M.B.A. said about his encounter with Defendant would not have made a difference at trial. Defendant has also failed to demonstrate how if Ms. Arnold-Harms had not been permitted to "summarize" R.J.A.'s mannerisms she observed during the videotaped interview the results of Defendant's trial would have been different.

Finally, Defendant's allegation that counsel was ineffective for failing to file a motion in limine to keep person's from testifying regarding Defendant teaching boys, preferring to "hang out" with boys, and only babysitting boys is also without merit. It is doubtful that such a motion would have been granted. Defendant alleges this testimony was "untruthful" but the credibility of evidence is up to the jury to decide. Defendant testified at trial in his own defense and had the opportunity to testify regarding this topic.[58] Defendant has failed to show that counsel acted deficiently or that Defendant was prejudiced. He is not entitled to relief as to these claims.

F. Character Evidence

Defendant next alleges his counsel was ineffective for failing to introduce character evidence of Defendant's reputation for peacefulness in the community. Defendant alleges that this evidence

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[57] *See* Attachment 4, Transcript, Jury Trial, Vol. II, pp. 205-217; 329-330.

[58] *See* Attachment 4, Transcript, Jury Trial, Vol. III, pp. 432-436.

would have been admissible to rebut the lesser-included offense of battery. In support of his claim, Defendant lists persons who would have offered favorable testimony regarding his reputation for peacefulness, and also asserts the testimony would have rebutted Ms. Atkinson's testimony that Defendant would hide what was going on in his real life.

Defendant is not entitled to relief as to this claim. Character evidence would not have been properly admitted just because battery was a lesser-included offense to some of Defendant's charges. Additionally, Ms. Atkinson's testimony regarding Defendant "hiding" his real life, would not have opened the door for character evidence of this nature to be presented. Even if this evidence had been admissible, reputation for peacefulness in the community fails to refute the testimony that Defendant hid what his life was like, and does not show Defendant was of such a character not to have committed these crimes. Defendant has failed to demonstrate that his counsel was deficient or he was prejudiced by his counsel's failure to present character evidence on Defendant's behalf. He is not entitled to relief as to this claim.

Ground VII: Counsel was Ineffective for Failing to Raise Numerous Critical Objections

A. *Child Hearsay*

Defendant alleges that counsel was ineffective for failing to argue that M.B.A.'s testimony was inadmissible because it did not fall within the limited exception of hearsay set forth in section

90.803(23), Florida Statutes. Specifically, R.J.A.'s statement to M.B.A. that something happened involving Defendant, without any other elaboration, did not describe an act of child abuse, sexual abuse, or other offense involving unlawful sexual acts, as required to fall within the exception of the rule. Defendant alleges that had counsel objected to M.B.A.'s testimony, the jury would not have been exposed to this allegedly inadmissible hearsay and the results of Defendant's trial would have been different.

Defendant's claim is refuted by the record. When reviewing M.B.A.'s statement in context, M.B.A.'s statement clearly describes sexual abuse that meets the child hearsay exception.[59] *Arguendo*, even if it were not clear that M.B.A.'s testimony referenced sexual abuse and the testimony had been excluded, Defendant has failed to demonstrate the exclusion of this testimony would have changed the outcome of Defendant's trial given the strong evidence against Defendant.[60] Defendant has failed to show that counsel acted deficiently or Defendant was prejudiced. Defendant is not entitled to relief as to this claim.

Defendant further alleges that counsel should have objected to Ms. Atkinson testifying that M.B.A. "identified their grandfather" as their abuser after M.B.A. and his brother R.J.A. were found viewing pornographic websites. Defendant

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[59] *See* Attachment 4, Transcript, Jury Trial, Vol. I, pp. 101-104.

[60] *See* Attachment 4, Transcript, Jury Trial, Vol. II, pp. 208-217; 222-252; 280-330.

argues that counsel failed to object that neither the State's notice nor testimony proffered by the State at the child hearsay hearing included statements by M.B.A. to anyone. Defendant further asserts the Court did not rule on the admissibility of M.B.A.'s statements. Defendant alleges that counsel's failure to object to the inadmissible hearsay resulted in the jury being exposed to prejudicial testimony that bolstered the State's case.

The Court finds that the allegedly inadmissible hearsay would have been found admissible pursuant to the exception referenced above. Even if such testimony had been excluded, M.B.A. testified at trial regarding the incidents in question,[61] therefore Defendant is unable to show that the exclusion of the allegedly inadmissible hearsay statements would have changed the result of Defendant's trial. Defendant is not entitled to relief as to this claim.

