**[Cite as *State v. Blade*, 2023-Ohio-3054.]**

**COURT OF APPEALS OF OHIO**

**EIGHTH APPELLATE DISTRICT**
**COUNTY OF CUYAHOGA**

| | | |
|---|---|---|
| STATE OF OHIO, | : | |
| Plaintiff-Appellee, | : | No. 112084 |
| v. | : | |
| VALEMAR BLADE, | : | |
| Defendant-Appellant. | : | |

JOURNAL ENTRY AND OPINION

**JUDGMENT:** AFFIRMED
**RELEASED AND JOURNALIZED:** August 31, 2023

Criminal Appeal from the Cuyahoga County Court of Common Pleas
Case Nos. CR-20-653162-A, CR-22-667895-A, and CR-22-667896-A

***Appearances:***

Michael C. O'Malley, Cuyahoga County Prosecuting Attorney, and Mary Grace Tokmenko, Assistant Prosecuting Attorney, *for appellee*.

Carmen Naso, *for appellant*.

FRANK DANIEL CELEBREZZE, III, P.J.:

**{¶ 1}** Appellant Valemar Blade ("appellant") appeals from his convictions for multiple felonies in the Cuyahoga County Court of Common Pleas. After a thorough review of the applicable law and facts, we affirm the judgment of the trial court.

## I. Factual and Procedural History

{¶ 2} In September 2020, Cleveland police officers were on patrol and pulled behind a vehicle that they initially believed did not have a rear license plate. As they got closer, they determined that the license plate was actually tucked into the rear windshield.

{¶ 3} The officers initiated a traffic stop, and the vehicle quickly turned into a driveway. The officers observed the driver, later identified as appellant, lean over to the passenger side, then exit the vehicle via the driver's side door and run behind some houses in the neighborhood.

{¶ 4} One officer chased after him, but eventually lost sight of him. Other officers came to the area to look for appellant and located him at a convenience store around the corner. Appellant was placed under arrest.

{¶ 5} The second officer at the traffic stop remained behind. He approached the vehicle and observed a firearm on the front passenger seat. After appellant was arrested, the officers notified dispatch that they had recovered a firearm and provided the serial number. The firearm had been stolen out of Brunswick.

{¶ 6} Appellant was charged in Cuyahoga C.P. No. CR-20-653162, with having weapons while under disability, a felony of the third degree, in violation of R.C. 2923.13(A)(2); improperly handling firearms in a motor vehicle, a felony of the fourth degree, in violation of R.C. 2923.16(B); receiving stolen property, a felony of the fourth degree, in violation of R.C. 2913.51(A); and obstructing official business, a misdemeanor of the second degree, in violation of R.C. 2921.31(A).

{¶ 7} In November 2021, appellant pulled into a driveway and hit a vehicle that was parked there. Sitting inside the vehicle was Cory Drake ("Drake"), a relative of appellant. Appellant emerged from his vehicle and confronted Drake. A physical altercation ensued until Drake's mother, Margaret Ridgell ("Ridgell"), came out of her house and broke it up. As appellant was leaving, he said that he was going to come back and kill them.

{¶ 8} Minutes later, appellant returned, parked up the street, and got out of his car. He pulled out a gun and began firing shots. Drake and Ridgell went inside to take cover and saw appellant get back in his car and leave. However, he returned several minutes later and shot at the house again. Neighbors called 911 and identified appellant as the shooter.

{¶ 9} No person was struck by the shots, but Ridgell's kitten was killed during the melee.

{¶ 10} Police arrived on scene and collected shell casings. They spoke with Drake and Ridgell. A detective later followed up with Ridgell, who identified appellant as the shooter.

{¶ 11} Appellant was charged in Cuyahoga C.P. No. CR-22-667895, with two counts of improperly discharging into a habitation, felonies of the second degree, in violation of R.C. 2923.161(A)(1); two counts of felonious assault, felonies of the second degree, in violation of R.C. 2903.11(A)(2); discharge of a firearm on or near prohibited premises, a felony of the third degree, in violation of R.C. 2923.13(A)(2); having weapons while under disability, a felony of the third degree, in violation of

R.C. 2923.13(A)(2); criminal damaging or endangering, a misdemeanor of the first degree, in violation of R.C. 2909.06(A)(1); two counts of aggravated menacing, misdemeanors of the first degree, in violation of R.C. 2903.21(A); and cruelty to animals, a felony of the fifth degree, in violation of R.C. 959.131(C). Six of the counts carried accompanying firearm specifications.

