[Cite as *State v. Thornton*, 2009-Ohio-3685.]

IN THE COURT OF APPEALS

TWELFTH APPELLATE DISTRICT OF OHIO

CLERMONT COUNTY

STATE OF OHIO,	:	
Plaintiff-Appellee,	:	CASE NO. CA2008-10-092
	:	O P I N I O N
- vs -		7/27/2009
	:	
KEVIN MICHAEL THORNTON,	:	
Defendant-Appellant.	:	

CRIMINAL APPEAL FROM CLERMONT COUNTY COURT OF COMMON PLEAS
Case No. 2007-CR-00792

Donald W. White, Clermont County Prosecuting Attorney, David H. Hoffmann, 123 North Third Street, Batavia, OH 45103-3033, for plaintiff-appellee

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YOUNG, J.

{¶1} Defendant-appellant, Kevin Michael Thornton, appeals his conviction and sentence in the Clermont County Court of Common Pleas for aggravated robbery and kidnapping and the firearm specifications that accompanied those offenses.

{¶2} On September 11, 2007, at approximately 1:15 p.m., a man wearing sunglasses and a hat entered the Cash Express on Main Street in the city of Milford,

Clermont County, Ohio. The man walked up to the counter and asked store employee Leslie Fahey what he needed to do to obtain a loan. When Fahey walked around the counter to give him a brochure, the man pointed a handgun at her stomach and demanded money. When Fahey asked if he was serious, the man racked the slide on his handgun, thereby chambering a round in the weapon, and repeated his demand. Fahey handed over the contents of her cash drawer. The man then ordered Fahey to lie down on the floor, bound her hands and feet with zip ties, and told her not to scream or he would come back. After hearing nothing but silence, Fahey freed her hands, cut the zip tie on her feet and sent out an alarm using her computer.

{¶3} Even though the surveillance photographs of the robbery taken by the store's security camera did not show the robber's face, several Milford police officers believed that, given the perpetrator's height and posture, the robber was Thornton. When the police showed Fahey a photo lineup that did not include Thornton, but contained the photo of a known shoplifter, she did not identify any of the men in the lineup as being the robber. However, when the police showed Fahey a second photo lineup that contained Thornton's photograph, she identified Thornton as the man who robbed her.

{¶4} On September 21, 2007, Thornton was indicted on one count of aggravated robbery in violation of R.C. 2911.01(A)(1), a felony of the first degree, and one count of kidnapping in violation of R.C. 2905.01(A)(2), a felony of the first or second degree, depending on whether the offender released the victim in a safe place unharmed. See R.C. 2905.01(C). Both counts were accompanied by firearm specifications pursuant to R.C. 2941.145. Thornton's first trial in November 2007 ended with a hung jury, and the trial court declared a mistrial. On April 7-10, 2008, Thornton was again tried by jury, and this time was convicted as charged, with the jury finding with respect to the kidnapping charge that Thornton released Fahey in a safe place unharmed.

{¶5} On May 5, 2008, Thornton moved for a new trial based on newly-discovered evidence, and on August 15, 2008, the trial court overruled the motion.

{¶6} The trial court sentenced Thornton to a nine-year prison term for his conviction for aggravated robbery, to be served consecutively with a mandatory three-year prison term for his conviction on the accompanying firearm specification, and to an eight-year prison term for his conviction for kidnapping, to be served consecutively with a mandatory three-year prison term for his conviction on the accompanying firearm specification. The trial court also ordered Thornton to serve his sentence for kidnapping and the accompanying firearm specification concurrently with his sentence for aggravated robbery and the accompanying firearm specification.

{¶7} Thornton now appeals, assigning the following as error:

{¶8} Assignment of Error No. 1:

{¶9} "THE TRIAL COURT ERRED IN OVERRULING DEFENDANT'S MOTION FOR MISTRIAL AFTER A STATE'S WITNESS INFORMED THE JURY THAT HIS PRIOR TRIAL RESULTED IN A HUNG JURY."

{¶10} Thornton argues the trial court erred by refusing to grant a mistrial when a prosecution witness disclosed that Thornton was being retried after his first trial had ended in a hung jury. We disagree.