B. <u>Videotaped Interview Became a Feature of the Trial</u>

Defendant next alleges that counsel should have objected to R.J.A.'s videotaped interview becoming a feature of the trial. In support of this argument, Defendant references the trial transcript which allegedly shows R.J.A.'s trial testimony was fifteen pages in length, while the videotaped interview was fifty pages in length. Defendant alleges that the videotape included more information than R.J.A.'s testimony and the State directed the

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[61] *See* Attachment 4, Transcript, Jury Trial, Vol. II, pp. 2015-217.

jury to concentrate on the video. Defendant alleges that but for counsel's failure to object to the video becoming a feature of the trial and move for a mistrial, the results of Defendant's trial would have been different.

Defendant is not entitled to relief regarding this claim. The fact that the video was longer in duration than R.J.A.'s testimony at trial is not a legal reason for a mistrial to be granted. *See Serrano v. State*, 64 So. 3d 93, 108 (Fla. 2011) ("A motion for mistrial should only be granted when an error is so prejudicial as to vitiate the entire trial") (citations omitted). As Defendant has failed to demonstrate that counsel was deficient or Defendant was prejudiced, relief will not be granted as to this claim.

C. Jury Instructions regarding *Williams* Rule Evidence

Defendant next alleges counsel was ineffective for failing to ensure that *Williams* rule evidence jury instructions were given. Defendant contends that if the jury had been advised properly of the role of *Williams* rule evidence, there is a reasonable probability the results of the trial would have been different.

Defendant has failed to demonstrate that this jury instruction should have been given in his trial. "[E]vidence of uncharged crimes which are inseparable from the crime charged, or evidence which is inextricably intertwined with the crime charged, is not *Williams* rule evidence." *Griffin v. State*, 639 So. 2d 966, 968 (Fla. 1994). The Court

found the evidence in question to be admissible because it was inextricably intertwined with the crimes charges;[62] therefore, the evidence was considered *Williams* rule evidence. A *Williams* rule jury instructions would have been inappropriate under the circumstances. Even if a *Williams* rule instruction could have been properly given, Defendant would still not be entitled to relief. The evidence offered by the two child victims in this case was very strong.[63] A *Williams* rule instruction would have done little to nothing to diminish the strength of the evidence offered by the State regarding the crimes charged. Additionally, one of the referenced witnesses (T.H.) did not testify at trial, and the other one (K.S.) testified for the defense. Defendant has failed to demonstrate that his counsel was deficient or that he was prejudiced by counsel's failure to request a *Williams* rule instruction. He is not entitled to relief as to this claim.

D. Motion for Judgment of Acquittal

Defendant next alleges that trial counsel was ineffective for only making a "boilerplate" motion for acquittal (the State had not proven its case) which did not preserve any argument or issue for appellate review. Defendant alleges that counsel failed to argue that the State's evidence did not establish that Defendant solicited M.B.A. to commit

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[62] *See* Attachment 6, Transcript, Hearing, June 28, 2010, pp. 5-8.

[63] *See* Attachment 4, Transcript, Jury Trial, Vol. II, pp. 205-217; 222-252; 280-330.

a lewd or lascivious act, as charged in count nine. Defendant further contends that if counsel would have made this argument during his motion for judgment of acquittal, the judgment of acquittal would have been entered or the issue would have been preserved for appeal.

Defendant's claim is refuted by the record. Defendant was charged with lewd or lascivious conduct in count nine. For a person to be convicted of lewd or lascivious conduct, the State must show the person intentionally touched a person under sixteen (16) years of age in a lewd or lascivious manner or solicited a person under sixteen (16) years of age to commit a lewd or lascivious act. *See* § 800.04, Florida Statutes. The evidence at trial showed that Defendant pulled down M.B.A.'s underwear and also pulled M.B.A. against him into bed.[64] When viewing the evidence in a light most favorable to the State, a judgment of acquittal would not have been granted as to count nine. Defendant is not entitled to relief as to this claim.

E. Testimony Regarding Other Children Staying the Night

The Court granted the State's pretrial motion in limine that evidence of other children staying the night at Defendant's residence without incident should be excluded. However, Defendant alleges that the State "opened the door" to this type of evidence, and counsel was ineffective in failing to ask again whether this testimony could be

[64] *See* Attachment 4, Transcript, Jury Trial, Vol. II, p. 209.

admitted. Defendant alleges that but for counsel's inaction, the results of Defendant's trial would be different.

