

Ohio Department of Youth Services for an aggregate term of eighteen months, and ordered him to pay restitution in the amount of \$500.

I

{¶ 2} Brandon's history with the juvenile court began in July 2006, when he was charged with criminal damaging at the age of 12. Since then, Brandon has been charged with numerous other offenses, including theft in Case No. 2007-1538 and another theft in Case No. 2007-1887. During the past few years, Brandon has been placed with his family, at two different foster homes, at the David L. Brown Youth Center in Miami County, at the Clark County Juvenile Detention Center, and at Cornell-Abraxas. In both Case No. 2007-1538 and Case No. 2007-1887, the juvenile court suspended commitment to the Department of Youth Services ("DYS") and placed Brandon on probation. The terms of his probation included requirements that Brandon "obey [his] parent(s)/guardian(s), teachers, school administrators, Probation Officers, and any other person responsible for [him]" and that he "accomplish [his] case plan and/or counseling objectives successfully, which are now and will be set for you throughout your supervision." (Rules of Probation Nos. 8 and 9.)

{¶ 3} In January 2009, the juvenile court ordered in Case No. 2007-1538 that Brandon be placed at West Central Juvenile Rehabilitation Facility ("West Central") "for treatment and rehabilitation subject to its rules, regulations and control." On February 11, 2009, Brandon's probation officer filed a complaint in

violation in two separate cases.

Case Nos. 2007-1538 and 2007-1887, alleging that Brandon had violated the terms of his probation by violating Rules 8 and 9 due to his failure to successfully complete the program at West Central.

{¶ 4} On February 11, the juvenile court held an arraignment on the probation violation, during which it informed Brandon of the allegations and of his rights and entered a denial in order to allow Brandon an opportunity to obtain counsel. The court informed Brandon's mother about the procedure for seeking counsel through the Public Defender's Office. It ordered that Brandon be placed in detention pending a resolution of the probation violation.

{¶ 5} Another hearing on the probation violation was held on March 9, 2009, during which Brandon was represented by counsel. The court dismissed the probation violation in Case No. 2007-1538 and proceeded in Case No. 2007-1887. Brandon's counsel informed the court that Brandon intended to admit to the probation violation. The court spoke with Brandon and his mother regarding his proposed admission, following which it accepted Brandon's admission and scheduled a dispositional hearing. Brandon remained in detention pending disposition.

{¶ 6} A disposition hearing was held on March 18. The juvenile court released Brandon to his mother and placed him on an electronic monitor on the condition that he be evaluated by Children's Medical Center in Dayton within 14 days. Disposition was rescheduled for June 24, 2009.

{¶ 7} On April 1, 2009, however, Brandon's probation officer filed another complaint, alleging that Brandon had committed vandalism by cutting off his

electronic monitor. Case No. 2009-572. Brandon was arraigned on this new charge on April 6; at that time, he admitted to the vandalism charge. The following day, the juvenile court committed him to DYS for six months each on the vandalism charge, for violating his probation in Case No. 2007-1538, and for violating his probation in Case No. 2007-1887, to be served consecutively for a total of eighteen months and potentially to his twenty-first birthday. The court also ordered restitution of \$500 in Case No. 2009-572.

{¶ 8} Brandon appeals from these adjudications and dispositions, raising three assignments of error. We will address them in an order that facilitates our analysis.

II

{¶ 9} Brandon's second assignment of error states:

{¶ 10} "THE TRIAL COURT VIOLATED BRANDON M.'S RIGHT TO COUNSEL AND TO DUE PROCESS UNDER THE FIFTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION, SECTION 16, ARTICLE 1 OF THE OHIO CONSTITUTION, OHIO REVISED CODE SECTION 2141.352, AND JUVENILE RULES 3,4, AND 29."

{¶ 11} In his second assignment of error, Brandon claims that the juvenile court failed to obtain a knowing and intelligent waiver of his right to counsel at the April 6, 2009, arraignment, during which he admitted to the vandalism charge. He also asserts that the juvenile court should have obtained a written waiver of counsel. The State agrees with Brandon that he did not properly waive his right to counsel at the April 6, 2009, hearing.