**{¶ 12}** In February 2022, appellant was in his residence where he lived with his girlfriend, Shaniya Nesbitt ("Nesbitt"), and their two children, a two-year-old and an eight-month-old. While Nesbitt was sleeping, appellant went through her phone and found messages between her and another man. He woke Nesbitt up and they began arguing. Appellant punched Nesbitt multiple times and smashed a lamp over her. Eventually things settled down and Nesbitt left, leaving appellant home with the children.

**{¶ 13}** Nesbitt went to the police department and reported the incident. The police then came back with her to the residence so she could get the children and leave for a while. When they arrived at the residence, the door was ajar and they heard crying inside. Appellant had left the children by themselves. Luckily, the children were unharmed.

**{¶ 14}** The officers helped Nesbitt pack the children up. Security guards at the apartment building located appellant in a stairwell. Officers went there and confronted appellant about what had happened.

**{¶ 15}** Appellant was charged in Cuyahoga C.P. No. CR-22-667896 with domestic violence, a felony of the fourth degree, in violation of R.C. 2919.25(A), and

two counts of endangering children, misdemeanors of the first degree, in violation of R.C. 2919.22(A).

{¶ 16} Prior to trial, the state filed a notice of intent to use evidence under Evid.R. 804(B)(6), seeking to introduce the statements made to law enforcement by Nesbitt and Drake following the incidents. This rule provides an exception to hearsay when witnesses are unavailable as a result of wrongdoing by the defendant. The court held a hearing on the motion and heard testimony regarding phone calls that appellant had made from jail. He had made 575 total calls between February 10, 2022, and July 25, 2022. The state asserted that he made numerous calls to Nesbitt and Drake, asking them to recant their statements against him and also asked a third party to contact them for the same purpose.

{¶ 17} The court granted the state's motion, stating as follows:

> We've had the motion in limine subject to the State's motion or, actually, their notice of intent to use evidence pursuant to Evidence Rule 804(B)(6). We had a hearing, the Court heard testimony yesterday and I've reviewed the documents and the audio files that were entered into evidence. There is [sic] two issues.
>
> First of all, the — the authentication of the voices on the jail calls, the State made its burden that they are what they purport to be. The Court finds that — that that's clear, that it's this defendant making these phone calls.
>
> And the next issue becomes whether or not the — that the actions the defendant took or the requests being made of the various people he spoke to had a purpose to create their unavailability for trial. There [are] basically two witnesses involved, Ms. Shaniya Nesbitt and * * *
>
> * * *

* * * Cory Drake. And in those two cases, 667895 and 667896, one is domestic violence in general, the other one is an alleged shooting that Mr. Cory Drake was a witness in.

It's also clear these are family members, these witnesses, and that the statements defendant made on these tapes were — had a purpose to affect whatever testimony may happen in court and urging them to go write affidavits, take them to the prosecutor, contact police, and basically give evidence contrary to the evidence the police had gathered to that point in those allegations.

The nexus of those conversations and the unavailability, or the witnesses not making themselves available, and it's clear the State's made every effort possible to gain their attendance, whether or not those statements caused the unavailability or not is really the next issue.

It's clear that the conversations with the third-party had this purpose. However, the strongest evidence that the — of the defendant's wrongdoing to create the unavailability of the witness was with Ms. Shaniya Nesbitt. He had 179 phone calls with her contrary to the no contact order. That is clear wrongdoing, clear attempts in very manipulative ways to — or various manipulative ways to procure her unavailability or change her testimony.

So for that reason I will grant the motion with respect to Ms. Nesbitt.

As far as it goes with the witness, Mr. Cory Drake, there's less evidence that the attempts that Mr. Blade made to create the unavailability of Mr. Drake, the nexus of that hasn't been shown. It's clear that Mr. Drake didn't want to be part of the prosecution, made it clear to the State of Ohio, and there's just not evidence that what the defendant did caused that. He's certainly — there's plenty of evidence that he certainly wanted to affect their testimony, wanted them to create evidence to help him. Whether that is false evidence or not is yet to be seen with respect to whatever the State has as far as what actually occurred that day.