Defendant fails to allege how the State "opened the door" to this evidence. The record shows the State asked Defendant about him babysitting SCA's members' children. Defendant was also asked if some children stayed over for the weekends at his house. However, the only children specifically referenced by the State in its questions were R.J.A., M.B.A., K.S., and T.H.[65] This line of questioning hardly appears to have opened a door. However, assuming the State did "open the door," evidence regarding other children staying the night at Defendant's home without incident would not be relevant to whether Defendant abused the particular children in question. It appears the admittance of such evidence would be improper character evidence through specific acts. As it is most probable that the evidence in question would not have been admitted even if counsel had again asked for it to be permitted, Defendant has failed to demonstrate that counsel was deficient or Defendant was prejudiced. Defendant is not entitled to relief as to this claim.

F. Testimony from Angela Atkinson

Defendant alleges that counsel was ineffective for failing to object to irrelevant evidence offered by Ms. Atkinson about Defendant wanting to maintain an outward appearance, which

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[65] *See* Attachment 4, Transcript, Jury Trial, Vol. III, pp. 433-436.

Defendant contends was a prejudicial "blatant attack" on Defendant's character. Defendant claims that counsel should have challenged this remark by asking for a curative instruction or a mistrial. Defendant further contends that but for counsel's inaction, there is a reasonable probability that the outcome of the trial would have been different.

Defendant is not entitled to relief as to this claim. Ms. Atkinson's testimony regarding her opinion that Defendant wanted to maintain a certain outward appearance would not have warranted a mistrial. *See Serrano v. State*, 64 So. 3d at 108. In fact, Defendant even admitted during his testimony that he was very concerned with his own public appearance thus validating Ms. Atkinson's testimony on this point.[66] It would appear a curative instruction would not have been appropriate under the circumstances. For argument's sake, even if counsel had asked for a curative instruction and it was given, it is highly unlikely that the results of Defendant's trial would have been different based upon the strong evidence offered in this case. Defendant has failed to demonstrate that counsel was deficient or he was prejudiced. He is not entitled to relief as to this ground.

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[66] *See* Attachment 4, Transcript, Jury Trial, Vol. III, p. 431.

Ground VIII: Counsel was Ineffective for Failing to Highlight Numerous Inconsistencies and Deficiencies in the Evidence Submitted by the State

Lastly, Defendant alleges that counsel was ineffective for failing to highlight "numerous" inconsistencies and deficiencies in the evidence submitted by the State. Specifically, Defendant alleges that counsel should have highlighted the fact that Ms. Atkinson testified she found the underwear and threw it away, but Leillanya Williams also testified that she found the underwear and threw it away; R.J.A. testified that he decided to tell about his abuse because he saw on the law shows that the was the victim, but during deposition he indicated he came forward because his mother asked him; R.J.A. said he slept in the nude but he also said he slept in underwear. Defendant further argues that counsel failed to ask R.J.A. or Ms. Atkinson about being coached or to argue to the jury that R.J.A.'s testimony contained multiple indicators of coaching.

Defendant is not entitled to relief. The inconsistencies detailed by Defendant are minute and counsel highlighting them would have done nothing to change the verdict of the jury. Additionally, it is up to the jury to weigh and determine the credibility of the evidence. The jury is instructed on its duty and there is no indication that counsel's failure to highlight these inconsistencies kept the jury from weighing the evidence as instructed. Defendant has failed to demonstrate that counsel was deficient or he was prejudiced. He is not entitled to relief.

ACCORDINGLY, it is **ORDERED and ADJUDGED** that:

1. Defendant's "Amended Motion for Postconviction Relief Pursuant to Florida Rule of Criminal Procedure 3.850" is **DENIED**; and
2. Defendant has thirty (30) days from the date of rendition of this order to file his notice of appeal, should he so choose.

DONE and ORDERED in Chambers at Pensacola, Escambia County, Florida, this 19th day of September, 2016.