{¶ 12} At the beginning of the arraignment, the juvenile court orally informed a group of juveniles, including Brandon, of their constitutional rights. The court stated that they had a right to be represented by an attorney and the right to a trial. The court explained that, at trial, the prosecuting attorney would be required to prove the charge beyond a reasonable doubt through the presentation of evidence and witnesses. The judge stated that the juveniles would have the right to confront the State's witnesses, to cross-examine the witnesses, to bring their own witnesses, and to subpoena witnesses. The court further explained that the juveniles have the right to remain silent or, alternatively, they could choose to testify on their own behalf. The court continued:

{¶ 13} "Today your choices are to admit or to deny. If you admit the charge, you are essentially saying Judge, I did do what I'm accused of, I don't need to have an attorney represent me today, and I don't need to have a trial and make the State of Ohio prove the charge because I admit that I did do this. On the other hand, you can deny the charge. And in that, you are essentially saying Judge, I disagree with all or with some part of the charge that is filed against me.

{¶ 14} "If you think you have a legal defense, or if you have legal questions that you would like answered, today is not the day we can do that; you should enter a denial. The case will then be set for a pre-trial, which is an informal meeting with the prosecutor. At that time you can ask you questions of him, and perhaps come to some resolution in your case. But today your choices are to admit or to deny."

{¶ 15} Upon calling Brandon's name, the court addressed Brandon and his parents individually. The court informed him that he faced a fifth-degree felony

vandalism charge and read the charge, which stated that “on March 30th of 2009, in Springfield, Clark County, Ohio, you did knowingly cause serious physical harm to property owned, leased, or controlled by a governmental entity. *** A brief description of the property is that it was an electronic monitoring bracelet and battery. The bracelet totals \$550, and the battery an additional \$20.” Brandon stated that he understood the felony charge and its consequences. He told the court that he could be sent to DYS for six months to a year for that offense. Brandon stated that he wanted to admit to the charge because it was true. The court then had the following discussion with Brandon and his parents:

{¶ 16} “THE COURT: And are you admitting this charge because it’s true?

{¶ 17} “THE YOUTH: Yes, ma’am.

{¶ 18} “THE COURT: Have you had an opportunity to discuss this with your mother and father?

{¶ 19} “THE YOUTH: No, ma’am.

{¶ 20} “THE COURT: Would you like to take the time to talk with them now?

{¶ 21} “THE YOUTH: No, ma’am.

{¶ 22} THE COURT: “Ms. [M.] and Mr. [S.], do you need time to counsel your son?

{¶ 23} “MOTHER: No. Because he did it willingly and he knew exactly what he was doing, so he will, you know, right now what he gets is what he gets.

{¶ 24} “THE COURT: Okay. So knowing –

{¶ 25} “MOTHER: I’m very upset at him because he just –

{¶ 26} “THE COURT: You still want him to admit?

{¶ 27} “MOTHER: Yes, I do.

{¶ 28} “THE COURT: All right. Brandon, you understand you could have a trial and make the State of Ohio prove this charge?

{¶ 29} “THE YOUTH: Yes, ma’am.

{¶ 30} “THE COURT: And do you understand you could have an attorney represent you?

{¶ 31} “THE YOUTH: Yes, ma’am.

{¶ 32} “THE COURT: Knowing that, do you want to give up these rights today to enter an admission?

{¶ 33} “THE YOUTH: Yes, ma’am.”

{¶ 34} The court reviewed the possible consequences of his admission, and Brandon and his parents both reiterated that they wished for Brandon to admit to charge. The court accepted Brandon’s admission. There is no indication in the transcript of the hearing or in the record that Brandon waived his right to counsel in writing.

{¶ 35} “[A] juvenile facing delinquency proceedings is entitled to due process of law, as guaranteed by the Ohio and United States Constitutions. See *In re C.S.*, 115 Ohio St.3d 267, 874 N.E.2d 1177, 2007-Ohio-4919, ¶¶71-73, 79, citing *In re Gault* (1967), 387 U.S. 1, 87 S.Ct. 1428, 18 L.Ed.2d 527. Like an adult’s guilty plea, a juvenile’s admission to an alleged offense implicates important procedural safeguards.” *In re G.W.*, Clark App. Nos. 2008 CA 124, 2008 CA 125, 2009-Ohio-4324, at ¶17. Due process requires that a juvenile facing commitment have the right to counsel at every stage of the proceedings. *In re C.S.* at ¶78, citing

In re Gault, 387 U.S. at 36. In Ohio, a juvenile's right to counsel has been codified and expanded in R.C. 2151.352.