{¶11} A trial court should not grant a motion for a mistrial unless it appears that some error or irregularity has been injected into the proceeding that adversely affects the substantial rights of the accused, and as a result, a fair trial is no longer possible. See *State v. Reynolds* (1988), 49 Ohio App.3d 27, 33. The decision as to whether or not to grant a mistrial rests within the trial court's sound discretion, and the trial court's decision will not be reversed absent an abuse of discretion, i.e., the trial court's decision was arbitrary, unconscionable, or unreasonable. See, e.g., *State v. Kersey*, Warren App. No. CA2008-02-

031, 2008-Ohio-6890, ¶8.

{¶12} At trial, one of the state's witnesses, Eric Crawford, testified that he and Thornton had discussed some of the facts of Thornton's case. When the state asked him if he was aware that Thornton's case "was set for trial," Crawford replied, "I was aware that he just had a hung jury." Defense counsel objected to this testimony, and at a sidebar conference, requested that a mistrial be declared. The trial court initially agreed to defense counsel's request for a mistrial. However, after giving both parties an opportunity to argue the issue, the trial court overruled defense counsel's request for a mistrial and, instead, issued a curative instruction to the jurors, instructing them not to consider, for any purpose, Crawford's testimony about a hung jury.

{¶13} Thornton asserts the curative instruction was insufficient and the trial court should have declared a mistrial. However, curative instructions have been held to be an effective means of remedying errors or irregularities that occur during trial, see *State v. Zuern* (1987), 32 Ohio St.3d 56, 61, and juries are presumed to follow any curative instructions issued by a trial court. See *State v. Henderson* (1988), 39 Ohio St.3d 24, 33. There is nothing in the record that suggests that the jury in this case failed to follow the curative instruction given by the trial court.

{¶14} The trial court's decision as to whether to grant a mistrial or issue a curative instruction to the jury is accorded great deference, since the trial court is most familiar with the evidence and background of the case and has observed the jurors' reaction to the testimony or argument that caused the request for the mistrial. See *Kersey*, 2008-Ohio-6890, and *Arizona v. Washington*, (1978), 434 U.S. 497, 514, 98 S.Ct. 824.

{¶15} This case is not analogous to cases where the offending remarks were made by one of the parties, cf. *State v. Colvin*, Franklin App. No. 04AP-421, 2005-Ohio-1448, ¶21, or where the prosecution disclosed that a prior jury was hung "11 to one," in the apparent

hope that the jury would interpret the remark to mean that 11 jurors were for conviction. Cf. *Williams v. State* (Alaska 1981), 629 P.2d 54, 59. Instead, as the trial court found, Crawford's remarks about the hung jury "cut both ways," because while the jury learned that some of the jurors in the previous trial had voted to convict Thornton after hearing the state's evidence, they also leaned that other members of the jury had refused to do so. Moreover, the disclosure of this information was not deliberate, and the state made no attempt to have the jury infer anything from this testimony. Cf. *Colvin*, 2005-Ohio-1448 at ¶23-28. Under these circumstances, the trial court did not abuse its discretion in overruling Thornton's request for a mistrial.

{¶16} Consequently, Thornton's first assignment of error is overruled.

{¶17} Assignment of Error No. 2:

{¶18} "THE TRIAL COURT ERRED TO DEFENDANT'S PREJUDICE BY ACCEPTING AND JOURNALIZING VERDICTS OF GUILTY, IN VIOLATION OF THE DUE PROCESS CLAUSES OF THE OHIO AND UNITED STATES CONSTITUTIONS."

{¶19} Thornton argues the state failed to prove he was the person who committed the aggravated robbery and kidnapping, and therefore, his convictions were not supported by sufficient evidence. However, while Thornton made a Crim.R. 29(A) motion for acquittal at the close of the state's case, he failed to renew his motion for acquittal at the close of all the evidence, and therefore waived any sufficiency-of-the-evidence claim he may have had. *State v. Lloyd*, Warren App. Nos. CA2007-04-052, CA2007-04-053, 2008-Ohio-3383, ¶38.

{¶20} Thornton also argues that his conviction was against the manifest weight of the evidence because Thornton's mother and a neighbor both testified that Thornton was elsewhere at the time of the offense. However, the jury was entitled to believe Fahey's testimony and disbelieve that of Thornton's mother and the neighbor. *State v. Golden*, Stark App. No. 2008CA00182, 2009-Ohio-1624, ¶20. This is not a case where the jury clearly "lost

its way" in resolving conflicts in the evidence and created such a manifest miscarriage of justice that Thornton's conviction must be reversed and a new trial granted. *State v. Thompkins*, 78 Ohio St.3d 380, 387, 1997-Ohio-52, citing *State v. Martin* (1983), 20 Ohio App.3d 172, 175.