/s/ Scott Duncan
J. SCOTT DUNCAN
CIRCUIT JUDGE

JSD/mco

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and accurate copy of the foregoing Order was furnished via regular U.S. Mail (*unless otherwise indicated*) to:

✓ Mark V. Murray, Esq.
317 E. Park Avenue
Tallahassee,
Florida 32301
mvm@capitalcity
attorney.com
(*via electronic delivery*)

✓ Office of the State Attorney
ATTN: Kenneth Ridlehoover
kridlehoover, ASA
kridlehoover@sa01.org
(*via electronic delivery*)

✓ Albon Curry Diamond
DC# A50493
Holmes Correctional Institution
3142 Thomas Drive
Bonifay, Florida 32425

this 20th day of September, 2016.

[SEAL]

PAM CHILDERS, Clerk of Court

BY: /s/ [Illegible]
Deputy Clerk

DISTRICT COURT OF APPEAL,
FIRST DISTRICT
2000 Drayton Drive
Tallahassee, Florida 32399-0950
Telephone No. (850)488-6151

July 25, 2018

CASE NO.: **1 D16-5051**
L.T. No.: 2009-CF-4625

Albon C. Diamond, III	v.	State of Florida
Appellant/Petitioner(s),		Appellee/Respondent(s)

BY ORDER OF THE COURT:

Appellant's motion filed June 21, 2018, for written opinion is denied.

I HEREBY CERTIFY that the foregoing is (a true copy of) the original court order.

Served:

Hon. Pamela Jo Bondi, AG
Mark V. Murray

Sharon Traxler, AAG
Paul M. Hawkes

th

/s/ Kristina Samuels [SEAL]
KRISTINA SAMUELS, CLERK

IN THE DISTRICT COURT OF APPEAL
FIRST DISTRICT, STATE OF FLORIDA

ALBON C. DIAMOND, III, Appellant, v. STATE OF FLORIDA, Appellee.	CASE NO.: 1D16-5051

APPELLANT'S MOTION FOR WRITTEN OPINION

COMES NOW, Appellant ALBON C. DIAMOND, III, and moves this Court for rehearing in the form of a written opinion substituted for the *per curiam* decision without written opinion issued on June 7, 2018.

Rule 9.330, Fla. R. App. P. (2016), states that if "a party believes that a written opinion would provide a legitimate basis for supreme court review, the party may request that the court issue a written opinion." A written opinion would provide a firm basis for Florida Supreme Court review on any or all of the three issues raised in the instant appeal.

A. Failure to Call Neurologist

Any written opinion on Issue I, the failure to call a neurologist to establish the physical inability of the Appellant to perform the actions described by the accuser, would likely lead to supreme court review. The

parties agreed that this matter was preserved and therefore this Court's affirmance must have been on the merits. The State raised no argument or issue other than to rely on the lower court's opinion. An attorney's failure to call a key witness constitutes a valid postconviction claim. The ultimate authority to decide whether to call a witness rests not with the defendant or with the client, but with the attorney. *Puglisi v. State*, 112 So. 3d 1196, 1206 (Fla. 2013). When

> a defendant alleges ineffective assistance of counsel for failure to call specific witnesses, a defendant is "required to allege what testimony defense counsel could have elicited from witnesses and how defense counsel's failure to call, interview, or present the witnesses who would have testified prejudiced the case."

Bryant v. State, 901 So. 2d 810, 821 (Fla. 2005) (*citing Nelson v. State*, 875 So. 2d 579, 583 (Fla. 2004)). If defense counsel could have called a witness who would have countered key testimony against the defendant, absent any reasonable tactical basis for doing so, counsel is ineffective. *See generally Townsend v. State*, 201 So. 3d 716, 718 (Fla. 4th DCA 2016) (reversing for relief where witness could have countered State's expert).

If this Court affirmed on the same basis that the lower court denied relief, namely that it was a reasonable tactical decision to refrain from calling a neurologist who would impeach the accuser's testimony simply because the neurologist could not entirely rule out that the Appellant was unable to achieve an erection or use his mouth, then a written opinion on the

issue would likely lead the Florida Supreme Court to find conflict with its decision in *State v. Coney*, 845 So. 2d 120, 127-33 (Fla. 2003). In that case, the supreme court applied the *Strickland* test *de novo* and held that postconviction relief was warranted where a trial attorney failed to obtain expert medical testimony that would support his defense. In the case at hand, Neurologist Dr. Bear clearly impeached the alleged victim's story that Appellant performed sexual acts on his knees, something the doctor said was impossible, and Dr. Bear impeached the victim's mother's testimony that Appellant was in good physical condition at the time of the alleged abuse. The trial attorney's strategy was to hope that the jury concluded that Appellant looked too frail to have committed the described acts, but the attorney failed to call an expert witness to support that claim. Given the impeachment provided by the alleged other child victim who testified at trial that the Appellant never abused him, and the testimony from Appellant's other adult children that his health was fragile at the time of the alleged abuse, the jury would likely have acquitted Appellant if a credible doctor was called to testify that the Appellant **could not have** performed the sex acts that the accuser said he performed. In regard to the accuser's (R.J.A.'s) claim that he and Appellant had anal intercourse with one another where they took turns getting on their hands and knees while the other person knelt and positioned himself "on back," **Dr. Bear testified that it would have been physically impossible for Appellant to get on his hands and knees to engage in such sexual activity due to his severely weakened**