{¶ 36} “[A] juvenile may waive his constitutional right to counsel, subject to certain standards ***, if he is counseled and advised by his parent, custodian, or guardian. If the juvenile is not counseled by his parent, guardian, or custodian and has not consulted with an attorney, he may not waive his right to counsel.” *In re C.S.* at ¶98. If the juvenile is charged with a serious offense, the waiver of counsel must be made in open court, recorded, and in writing. *Id.* at ¶109.

{¶ 37} When addressing a juvenile regarding a waiver of counsel, the juvenile court must “engage in a meaningful dialog with the juvenile” and “scrupulously ensure that the juvenile fully understands, and intentionally and intelligently relinquishes, the right to counsel.” *Id.* at ¶106, ¶107. In order to determine whether a juvenile has validly waived his right to counsel, courts must consider the totality of the circumstances. *Id.* at ¶108. Relevant factors include the age, intelligence, and education of the juvenile; the juvenile's background and experience generally and in the court system specifically; the presence or absence of the juvenile's parent, guardian, or custodian; the language used by the court in describing the juvenile's rights; the juvenile's conduct; the juvenile's emotional stability; and the complexity of the proceedings. *Id.*

{¶ 38} In *In re J.F.*, 178 Ohio App.3d 702, 2008-Ohio-4325, we concluded that the court had not obtained a valid waiver of counsel when there was no evidence that his mother had advised him regarding his alleged probation violation.

In that case, the juvenile's mother had been present at the probation violation

hearing, but she simply requested continued treatment and asked that her child not be detained long before being transported to DYS. There was no indication that she counseled her son about waiving his right to counsel. Id. at ¶92-93.

{¶ 39} Here, Brandon's parents were present at the adjudicatory hearing on the vandalism charge. However, Brandon indicated that he had not discussed the charge with his parents, and both Brandon and his parents declined the opportunity provided by the court to confer regarding the charge. Rather, Brandon's mother expressed frustration with her son, and she told the court that Brandon should admit to the charge and "what he gets is what he gets." As in *In re J.F.*, there is no suggestion that Brandon's parents counseled him about waiving his right to an attorney. See, also, *In re T.B.*, Greene App. No. 08CA83, 2009-Ohio-2551. Accordingly, Brandon did not validly waive his right to counsel, and his admission to vandalism must be reversed.

{¶ 40} The second assignment of error is sustained.

III

{¶ 41} Brandon's first assignment of error states:

{¶ 42} "BRANDON M.'S ADMISSIONS WERE NOT KNOWING, INTELLIGENT, AND VOLUNTARY IN VIOLATION OF THE FIFTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION; SECTIONS 10 AND 16, ARTICLE I OF THE OHIO CONSTITUTION; AND JUVENILE RULE 29."

{¶ 43} In his first assignment of error, Brandon claims that the trial court failed to comply with Juv.R. 29(D) when it accepted his admission to the probation

violation on March 9, 2009.² He argues that the juvenile court did not ascertain whether he understood his rights and the nature of the charges. The State responds that, viewing the February 11, 2009, and March 9, 2009, hearings together, the juvenile court fully apprised Brandon of the charge (probation violation) and the nature of the allegations (failure to complete West Central).

{¶ 44} As stated above, the juvenile court advised Brandon of the charges and of his rights at the February 11, 2009, initial hearing. The court stated:

{¶ 45} “*** In the matter of Brandon [M.], 2007-1538. We’re scheduled for a dispositional review hearing today, and yet Mr. Kerby filed a probation violation earlier, Brandon. He alleges that you violated your probation by not successfully completing the West Central Juvenile Rehabilitation Center Program. Your behavior was detrimental and disruptive, and you were ordered to be removed from the program, in violation of the rules of probation.