So at this point these are preliminary decisions, rulings that the State is permitted to use the hearsay statements of Ms. Shaniya Nesbitt, if it becomes necessary. And at this point I'm ruling that Mr. Drake's, pursuant to 804 (B)(6), hearsay statements are not admissible at this time. That may change. State may receive new information and may

affect — or these rulings may be affected by other evidence ascertained during a trial.

**{¶ 18}** The state moved for joinder of indictments under Crim.R. 8(A), arguing that all three incidents occurred in Cleveland's Fourth District, two involved violence against parties known to appellant, two involved firearms, and two occurred very close in time. Appellant opposed joinder, asserting that the incidents were not part of the same act or transaction nor did they constitute parts of a common scheme. He argued that putting all three cases before a jury would be confusing and that appellant's presumption of innocence "may be tinkered with a little bit or infringed upon."

**{¶ 19}** The court granted the motion, stating:

> [P]ursuant to the criminal rules, the Court is to liberally consolidate matters for trial. I haven't heard specific prejudice to this defendant other than in general with respect to his right to presume — to be presumed innocent, which this Court will make abundantly clear to the jurors in voir dire and with my final instructions to the jury.
>
> They are three separate incidents, but they do indicate a course of criminal conduct, which I disagree, it's not a catchall. It's specific to the facts of these cases.
>
> There's also the issue with respect to the jail calls, which the evidence that the State may present with respect to those calls overlap at least two of the cases. And then the third case involves having weapon while under disability, improperly handling a firearm, as well as that improperly discharging into a habitation, so there's two firearm cases in this close proximity.
>
> * * *
>
> Pursuant to the map, that shows a consistent course of criminal conduct.

> Because some of the evidence is overlapping, especially through the jail calls, and because they are separate and distinct, I don't see an issue with respect to potential for the jurors to be confused by these. And they'll be made abundantly clear that each and every count in each and every indictment is a separate matter to be considered separately without respect to a verdict in any other count. And we'll make sure that all the counts — we won't indicate three different cases, we'll just read — re-number the count so the jurors have one complaint to consider.
>
> So I'm going to grant the State's motion.

**{¶ 20}** During voir dire, appellant asked the court to reconsider its decision to join the indictments for trial, arguing that he would be at a disadvantage having a jury consider three different fact patterns and cases involving different victims.

**{¶ 21}** The court declined to reconsider joinder, finding that there was no particular prejudice shown and that the cases were simple, straightforward, and would not be confusing to the jury.

**{¶ 22}** The cases proceeded to a jury trial where the state presented the testimony of a number of witnesses; however, both Nesbitt and Drake failed to appear. At the close of the state's case, appellant moved for acquittal under Crim.R. 29, which was denied.

**{¶ 23}** The jury returned a verdict as follows: In CR-20-653162, appellant was found guilty of having a weapon while under a disability, improperly handling a firearm in a motor vehicle, and obstructing official business. He was found not guilty of receiving stolen property.

**{¶ 24}** In CR-22-667896, appellant was found guilty of domestic violence, along with a prior conviction specification, and both counts of endangering children.

**{¶ 25}** In CR-22-667895, appellant was found guilty of discharge of a firearm on or near prohibited premises, along with a one- and three-year firearm specification; having weapons while under a disability; and one count of aggravated menacing. He was found not guilty of both counts of improperly discharging a firearm into habitation or school, both counts of felonious assault, criminal damaging, one count of aggravated menacing, and animal cruelty.

**{¶ 26}** The trial court imposed an aggregate sentence of nine years. Appellant then filed the instant appeal, raising two assignments of error for our review:

> 1. The trial court erred in granting the state's motion to join these three cases for trial and then proceeding to trial on all 17 counts.
>
> 2. The trial court erred by admitting hearsay statements of three non-testifying witnesses under the forfeiture by wrongdoing exception in Evid.R. 804(B)(6) and violated appellant's right to confront the witnesses against him as guaranteed by the 6th Amendment of the United States Constitution and Section 10 of the Ohio Constitution.

## II. Law and Analysis

### A. Joinder of Trials

**{¶ 27}** In appellant's first assignment of error, he argues that the trial court improperly joined his three cases for trial. He contends that he was prejudiced by the joinder because the offenses were different and the evidence was incompatible.