{¶21} Therefore, Thornton's second assignment of error is overruled.

{¶22} Assignment of Error No. 3:

{¶23} "THE TRIAL COURT ERRED IN ENTERING SEPARATE CONVICTIONS AND SENTENCES FOR AGGRAVATED ROBBERY, KIDNAPING AND TWO FIREARM SPECIFICATIONS."

{¶24} Thornton argues that aggravated robbery and kidnapping are allied offenses of similar import under R.C. 2941.25(A), and therefore the trial court erred by failing to merge his convictions on those offenses, as well as the firearm specifications that accompanied both offenses. We agree.

{¶25} R.C. 2941.25 provides:

{¶26} "(A) Where the same conduct by defendant can be construed to constitute two or more allied offenses of similar import, the indictment or information may contain counts for all such offenses, but the defendant may be convicted of only one.

{¶27} "(B) Where the defendant's conduct constitutes two or more offenses of dissimilar import, or where his conduct results in two or more offenses of the same or similar kind committed separately or with a separate animus as to each, the indictment or information may contain counts for all such offenses, and the defendant may be convicted of all of them."

{¶28} The Ohio Supreme Court has set forth a two-tiered test to determine whether two crimes with which a defendant is charged are allied offenses of similar import under R.C. 2941.25(A). "In the first step, the elements of the two crimes are compared. If the elements

of the offenses correspond to such a degree that the commission of one crime will result in the commission of the other, the crimes are allied offenses of similar import and the court must then proceed to the second step. In the second step, the defendant's *conduct* is reviewed to determine whether the defendant can be convicted of both offenses. If the court finds either that the crimes were committed separately or that there was a separate animus for each crime, the defendant may be convicted of both offenses. (Emphasis sic.)" *State v. Cabrales*, 118 Ohio St.3d 54, ¶14, 2008-Ohio-1625, quoting *State v. Blankenship* (1988), 38 Ohio St.3d 116, 117.

{¶29} In *State v. Rance*, 85 Ohio St.3d 632, 1999-Ohio-291, the court settled an issue that had arisen as to the appropriate application of the first step in the "allied offenses of similar/dissimilar import" test:

{¶30} "A problem inherent in the application of the test for similar/dissimilar import is whether the court should contrast the statutory elements in the abstract or consider the particular facts of the case. We think it useful to settle this issue for Ohio courts, and we believe that comparison of the statutory elements in the abstract is the more functional test, producing 'clear legal lines capable of application in particular cases.'" (Citation omitted.) Id. at 636.

{¶31} However, in *Cabrales*, 2008-Ohio-1625, ¶27, the court found that numerous Ohio appellate districts had misinterpreted *Rance* as requiring "a strict textual comparison" of elements under R.C. 2941.25(A). The *Cabrales* court stated:

{¶32} "To interpret *Rance* as requiring a strict textual comparison would mean that only where *all* the elements of the compared offenses coincide *exactly* will the offenses be considered allied offenses of similar import under R.C. 2941.25(A). Other than identical offenses, we cannot envision any two offenses whose elements align *exactly*. [Footnote omitted.] We find this to be an overly narrow interpretation of *Rance's* comparison test."

(Emphasis sic.) *Cabrales* at ¶22.

{¶33} Consequently, the *Cabrales* court clarified *Rance* as follows:

{¶34} "In determining whether offenses are allied offenses of similar import under R.C. 2941.25(A), courts are required to compare the elements of offenses in the abstract without considering the evidence in the case, but are not required to find an exact alignment of the elements. Instead, if, in comparing the elements of the offenses in the abstract, the offenses are so similar that the commission of one offense will *necessarily* result in commission of the other, then the offenses are allied offenses of similar import." (Emphasis added.) *Cabrales*, 2008-Ohio-1625, paragraph one of the syllabus.