{¶ 46} “Brandon, you have the right to have a trial on that issue, whether you violated your probation or not. You clearly have the right to have a lawyer assist you or help you in the process. Your mother’s with you here today, but if you want to have a lawyer here with you, you’re welcome to do that as well. What I’m going to do for you today, Brandon, because you have a suspended commitment to the Department of Youth Services and you have just come back from a treatment

²Brandon also argues that the trial court failed to comply with Juv.R. 29(D) when it accepted his admission to the vandalism charge on April 6, 2009. Because we have concluded, supra, that the trial court did not obtain a valid waiver of his right to counsel at the April 6, 2009, hearing, Brandon’s admission to vandalism will be reversed on that ground and we need not address whether the court failed to comply with Juv.R. 29(D) at that hearing.

center today, I'm going to go ahead and enter a denial today to give you the opportunity to discuss with your parent or parents, and with a lawyer if you hire one, the charges against you and your decisions or your response."

{¶ 47} Brandon appeared at the March 9 adjudicatory hearing with counsel. Counsel informed the court of Brandon's intention to admit to the probation violation, stating:

{¶ 48} "Brandon understands that one of the consequences for that admission could be a sentence by the Court to DYS, which is a prison for young people, for six months, or until he's 21. He understands the Court will examine what's happened in the past, and also examine his behavior upstairs, and listen to his mother and his other family members and friends, and to me before making a decision.

{¶ 49} "He does understand that he could have a trial on this issue. And at that trial, the State would present witnesses to try to establish that he did in fact fail to complete the West Central program. But he understands that at the conclusion of the hearing, no matter what was said, the fact would be that he did not complete the program, and he understands that was part of his probationary requirement."

{¶ 50} The court then engaged in the following discussion with Brandon:

{¶ 51} "THE COURT: All right. Regarding the probation violation, Brandon, is it true that you wish to admit this?

{¶ 52} "THE YOUTH: Yes, ma'am.

{¶ 53} "THE COURT: And is that because the probation violation is true?

{¶ 54} "THE YOUTH: Yes, ma'am.

{¶ 55} “THE COURT: You understand you could have a trial?”

{¶ 56} “THE YOUTH: Yes, ma’am.

{¶ 57} “THE COURT: Are you telling me today you want to give up your right to trial?”

{¶ 58} “THE YOUTH: Yes, ma’am.

{¶ 59} “THE COURT: Brandon, do you understand that this probation violation could result in your prior suspended commitment to DYS as suspension [sic] being revoked and that you could be sent to the Department of Youth Services?”

{¶ 60} “THE YOUTH: Yes, ma’am.

{¶ 61} “THE COURT: Knowing that, do you still wish to make this admission?”

{¶ 62} “THE YOUTH: Yes, ma’am.

{¶ 63} “THE COURT: Have you had enough time to discuss this with your attorney?”

{¶ 64} “THE YOUTH: Yes, ma’am.

{¶ 65} “THE COURT: Have you had enough time to discuss this with your mother?”

{¶ 66} “THE YOUTH: Yes, ma’am.

{¶ 67} “THE COURT: Ms. [M.], have you had enough time to counsel your son?”

{¶ 68} “MOTHER: Yes. Yeah.”

{¶ 69} The court discussed with Brandon’s mother whether she agreed with his admission and if she understood the possible consequences of the admission.

Brandon's mother reiterated that she agreed with the decision to admit to the charge. The court accepted Brandon's admission to the probation violation.

{¶ 70} Under Juv.R. 35(B), the juvenile court may not revoke a juvenile's probation except after a hearing at which the child is present and is apprised of the grounds for the proposed revocation. Probation may not be revoked unless the court finds that the child has violated a condition of probation of which the juvenile has been notified. *Id.* Because a probation revocation hearing may result in a finding that a juvenile has violated a court order and is delinquent, a probation revocation hearing is a type of adjudicatory hearing and is governed by Juv.R. 29, as well as Juv.R. 35. *In re L.A.B.*, 121 Ohio St.3d 112, 2009-Ohio-354, at ¶49, ¶52.

{¶ 71} Prior to accepting an admission, a juvenile court "must inquire carefully to ensure that an admission is entered voluntarily, intelligently, and knowingly." *In re G.W.* at ¶17, citing *In re J.R.P.*, 175 Ohio App.3d 481, 887 N.E.2d 1222, 2008-Ohio-989, at ¶32.