**{¶ 28}** Crim.R. 13 provides that a trial court may order two or more indictments to be tried together "if the offenses or the defendants could have been joined in a single indictment or information." In conjunction with Crim.R. 13,

pursuant to Crim.R. 8(A), two or more offenses may be charged in a single indictment if the offenses "are of the same or similar character, or are based on the same act or transaction, or are based on two or more acts or transactions connected together or constituting parts of a common scheme or plan, or are part of a course of criminal conduct." Crim.R. 8(A).

**{¶ 29}** The Supreme Court of Ohio has held that joinder "is liberally permitted to conserve judicial resources, reduce the chance of incongruous results in successive trials, and diminish the inconvenience to the witnesses." *State v. Schaim*, 65 Ohio St.3d 51, 58, 600 N.E.2d 661 (1992). Relief from joinder is available under Crim.R. 14 upon a demonstration of prejudice by the defendant. *State v. Harris-Powers*, 8th Dist. Cuyahoga No. 87921, 2007-Ohio-389, ¶ 17, citing *State v. Owens*, 51 Ohio App.2d 132, 366 N.E.2d 1367 (9th Dist.1975).

**{¶ 30}** In order to properly preserve the issue of a trial court's joinder of indictments for appeal, the defendant must object to the joinder of indictments at the time of trial, and at the close of the state's case or at the close of evidence. *Owens* at paragraph two of the syllabus. Furthermore, "[a] party waives any claim of error concerning the joinder by failing to raise an objection to the joinder." *Harris-Powers* at ¶ 17. Failure to renew an objection under these circumstances waives all but plain error.

**{¶ 31}** In the instant matter, the trial court joined, over appellant's opposition, his three indictments for one trial. Appellant did not renew his objection

at the close of the state's case.[1] Therefore, we review the trial court's joinder of appellant's indictments only for plain error. "Plain error exists only if 'but for the error, the outcome of the trial clearly would have been otherwise,' and is applied 'under exceptional circumstances and only to prevent a manifest miscarriage of justice.'" *State v. Harrison*, 122 Ohio St.3d 512, 2009-Ohio-3547, 912 N.E.2d 1106, ¶ 61, quoting *State v. Long*, 53 Ohio St.2d 91, 97, 372 N.E.2d 804 (1978).

**{¶ 32}** On appeal, appellant argues that the "alleged offenses lack any substantive connection to each other, but the nature of the charges and the words used in the indictment portray [appellant] as a violent, gun toting, cat killing, abuser with prior convictions." He contends that the nature of the offenses and the incompatibility of the evidence "clearly show" that appellant was prejudiced at trial. We disagree.

**{¶ 33}** Upon review of the facts in the case at hand, we find that the evidence in each of the three cases was simple and direct, and there is no indication in the record that the jury confused the evidence as to the different counts or that it was influenced by the cumulative effect of the joinder. All of the crimes were committed in the Fourth District of Cleveland, and two of the incidents were committed only months apart. Most importantly, appellant has not demonstrated how he was prejudiced or that the outcome of the trial would have been different had the indictments not been joined.

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[1] As noted above, during voir dire appellant asked the court to reconsider its decision regarding joinder; however, this was the only time his objection was renewed.

{¶ 34} Accordingly, we find no plain error in the trial court's joinder of appellant's three indictments. Appellant's first assignment of error is overruled.

**B. Forfeiture-by-Wrongdoing Exception**

{¶ 35} In appellant's second assignment of error, he asserts that the trial court erred by admitting hearsay statements of three nontestifying witnesses under the forfeiture-by-wrongdoing exception in Evid.R. 804(B)(6) and contends that this violated his right of confrontation.

{¶ 36} Prior to trial, the state filed a notice of intent to use evidence pursuant to Evid.R. 804(B)(6). Specifically, the state sought to introduce statements made by Nesbitt and Drake to law enforcement after the incidents.

{¶ 37} We note that in his brief, appellant argues statements made by Nesbitt, Ridgell, and Drake were improper; however, the court declined to allow hearsay statements by Drake under Evid.R. 804(B)(6), and appellant does not specify which statements made by Drake were improperly admitted. Moreover, the forfeiture-by-wrongdoing issue only related to Nesbitt and Drake; the state did not seek admission of statements by Ridgell under this exception. Accordingly, we will only consider this assignment of error as it relates to statements by Nesbitt.

