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

GUY HAMMOND,

Appellant

v. Case No. 97-1835

STATE OF FLORIDA,

Appellee.
_____/

APPEAL FROM THE TWELFTH JUDICIAL CIRCUIT
IN AND FOR SARASOTA COUNTY
STATE OF FLORIDA

# ANSWER BRIEF OF APPELLEE

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for the purpose of this appeal.

## SUMMARY OF THE ARGUMENT

Issue I:

Because there was no bill of particulars,

dates alleged in the charging document and the dates proven at trial. Additionally, since Appellant has failed to demonstrate that he has been prejudiced in any manner, the trial court correctly denied the motion for judgment of acquittal.

Issue II:

Regardless of the tenor of the note sent from the jury during deliberations, Appellant waived review of the purported j

Issue III:

Not only did Appellant fail to preserve this issue for review, but all of the juror's

that would permit her to render an impartial verdict and the trial court correctly denied Appellant's challenge for cause.

Issue IV:

Contrary to Appellants assertions, he did proffer the expert's

and the trial court properly excluded the proposed testimony as an attempt to vouch for the credibility of the victims.

Issue V:

Because no witness expressed an opinion as to whether or not the children were lying, but only that the children were able to comprehend the difference between telling the truth and telling a lie, their testimony was properly admitted.

## ARGUMENT

### ISSUE I

### THE TRIAL COURT PROPERLY DENIED APPELLANT'S MOTION FOR JUDGMENT OF ACQUITTAL (Restated)

Appellant has misapprehended the ruling of the trial court regarding his motion for a statement of particulars. Not once, but twice, the trial court denied Appellants' motion. (Vol. I, R10-11, Vol. V, T19-22) Contrary to Appellants' assertions, there was no oral statement of particulars either, and the trial court specifically advised Appellant of that during his motion for judgment of acquittal. (Vol. IX, T599)

Because there was no bill of particulars, Appellant's reliance on Audano v. State, 674 So.2d 882 (Fla. 2d DCA 1996), is misplaced. In Audano, unlike the instant case, a bill of particulars had been requested and received narrowing the time within which the crime happened, yet the State failed to show the defendant committed the crime within that time frame. This deficiency resulted in the reversal. However, where there is no bill of particulars, there may be variance between the dates alleged in the charging document and the dates proven at trial so long as the crime was committed before the date of the information,

the crime was committed within the applicable statute of limitations, and the defendant has been neither surprised nor hampered in preparing a defense. Wykle v. State, 659 So.2d 1287 (Fla. 5th DCA 1995), citing Tingley v. State, 549 So.2d 649 (Fla. 1989). All of the conditions have been met in the instant case, and Appellant has failed to demonstrate that he has been prejudiced in any manner. (Vol. IX, T599-610). Accordingly, the trial court correctly denied the motion for judgment of acquittal.

## ISSUE II

### APPELLANT WAIVED ANY ISSUE OF JURY MISCONDUCT (Restated)

Regardless of the tenor of the note sent from the jury during deliberations, Appellant waived review. Williams v. State, 101 So.2d 877 (Fla. 1958); Hair v. State, 428 So.2d 760 (Fla. 3d DCA 1983). Not only did Appellant fail to move for a mistrial when notified of the purported misconduct, but Appellant elected to proceed, even advising the trial court on the language to be employed when addressing the jury. (Vol. X, T737-739). Thus, because the waiver was affirmative and Appellant knew of the purported misconduct when he chose to proceed, the dictates of Wilding v. State, 674 So.2d 114 (Fla. 1996), are inapplicable and there is no reason to reach the question of fundame

## ISSUE III

## THE TRIAL COURT CORRECTLY DETERMINED THAT JUROR MULLIGAN COULD BE IMPARTIAL (Restated)

Contrary to Appellant's position that she could be impartial. In support of his position Appellant relies on the phrase of the juror - I "think I can be impartial." A review of her entire voir dire, however, demonstrates that her words merely parrot the question posed, particularly the questions from Appellant. (Vol. VI, T247-248) In each instance, when asked do you think you can be impartial, the juror responded, I think I can. That does not indicate that the juror was equivocal or could not lay aside any bias or prejudice. To the contrary, all of the jurors' responses evidence that she possessed a state of mind that would permit her to render an impartial verdict. Jones v. State, 660 So.2d 291 (Fla.2d DCA 1995); Smith v. State, 699 So.2d 629 (Fla. 1997).