{¶ 72} At the beginning of the probation revocation hearing, the juvenile court is required to (1) ascertain whether notice requirements have been met; (2) inform the parties of the substance of the complaint, the purpose of the hearing, and possible consequences of the hearing; (3) inform unrepresented parties of their right to counsel and determine if those parties are waiving their right to counsel; (4) appoint counsel, if counsel has not been waived; and (5) if a party waives his or her right to counsel, advise that party of certain rights. Juv.R. 29(B). The court must also ask the juvenile to admit or deny the allegations. Juv.R. 29(C).

{¶ 73} Where a juvenile admits the allegations, the juvenile court may not accept the admission unless it has addressed the juvenile personally and determined that (1) the juvenile “is making the admission voluntarily with understanding of the nature of the allegations and the consequences of the admission,” and (2) the juvenile “understands that by entering an admission the party is waiving the right to challenge the witnesses and evidence against [him], to remain silent, and to introduce evidence at the adjudicatory hearing.” Juv.R. 29(D).

{¶ 74} The Supreme Court of Ohio has expressed a preference for strict compliance with the requirements of Juv.R. 29(D). *In re C.S.*, supra, at paragraph six of the syllabus. However, “[i]f the trial court substantially complies with Juv.R. 29(D) in accepting an admission by a juvenile, the plea will be deemed voluntary absent a showing of prejudice by the juvenile or a showing that the totality of the circumstances does not support a finding of a valid waiver.” *Id.*

{¶ 75} In *In re G.W.*, we noted: “*** This court has previously found substantial compliance with Juv.R. 29(D) where a magistrate explained a juvenile’s rights at an initial hearing, but not at the adjudication hearing. See *In re Pyles*, Montgomery App. No. 19354, 2002-Ohio-5539 (where the juvenile conceded there was compliance at the initial hearing, and a full adversarial trial occurred). This court has done so, however, only where the record allowed this court to confirm that the trial court had explained the rights in detail at the prior hearing. Where the record did not allow this court to determine whether the trial court had explained the juvenile’s right in a prior hearing, this court declined to assume the regularity of the

adjudication and concluded that Juv.R. 29(D) had not been met. See *In re J.F.*, 178 Ohio App.3d 702, 900 N.E.2d 204, 2008-Ohio-4325, ¶¶75-76 (distinguishing *In re Pyles*)." *G.W.* at ¶29.

{¶ 76} In his reply brief, Brandon asserts that we should not consider the February 11, hearing, because *Pyles* concerned compliance with Juv.R. 29(B), not Juv.R. 29(D). Brandon urges us to follow *In re Jones* (Apr. 13, 2000), Gallia App. No. 99 CA 4, in which the Fourth District held that "the obvious intent of Juv.R. 29(D)(1) is that the juvenile understands the charge *at the time he enters his admission of guilty*, not several weeks earlier ***." (Emphasis in original.) Brandon points out that the Third and Fifth Districts have adopted the rationale in *Jones*. *In re Messmer*, Wyandot App. No. 16-08-03, 2008-Ohio-4955; *In re Scott*, Licking App. No. 08-CA-32, 2008-Ohio-6668.

{¶ 77} We need not decide whether we should follow *G.W.* because, even if we were to consider both the February 11, and March 9, hearings, the trial court failed to substantially comply with Juv.R. 29(D) in accepting Brandon's admission. At the February 11, hearing, the juvenile court told Brandon that his probation officer had filed a complaint alleging that he had violated his probation by not successfully completing the West Central program. The court stated that his behavior had been detrimental and disruptive and that he had been removed from the program, in violation of the rules of probation. Because the court entered a denial on his behalf, the court did not discuss with Brandon whether he understood the nature of the charges.

{¶ 78} The trial court also did not discuss the nature of the charges with

Brandon at the March 9, 2009, hearing. Rather, Brandon's counsel informed the court that Brandon recognized that the State could establish that he failed to complete the West Central program and that successful completion of the program was part of his probationary requirement. The court's discussion with Brandon addressed whether he understood the consequence of his plea and that he wished to waive his trial rights (although those rights were not fully discussed at that hearing). At no time – either on February 11 or March 9 – did the trial court personally ask Brandon about the nature of the allegations to ascertain whether he, in fact, understood them.