physical state at the time (3 years before trial). (V1-137-38). Dr. Bear additionally noted the diagnoses of stroke, diabetes, hypertension, peripheral neuropathy, all of which were consistent with Appellant's claims of impotence. (V1-139). Dr. Bear testified that it was possible that Appellant was lying and could actually achieve an erection and ejaculate, **but it was medically impossible for him to physically perform as described in the trial testimony**. (V1-143). Dr. Bear's testimony shows that R.J.A. and his mother were **lying**. Appellant **could not have gotten on the floor and traded anal sex with the boy while getting on his hands and knees**. It was physically impossible according to the credible medical testimony below. Appellant testified to that fact, but the jury **did not believe him**; they believed R.J.A., his mother, and the prosecutor. They believed Appellant could do it. The credible neurologist says that he could **not** have and that any doctor would agree with him on that point because these conclusions were based on objective medical records.

Despite this, the lower court found that it was sound trial strategy to rely on Appellant's physical appearance three years after the alleged sexual activity (which was also three years after the Appellant's stroke) as evidence of his fragility and weakness rather than calling a doctor to testify that it was medically impossible for the Appellant to do the physical things the accuser said he did. (V2-240). In a case that revolved solely around the credibility of the accuser (R.J.A.) versus the credibility of the Appellant, there is

a reasonable probability that the jury would have found reasonable doubt about the credibility of R.J.A.'s story had they received testimony from a local, credible neurologist like Dr. Bear that it was **impossible** for Appellant to perform the specific actions that R.J.A. claimed the Appellant performed. Any written opinion would expressly and directly conflict with *Coney* and the other Florida Supreme Court authorities cited above.

B. Failure to Call Lay Witnesses Coon and Lay Witness Levin to Establish the Appellant's Impotence

Likewise, any written opinion affirming the lower court's decision that it was not ineffective assistance under *Strickland* for Appellant's trial attorney to fail to call two lay witnesses (Mr. Coon and Ms. Levin) to corroborate the Appellant's claim of impotence would conflict with Florida Supreme Court precedent. The State agreed that this issue was preserved. This claim was summarily denied as a matter of law, so no deference is owed to any factual findings by the lower court. Any written opinion by this Court upholding the lower court's conclusion that counsel was not deficient because the statements by Mr. Coon and Ms. Levin constituted inadmissible hearsay would necessarily conflict with the cases cited in the Initial Brief and the Reply Brief. The identified statements of these witnesses were not inadmissible. The lower court cited *Bedford v. State*, 589 So. 2d 245 (Fla. 1991), the seminal case in this area. The Appellant's main argument was

that *Bedford* was misapplied. That case and section 90.803, Fla. Stat., allow for admission of statements of then-existing bodily condition even if the witness did not physically observe or diagnose the condition. A declarant's **statement** about his or her own bodily health—not a third party witness's personal observations of the declarant's physical state—is what is admissible under a plain reading of the statute and a proper reading of *Bedford.* Trial counsel was deficient in failing to call these two witnesses for the same reason that he was deficient under Issue I in failing to call a physician to prove that the Appellant could not have performed the sexual acts that R.J.A. claimed he did. Part of trial counsel's strategy was to hope that the jury believed the Appellant was too frail in 2007 to commit the charged sexual acts based solely upon the jury looking at the Appellant during his trial three years later in 2010. There was no reasonable basis for failing to introduce two statements from two impartial witnesses who could testify that the Appellant discussed his impotence in 2007, years before his arrest, years before he was charged with a life felony, and even before he was alleged to have committed the charged offenses.