More importantly, this issue has not been preserved for appellate review. Appellant failed to object to the trial court's cause (Vol. VI, T265) and failed to object prior to accepting the jury. (Vol. VI, T270-272). Joiner v. State, 618 So.2d 174 (Fla. 1993); Franqui v. State, 699 So.2d 1332 (Fla. 1997).

As noted by the court in Joiner, at 176 n.2, strict construction of the rules of preservation is necessary because otherwise, the defense "could proceed to trial before a jury he unqualifiedly accepted, knowing that in the event of an unfavorable verdict,

## ISSUE IV

## THE TRIAL COURT PROPERLY EXCLUDED APPELLANT'S EXPERT WITNESS FOLLOWING THE PROFFER (Restated)

Appellant has neglected to advise this Court that the introduction of Dr.

statements, not during the trial. Moreover, after the trial court determined that the doctor's

requested proffer of testimony, Appellant noted an exception and was able to make the proffer. (Vol I, R14-18) Although not in the format, testimonial, originally anticipated by Appellant, his proffer was sufficiently detailed to make known to the trial court the substance of the evidence, and, therefore, sufficient for purposes of appellate review. Jacobs v. Wainwright, 450 So.2d 200 (Fla. 1984); Phillips v. State, 351 So.2d 738 (Fla. 3d DCA 1977); McGriff v. State, 601 So.2d 1320 (Fla. 2d DCA 1992). Thus, there was no error, much less a

Although Appellant does not contend that the doctor's

would have been admissible, but only that his proffer should have been allowed, the trial court was correctly able to determine that the proposed evidence was nothing more than an attempt to vouch for the credibility of the

children, and thus inadmissible. Weatherford v. State, 561 So.2d 629 (Fla. 1st DCA 1990). The proposed evidence was, according to Appellant, offered to assist the trial court in determining the reliability of the child hearsay statements. However, the trial court has sufficient guidance in making the required findings from the statute itself, and case law. See: s.90.803(23), F.S.; State v. Townsend, 632 So.2d 949 (Fla. 1994). Appellants' characterization of the evidence notwithstanding, the trial court correctly excluded it.

## ISSUE V

THE TRIAL COURT CORRECTLY ADMITTED TESTIMONY REGARDING THE CHILD WITNESSES' ABILITY TO COMPREHEND THE DIFFERENCE BETWEEN TELLING THE TRUTH AND LYING (Restated)

Although Appellant correctly recites the law relating to a witness vouching for the credibility of another witness, belies his conclusion that the witnesses verified the credibility of the child victims.

The adults to whom the children related the abuse, and Ms. Dembs, and about whose testimony Appellant complains, did not testify that the girls were telling the truth, but rather that the children were able to comprehend the difference between telling the truth and telling a lie. (Vol VIII, T439-441, T396-397) Furthermore, Appellant concedes that Ms. Dembs did not testify that the child was telling the truth. That witness' herself as a "counselor," was fully explained, and clarified why the girls had spoken to her about the abuse. A review of Ms. Dembs entire testimony reveals that there was no implication that the children were te

Since the record clearly demonstrates that no witness expressed an

opinion as to whether or not the children were lying, children were told to tell the truth and understood the difference between the truth and a lie was properly admitted.

## CONCLUSION

WHEREFORE based on the foregoing arguments, citations of authority and references to the record, the judgments and sentences should be affirmed.

Respectfully submitted,

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## CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. mail to Timothy J. Ferreri, Assistant Public Defender, P. O. Box 9000 Drawer PD, Bartow, Florida 33831 this ____ day o

_____

COUNSEL FOR APPELLEE