{¶35} While this case was pending on appeal, the Ohio Supreme Court issued *State v. Winn*, 121 Ohio St.3d 413, 2009-Ohio-1059, finding "[t]he crime of kidnapping, defined by R.C. 2905.01(A)(2), and the crime of aggravated robbery, defined by R.C. 2911.01(A)(1), are allied offenses of similar import pursuant to R.C. 2941.25." In support of its holding, the court noted that "[t]hese two offenses are 'so similar that the commission of one offense will necessarily result in commission of the other.'" Id. at ¶21, quoting *Cabrales*, 2008-Ohio-1625, paragraph one of the syllabus.

{¶36} Pursuant to *Winn*, the offenses with which Thornton was charged, aggravated robbery, defined by R.C. 2911.01(A)(1), and kidnapping, defined by R.C. 2905.01(A)(2), are allied offenses of similar import. The remaining question before us, then, is whether Thornton committed those offenses "separately or with a separate animus as to each," so as to allow him to be convicted of both offenses. R.C. 2941.25(B).

{¶37} In *State v. Logan* (1979), 60 Ohio St.2d 126, syllabus, the court stated:

{¶38} "In establishing whether kidnapping and another offense of the same or similar kind are committed with a separate animus as to each pursuant to R.C. 2941.25(B), this court adopts the following guidelines:

{¶39} "(a) Where the restraint or movement of the victim is merely incidental to a separate underlying crime, there exists no separate animus sufficient to sustain separate convictions; however, where the restraint is prolonged, the confinement is secretive, or the movement is substantial so as to demonstrate a significance independent of the other offense, there exists a separate animus as to each offense sufficient to support separate convictions;

{¶40} "(b) Where the asportation or restraint of the victim subjects the victim to a substantial increase in risk of harm separate and apart from that involved in the underlying crime, there exists a separate animus as to each offense sufficient to support separate convictions."

{¶41} The *Logan* court defined "animus," for purposes of R.C. 2941.25(B), as meaning "purpose or, more properly, immediate motive." Id. at 131.

{¶42} Applying *Logan* to the facts of this case, we conclude that Thornton did not commit the aggravated robbery and kidnapping separately or with a separate animus as to each offense, as the restraint placed on the victim was relatively brief and not secretive, and did not involve substantial movement of the victim or subject the victim to a substantially increased risk of harm. See *Logan*, 60 Ohio St.2d 126 at syllabus. See, also, *State v. Adams*, 103 Ohio St.3d 508, 2004-Ohio-5845, ¶89-95.

{¶43} The state argues Thornton "invited" any error the trial court may have made on this issue and requests that we ignore it for that reason. In support, the state points out that defense counsel stated at Thornton's sentencing, "I understand too as a matter of law that these two counts don't necessarily merge" and then requested that concurrent sentences be imposed for Thornton's convictions for aggravated robbery, kidnapping, and the accompanying firearm specifications, which the trial court imposed. We find this argument unpersuasive.

{¶44} The Ohio Supreme Court's decision in *Winn* essentially modified *Cabrales* by removing the word "necessarily." As the dissent in *Winn* pointed out, in determining whether two offenses are allied offenses of similar import, instead of requiring that the commission of one offense will *necessarily* result in the commission of the other, the majority in *Winn* requires only that the commission of one offense will *probably* result in the commission of the other. *Winn*, 2009-Ohio-1059, at ¶33 (Moyer, C.J., dissenting).

{¶45} *Winn*, at the very least, clarified the Ohio Supreme Court's previous decision in *Cabrales*. Therefore, it would be inappropriate to decide the allied-offenses-of-similar-import issue in this case on the basis of the invited error doctrine, since *Winn* had not been decided at the time of Thornton's sentencing, and Thornton (and his defense counsel) cannot be faulted for failing to anticipate it. Moreover, the fact that the trial court imposed concurrent sentences on Thornton for his aggravated robbery and kidnapping convictions does not obviate the need to vacate one of the separate sentences he received. See *Winn*, 2009-Ohio-1059, at ¶4 and 25.

{¶46} The state also argues the firearm specifications that accompanied both offenses should not be merged because they were not based upon a single act or transaction. In support, the state points to the evidence that Thornton chambered a round at the beginning of the robbery and asserts that "by allowing the earlier display of the gun to weigh upon [the victim's] mind, [Thornton] caused her to believe that he was going to shoot her as he was applying the zip ties." This argument lacks merit.