Beyond being admissible as a statement of bodily health, the testimony of Mr. Coon and Ms. Levin would have been admissible and invaluable as prior consistent statements by the Appellant that would have shown the jury that he was not now making up a story about impotence in order to avoid incarceration. Based upon the Florida Supreme Court authorities cited in

the Initial Brief and Reply Brief, a written opinion would very likely lead to Florida Supreme Court review to address the conflict of opinions. For instance, Appellant cited opinions from the supreme court for the proposition that

> prior consistent statements are inadmissible to corroborate or bolster a witness's trial testimony. *See, e.g., Bradley v. State*, 787 So. 2d 732, 743 (Fla. 2001); *Chandler v. State*, 702 So. 2d 186, 197 (Fla. 1997); *Jackson v. State*, 498 So. 2d 906, 910 (Fla. 1986); *Van Gallon v. State*, 50 So. 2d 882 (Fla. 1951). Because they are usually hearsay, "in order to be admissible, prior consistent statements, like any other hearsay statements, must qualify under a hearsay exception." *See Bradley*, 787 So. 2d at 743. However, prior consistent statements can be admitted as non-hearsay "if the following conditions are met: the person who made the prior consistent statement testifies at trial and is subject to cross-examination concerning that statement; and the statement is **offered to 'rebut an express or implied charge . . . of** improper influence, motive, or **recent fabrication**.'" *See Chandler*, 702 So. 2d at 197-98 (*quoting Rodriguez v. State*, 609 So. 2d 493, 500 (Fla. 1992)); see also § 90.801(2)(b), Fla. Stat. (1999). **However, a witness's prior consistent statements used for rehabilitation must have been made before the existence of a fact said to indicate bias, interest, corruption, or other motive to falsify the prior consistent statement**. *See Jackson*, 498 So. 2d at

> 910; *see also Quiles v. State*, 523 So. 2d 1261, 1263 (Fla. 2d DCA 1988).

Taylor v. State, 855 So. 2d 1, 22-23 (Fla. 2003) (emphasis supplied). *See also* § 90.801(2)(b), Fla. Stat. (prior consistent statements admitted to rebut claims of recent fabrication are not hearsay and are admissible). The State failed to address any of these authorities in its Answer Brief. The lower court's ruling that trial counsel was not deficient because the statements were inadmissible hearsay was simply incorrect. Any written opinion that agreed with the trial court's decision would very likely lead to Florida Supreme Court review to reconcile the conflict with the supreme court's decisions.

Also, any written opinion adopting the State's argument that the witnesses failed to offer this testimony would necessarily conflict with *Foster v. State*, 132 So. 3d 40, 62 (Fla. 2013), the case that provides the standard for review of summarily denied postconviction claims. In his 3.850 motion, Appellant **alleged under oath** that the witnesses would have testified at trial that Appellant made claims of impotence **prior to the alleged acts for which he is now convicted**. Because the lower court **summarily denied** this claim, this Court is **required**, under the applicable standard of review, to **presume** that the Appellant's factual allegations are **true** unless **conclusively refuted** by the record. Any written opinion would likely lead to supreme court review.

C. Failure to Call Elizabeth Weems to Corroborate Appellant's Testimony that He Was Impotent at the Time of the Alleged Offenses

A written opinion on Issue III would also lead to Florida Supreme Court review. As with the other issues, the State agreed that this matter was preserved. As with Issue II, the lower court found a lack of deficient performance because it found that Ms. Weems' testimony would have been inadmissible hearsay. A written opinion by this Court affirming on this issue would likely lead to supreme court review because the lower court was clearly wrong on this point. As with Issue II, Appellant's 2007 statement that he was impotent was admissible as a statement of then-existing bodily health and a prior consistent statement intended to rebut a charge of recent fabrication. Under the same authorities previously cited, the Florida Supreme Court would find conflict between its decisional law and a written opinion from this Court upholding the lower court's ruling.

We express a belief, based upon a reasoned and studied professional judgment, that a written opinion will provide a legitimate basis for supreme court review because it was conceded that all three issues were preserved, all issues were denied based on the lower court's finding of a lack of deficient performance, that denial was reviewed *de novo*, and all of Appellant's arguments were supported by the Florida Supreme Court precedents cited in this motion.

Any written opinion on any of the issues would likely lead to Florida Supreme Court review on the basis of express and direct conflict with the authorities cited in this motion.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing motion has been furnished by email to the Office of the Attorney General, Capitol PL-01, Tallahassee, Florida, at crimapptlh@myfloridalegal.com this 21st day of June, 2018.

s/ Mark V. Murray
MARK V. MURRAY