{¶ 79} On similar facts, we have reversed a juvenile court's acceptance of an admission at an adjudicatory hearing. In *In re J.R.P.*, counsel for the juvenile informed the court that his client was going to admit to a charge of receiving stolen property, that he understood that he was giving up his right to a trial and that, at trial, the State would have to prove its case beyond a reasonable doubt and would present witnesses. Counsel further stated that the juvenile understood that he (counsel) would have the right to cross-examine witnesses and to present evidence and witnesses on his behalf, and that the juvenile could testify if wished but was not required to. Counsel stated that the juvenile was admitting the charge because it was true. The court then inquired of the juvenile if he understood the charge, understood the possible commitment to DYS, understood the trial rights expressed by counsel, and wanted to waive his right to trial; the juvenile responded affirmatively to each question. The juvenile also stated that he had not been forced to admit to the charge nor had anyone promised him anything. The court

accepted the juvenile's admission

{¶ 80} On appeal, we concluded that the court had failed to substantially comply with Juv.R. 29(D), stating:

{¶ 81} “Although the magistrate might have been less reliant on the representations of defense counsel, we nevertheless conclude that her discussion with J.R.P. did substantially comply with Juv.R. 29(D) in most respects: determining voluntariness, consequences, and trial rights that are waived. However, there was one glaring deficiency in the exchange between the magistrate and J.R.P. (which was not ameliorated by counsel's representations) that was fatal to the admission: there was no inquiry made as to J.R.P.'s ‘understanding of the nature of the allegations’ as required by Juv.R. 29(D)(1). The court asked J.R.P. only whether he understood the charge.” *In re J.R.P.* at ¶29.

{¶ 82} We further note that, in *In re J.T.C.*, Miami App. No. 06-CA-34, 2007-Ohio-436, we reversed the judgment where the juvenile court “never personally addressed J.T.C. and determined that he understood the nature of the allegations surrounding the two charges of gross sexual imposition.” *In re J.R.P.* at ¶31, quoting *In re J.T.C.* at ¶57. A juvenile's mere affirmative response to the question of whether he understood the charges was insufficient to comply with Juv.R. 29. *In re J.R.P.* at ¶33.

{¶ 83} In this case, the trial court did not – at either the February 11, 2009, preliminary hearing or the March 11, 2009, adjudicatory hearing – ask Brandon regarding his understanding of the nature of the charges. In the absence of such an inquiry, the court did not substantially comply with the requirements of Juv.R.

29(D), and this failure is fatal to the juvenile court's acceptance of his admission to the probation violation in Case No. 2007-1887.

{¶ 84} The first assignment of error is sustained.

IV

{¶ 85} Brandon's third assignment of error states:

{¶ 86} "THE JUVENILE COURT VIOLATED BRANDON M.'S RIGHT TO DUE PROCESS OF LAW AS GUARANTEED BY THE FIFTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION; ARTICLE I, SECTION SIXTEEN OF THE OHIO CONSTITUTION; AND JUV.R. 35, WHEN IT IMPOSED SUSPENDED COMMITMENTS IN CASE NUMBER[S] 07-1538 AND 07[-]1887."

{¶ 87} In his third assignment of error, Brandon claims that the trial court erred in sentencing him in Case No. 2007-1538 because the probation violation charge in that case had been dismissed. He further asserts that, in Case No. 2007-1887, the trial court did not find that he had violated a condition of probation of which he had been properly notified, as required by Juv.R. 35.

{¶ 88} The State agrees with Brandon that the trial court's adjudication and disposition in Case No. 2007-1538 must be vacated, because the probation violation charge had been dismissed and no additional violations were filed in that matter. We likewise agree.

{¶ 89} In light of our disposition of the first assignment of error, Brandon's commitment under Case No. 2007-1887 must also be reversed. We need not determine whether Brandon was aware that successful completion of the West

Central program was a requirement of his probation in that case, although the juvenile court may wish to expressly address that issue upon remand.

{¶ 90} Finally, although Brandon does not challenge his commitment under Case No. 2009-572 in this assignment, our disposition of his second assignment of error requires that his commitment in that case be reversed.

{¶ 91} The third assignment of error is sustained.

V

{¶ 92} The judgments of the juvenile court in Case Nos. 2007-1887 and 2009-572 will be reversed, and those matters will be remanded for further proceedings.

{¶ 93} The judgment of the juvenile court in Case No. 2007-1538 will be vacated.

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FAIN, J. and GRADY, J., concur.

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