{¶47} Contrary to what Thornton contends, the evidence shows that Thornton's use of the firearm throughout the aggravated robbery and kidnapping was, in fact, part of the same "transaction," which has been defined for purposes of the firearm specification statutes as "a series of continuous acts bound together by time, space and purpose, and directed toward a single objective." *State v. Williams*, Warren App. No. CA2007-12-136, 2009-Ohio-435, ¶13,

quoting *State v. Wills*, 69 Ohio St.3d 690, 691, 1994-Ohio-417.

{¶48} As a result, Thornton's convictions on the firearm specifications attached to the kidnapping and aggravated robbery charges should be merged for the same reasons that his convictions on the kidnapping and aggravated robbery charges should be merged, to wit: the firearm specifications are allied offenses of similar import that were not committed separately or with a separate animus. Therefore, Thornton cannot be convicted and sentenced for both firearm specifications. See R.C. 2941.25(A) and (B).

{¶49} In light of the foregoing, the trial court erred by failing to find that the aggravated robbery and kidnapping charges, and the firearm specifications that accompanied them, were allied offenses of similar import, see *Winn*, 2009-Ohio-1059 at syllabus, because the offenses were not "committed separately or with a separate animus as to each." R.C. 2941.25(B); *Logan*, 60 Ohio St.2d 126 at syllabus.

{¶50} In *State v. Harris*, Slip Opinion No. 2009-Ohio-3323, ¶21-23, the Ohio Supreme Court recently stated:

{¶51} "Two allied offenses of similar import must be merged into a single conviction. [*State v.*] *Brown*, 119 Ohio St.3d 447, 2008-Ohio-4569, *** at ¶42. In merging two allied offenses of similar import, we have held: 'An accused may be *tried for both* but may be *convicted and sentenced for only one*. The choice is given to the prosecution to pursue one offense or the other, and it is plainly the intent of the General Assembly that the election may be of either offense.' (Emphasis added.) *Maumee v. Geiger* (1976), 45 Ohio St.2d 238, 244 ***.

{¶52} "A final judgment of conviction occurs when the judgment contains '(1) the guilty plea, the jury verdict, or the finding of the court upon which the conviction is based; (2) the sentence; (3) the signature of the judge; and (4) the entry on the journal by the clerk of courts.' *State v. Baker*, 119 Ohio St.3d 197, 2008-Ohio-3330 *** syllabus.

{¶53} "In light of *Baker*, we hold that *Geiger* requires the prosecution to elect which offense it will pursue after a finding of guilt but prior to sentencing."

{¶54} Accordingly, in light of *Baker* and *Harris*, we hold that *Geiger* requires the prosecution to elect which offense it will pursue now that Thornton has been found guilty of aggravated robbery and kidnapping, as well as the accompanying firearm specifications. *Harris* at ¶ 23.

{¶55} Accordingly, Thornton's third assignment of error is sustained.

{¶56} Assignment of Error No. 4:

{¶57} "THE TRIAL COURT ERRED IN DENYING DEFENDANT'S MOTION FOR A NEW TRIAL."

{¶58} Thornton argues the trial court erred by denying his motion for a new trial based on newly-discovered evidence. We disagree.

{¶59} A defendant may be granted a new trial "[w]here new evidence material to the defense is discovered which the defendant could not with reasonable diligence have discovered and produced at the trial." Crim.R. 33(A)(6). When a motion for a new trial is based on newly-discovered evidence, the defendant must produce affidavits of the witnesses from whom such evidence is expected to be provided that inform the trial court of the substance of the evidence that would be presented if a new trial were to be granted. *State v. Holmes*, Lorain App. No. 05CA008711, 2006-Ohio-1310, ¶13.

{¶60} A trial court may weigh the credibility of the affidavits submitted in support of a motion for a new trial to determine whether to accept the statements in the affidavit as true. *State v. Beavers*, 166 Ohio App.3d 605, 2006-Ohio-1128, ¶20-21. In assessing the credibility of affidavits, the trial court should consider all relevant factors, including whether the judge reviewing the motion for a new trial also presided at the trial at which the conviction occurred and whether the affidavits contain or rely on hearsay. Id. at ¶20. One or more of these

factors "may be sufficient to justify a conclusion that an affidavit asserting information outside the record lacks credibility." *Beavers*, at ¶21, citing *State v. Coleman*, Clark App. Nos. 04CA43, 04CA44, 2005-Ohio-3874, ¶25-27.