{¶ 38} Evid.R. 801 protects the defendant's confrontation right by prohibiting the use of hearsay statements, i.e., statements other than those made by the declarant while testifying at trial offered in evidence to prove the truth of the matter asserted. Hearsay statements are not admissible at trial unless subject to an exception. Evid.R. 801 and 802.

**{¶ 39}** Evid.R. 804(B)(6) is one such exception. Under Evid.R. 804(B)(6), regarding forfeiture by wrongdoing, a statement offered against a party is not excluded by the hearsay rule "if the unavailability of the witness is due to the wrongdoing of the party for the purpose of preventing the witness from attending or testifying." To qualify for this exception, the state must show by a preponderance of the evidence that (1) the defendant's wrongdoing resulted in the witness's unavailability; and (2) "one purpose was to cause the witness to be unavailable at trial." *State v. Hand*, 107 Ohio St.3d 378, 2006-Ohio-18, 840 N.E.2d 151, ¶ 84.

**{¶ 40}** The decision to admit or exclude evidence at trial lies within the sound discretion of the trial judge, and the court's decision will not be reversed absent an abuse of discretion. *State v. Gale*, 8th Dist. Cuyahoga No. 94872, 2011-Ohio-1236, ¶ 12. However, evidentiary rulings implicating the Confrontation Clause are reviewed de novo. *State v. McKelton*, 148 Ohio St.3d 261, 2016-Ohio-5735, 70 N.E.3d 508, ¶ 97.

**{¶ 41}** Appellant first takes issue with the state's demonstration that Nesbitt was unavailable. To establish that a witness is unavailable for purposes of Evid.R. 804(A)(5), the proponent must show that it has been "unable to procure" the witness's attendance "by process or other reasonable means." The Supreme Court of Ohio has held that in order for the witness to be "shown to be unavailable," there "must also be shown a good faith effort to secure the witness[.]" *State v. Jester*, 32 Ohio St.3d 147, 154, 512 N.E.2d 962 (1987).

**{¶ 42}** According to the record, the state spoke with Nesbitt via telephone on March 11 and 24, 2022, and again on July 5, 2022. She had expressed to the assistant prosecuting attorney that she did not want to come to court or press charges. On July 5, 2022, the state issued a subpoena for Nesbitt, which was served on her residence. Trial was set for July 25, 2022, at which time Nesbitt failed to appear. That same day, the state moved for a material witness warrant, which the court granted.

**{¶ 43}** Trial was reset for August 30, 2022, at which time Nesbitt appeared in court pursuant to subpoena. The prosecutor acknowledged that Nesbitt had waited all day for the court proceedings to begin and was willing to participate and handed her a subpoena to appear again on Friday of that week. The court addressed Nesbitt, stating as follows:

> So you have been served with a subpoena in the presence of the Court and all these folks here today. You have to come back. It's a Court order that you come back on that date on Friday. You should stay in contact with the prosecutor who — and that subpoena is good for this entire trial, and so the State can ask me to enforce that subpoena at any point during this trial. They're suggesting you would be here on Friday. You can stay in contact with them, and if you stay in contact, they may excuse you from that specific day without requiring another subpoena. So just consider yourself put on notice subpoenaed for this trial, and if nothing else, make sure you're back here Friday at the time the subpoena indicates, but the State can say you're excused on that day, come back another day because the schedule will be such that we need you within the next few days of this trial. Do you have any questions about that?

**{¶ 44}** Nesbitt replied that she did not; however, she failed to appear in court after that date.

{¶ 45} We find that the state made reasonable efforts to secure Nesbitt's presence at trial and that Nesbitt was unavailable under Evid.R. 804(A)(5).

{¶ 46} We now turn to the applicability of Evid.R. 804(B)(6). Prior to trial, the court conducted an evidentiary hearing on this issue. The state presented the testimony of Odilio Gonzalez, the on-site administrator for Securus, which is the phone company that allows inmates at the Cuyahoga County Jail to use the telephone; Cuyahoga County Sheriff's Department Sgt. Brian Williams, who was formerly in charge of the Investigation Unit in the Cuyahoga County Jail and authenticated the phone calls made by appellant; and Cleveland Police Department Ptl. Steven Schmitz, who responded to the domestic incident involving Nesbitt.