{¶61} To warrant the granting of a new trial based on newly-discovered evidence, the new evidence must disclose a "strong probability" that it will change the result if a new trial is granted. *State v. Barton*, Warren App. No. CA2005-03-036, 2007-Ohio-1099, ¶31. The decision as to whether or not to grant a new trial on the grounds of newly-discovered evidence rests within the trial court's discretion, and the trial court's decision will not reversed absent an abuse of discretion. Id. at ¶30.

{¶62} Thornton's motion for a new trial was based on the affidavit of one of his fellow jail inmates, Gary Vanover. Vanover alleged that another inmate, Kris Dawson, told him that he had "used a black revolver to * * * rob[ ] a check cashing business located near the Edgecombe Apartments in Milford, Ohio," sometime in the fall of 2007.

{¶63} The trial court overruled Thornton's motion for a new trial after finding "there is not a strong probability that a new trial would bring about a different result." In support, the trial court found (1) Vanover's affidavit consisted solely of Dawson's hearsay statements; (2) Dawson's hearsay statements would not be admissible under any exception to the hearsay rule, including the exception for statements against penal interest contained in Evid.R. 804(B)(3), since Thornton failed to show Dawson was "unavailable" for purposes of that rule of evidence; and (3) the affidavit of Officer Jamey Mills, presented by the state, "does much to call the hearsay evidence set forth [in Vanover's affidavit] into question."

{¶64} Thornton argues the trial court erred in finding that he failed to prove that Dawson was unavailable for purposes of Evid.R. 804(B)(3) because generally a witness who invokes his privilege against self-incrimination is considered unavailable for purposes of that rule, and defense counsel "could not ethically approach a criminal defendant represented by

other counsel to urge him to incriminate himself[.]" Therefore, according to Thornton's argument, Dawson "was unavailable for purposes of producing an affidavit, and could reasonably be anticipated to be unavailable at any new trial." Thornton concludes by asserting that if Dawson agreed to testify at the new trial, he would either confirm his admission of guilt that he allegedly made to Vanover or render the statement admissible as a prior inconsistent statement, and that in either event, the substance of Dawson's alleged admission would be heard by the jury at the new trial. We find this argument unpersuasive.

{¶65} As the trial court found, Thornton failed to demonstrate that Dawson was unavailable to testify about Vanover's claim that Dawson had confessed to the robbery. Thornton's assertions to the contrary are based merely on his speculation that Dawson would assert his privilege against self-incrimination, yet there was no evidence presented to show that he would have invoked that privilege in this circumstance.

{¶66} Furthermore, the state rebutted Vanover's affidavit by presenting the affidavit of Officer Jamey Mills, who interviewed Dawson regarding Vanover's allegations. According to Officer Mills, Dawson denied robbing the Cash Express or telling anyone that he had. Officer Mills also interviewed the victim in this case, Leslie Fahey. Officer Mills reported that when Fahey was shown a photo of Dawson and told that Dawson had allegedly confessed to the robbery, she immediately stated that Dawson was not the person who robbed her and reiterated that she was positive that Thornton was the person who did.

{¶67} Given the foregoing, the trial court did not abuse its discretion in overruling Thornton's motion for a new trial, since Thornton failed to show there was a strong probability that the new evidence would have changed the outcome of his previous trial. *Barton*, 2007-Ohio-1099, at ¶30-31.

{¶68} Consequently, Thornton's fourth assignment of error is overruled.

{¶69} Thornton's first, second, and fourth assignments of error are overruled.

Thornton's third assignment of error is sustained, and the separate sentences the trial court imposed on Thornton for his convictions on the aggravated robbery and kidnapping charges, as well as the accompanying firearm specifications, are vacated. On remand, Thornton's convictions for aggravated robbery under R.C. 2911.01(A)(1) and kidnapping under R.C. 2905.01(A)(2) "must be merged to one conviction, to be determined by the state on remand." *Harris*, 2009-Ohio-3323 at 26.

{¶70} Accordingly, the trial court's judgment is affirmed in part and reversed in part, and this cause is remanded for proceedings consistent with this opinion and the law of this state.

BRESSLER, P.J., and POWELL, J., concur.

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