{¶ 47} Gonzalez testified that appellant made 575 calls between February and July 2022; 171 of those calls were to Nesbitt's phone number. Ptl. Schmitz testified regarding appellant's arrest and booking for the domestic incident involving Nesbitt. The arrest had been recorded on Ptl. Schmitz's body camera, and he identified appellant's voice from the jail calls as the same that was heard on his body camera and identified appellant in the courtroom.

{¶ 48} The state played for the court several recorded jail calls between appellant and Nesbitt. In one such call, appellant said to Nesbitt, "You weren't never supposed to call no police on me, you put me in here * * * " and "[i]f you really love me, you wouldn't have put me in jail * * *. I'm trying to see how much love you got for me." In another, he stated, "You put me in here on some goofy a** sh*t, what you want me to go to jail for a long a** time? You got me in the joint, what you gonna

do next? Don't continue to kick my back down while I'm in jail." In another conversation, Nesbitt agreed that she would not be there and said that "they" would never find her.

{¶ 49} The state also offered calls made to a third party where appellant instructed that person to tell Nesbitt to submit an affidavit to the prosecutor's office saying that she did not want to press charges. The state argued that the jailhouse phone conversations indicated that appellant was actively trying to dissuade Nesbitt from testifying at trial. The state acknowledged that there was no explicit order by appellant for Nesbitt not to appear for trial, but argued that under the totality of the circumstances, what appellant said to Nesbitt was sufficient to cause her to not appear.

{¶ 50} After listening to the jail calls between appellant and Nesbitt, and appellant and a third party, the trial court determined that appellant had actively engaged in wrongdoing with the purpose of making Nesbitt unavailable for trial. As a result, appellant forfeited his constitutional right of confrontation with regard to Nesbitt.

{¶ 51} Appellant argues that the calls did not evidence any threat or force and that appellant never told Nesbitt to lie or not show up for trial. Appellant contends that the state did not show there was a pattern of violence or abuse and that the state was merely speculating that Nesbitt was an abused partner. He insists that his statements on the jail calls were because he was frustrated that he was still in jail when the complaining witnesses said they were not going to prosecute.

{¶ 52} While appellant is correct in his assertion that during the calls, he did not overtly threaten Nesbitt or explicitly tell her not to testify, he clearly was pressuring her about putting him in jail and placing the blame on her for whatever were to happen next. These statements must be viewed in the context of the totality of the circumstances of this case. Appellant was charged with domestic violence against Nesbitt, and the docket reflects that a no-contact order had been in place since the beginning of the case. Appellant's phone calls constituted continued harassment in an attempt to dissuade Nesbitt from testifying.

{¶ 53} We find that the state demonstrated by a preponderance of the evidence that appellant's conduct caused Nesbitt to be unavailable and that his purpose in making so many calls to her was to cause her to be unavailable at trial. Accordingly, the court properly admitted Nesbitt's statements under the exception for forfeiture by wrongdoing.

{¶ 54} Finally, we note that within appellant's second assignment of error, he includes additional arguments regarding the admission of 911 calls as business records, statements by Ridgell, and a claim that his convictions were not supported by sufficient evidence. However, these arguments were not specifically assigned as error for our review. App.R. 16(A)(3) provides that an appellant's brief must include "[a] statement of the assignments of error presented for review, with reference to the place in the record where each error is reflected." Pursuant to App.R. 12(A)(1)(b), this court is required to determine the appeal based upon the assignments of error set forth in the briefs under App.R. 16.

{¶ 55} Consequently, we decline to consider the extraneous arguments that were not separately assigned as error.

{¶ 56} Appellant's second assignment of error is overruled. The judgment of the trial court is affirmed.

It is ordered that appellee recover from appellant costs herein taxed.

The court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate issue out of this court directing the common pleas court to carry this judgment into execution. The defendant's convictions having been affirmed, any bail pending appeal is terminated. Case remanded to the trial court for execution of sentence.

A certified copy of this entry shall constitute the mandate pursuant to Rule 27 of the Rules of Appellate Procedure.

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FRANK DANIEL CELEBREZZE, III, PRESIDING JUDGE

KATHLEEN ANN KEOUGH, J., and
EMANUELLA D. GROVES, J., CONCUR