



## STATEMENT OF THE CASE

Appellant-Defendant, Jeffrey L. Howard (Howard), appeals his convictions of Count I, sexual misconduct with a minor, as a Class B felony, Ind. Code § 35-42-4-9; Count II, sexual misconduct with a minor, as a Class B felony, I.C. § 35-42-4-9; Count III, furnishing alcoholic beverages to a minor, as a Class C misdemeanor, I.C. § 7.1-5-7-8; Count IV, contributing to the delinquency of a minor, as a Class A misdemeanor, I.C. § 35-46-1-8; Count V, furnishing alcoholic beverages to a minor, as a Class A misdemeanor, I.C. § 7.1-5-7-8; Count VI, contributing to the delinquency of a minor, as a Class A misdemeanor, I.C. § 35-46-1-8; Count VII, sexual misconduct with a minor, as a Class C felony, I.C. § 35-42-4-9(b); and Count VIII, child exploitation, as a Class C felony, I.C. § 35-42-4-4.

We affirm in part, reverse in part, and remand.

## ISSUES

Howard raises six issues on appeal, which we consolidate, reorder, and restate as the following five issues:

- (1) Whether Howard's two Motions to Suppress were properly denied;
- (2) Whether Howard was prevented from presenting a defense;
- (3) Whether prosecutorial misconduct was committed during the final argument;
- (4) Whether the trial court properly gave Final Instruction Number 20; and
- (5) Whether the trial court properly sentenced Howard.

## FACTS AND PROCEDURAL HISTORY

A.Z. was born July 3, 1988. Howard met A.Z. in an Internet chat room around Thanksgiving of 2002. At that time, A.Z. was fourteen years old, albeit holding herself out to be sixteen years old, and lived with her mother in Crawfordsville, Indiana. Howard was thirty-six years old and lived in Elkhart, Indiana.

In February 2003, Howard rented a motel room in Crawfordsville and arranged to meet A.Z. in person. Howard met A.Z. and her boyfriend at a bowling alley. All three proceeded to the motel where only A.Z. and Howard entered the motel room. Inside the motel room Howard gave A.Z. some presents he bought her for Valentine's Day and took pictures of her, after which A.Z. and her boyfriend left.

In March 2003, Howard returned to Crawfordsville. A.Z. and Howard again met at the bowling alley and proceeded to Howard's motel room. This was the last face-to-face contact A.Z. and Howard had for approximately one year, although they continued to communicate via the Internet and occasionally over the phone.

In November 2003, A.Z. moved to Lafayette, Indiana to live with her grandparents. A.Z. continued to communicate with Howard. On or about January 25, 2004, in an email to A.Z., Howard acknowledged that he was aware A.Z. was under sixteen years of age, but still made arrangements to see her in March of 2004.

On March 6, 2004, Howard met A.Z. at a mall in Lafayette and took her to a Red Roof Inn hotel. While at the hotel, Howard proposed to A.Z., gave her a ring and some other gifts, and they performed oral sex on each other.

Later that same evening, A.Z. and her friend, J.O., made plans to go bowling. After they arrived at the bowling alley, Howard arrived, picked up the girls, and took them back to his hotel room, stopping to buy alcohol on the way. Once at the hotel room, Howard set up a video camera, turned it on, and had A.Z. try on clothes he bought for her. While A.Z. tried on the clothes her bare breasts were exposed to the camera. J.O. took pictures of A.Z. sitting on Howard's lap. A.Z. and J.O. were in the hotel room with Howard for a couple hours before he drove them back to the bowling alley.

On July 4, 2004, the day after A.Z. turned sixteen, Howard returned to Lafayette. Only this time he picked A.Z. up at her grandparents' house. They told A.Z.'s grandmother they were going to play miniature golf. Instead, they went to a motel room where Howard gave A.Z. her birthday presents. Later that evening, Howard and A.Z. told her grandmother they were going to see fireworks, only to return to Howard's motel room once again. This time they engaged in sexual intercourse and Howard took a nude photograph of A.Z. The next day, July 5, 2004, Howard emailed the nude photograph to A.Z. A.Z.'s grandmother intercepted the email containing the nude picture, and the instant case commenced shortly thereafter.

On August 23, 2004, the State filed an Information charging Howard with Count I, sexual misconduct with a minor, as a Class B felony, I.C. § 35-42-4-9; Count II, sexual misconduct with a minor, as a Class B felony, I.C. § 35-49-4-9; Count III, sexual misconduct with a minor, as a Class B felony, I.C. § 35-49-4-9; Count IV, furnishing alcoholic beverages to a minor, as a Class C misdemeanor, I.C. § 7.1-5-7-8; Count V, contributing to the delinquency of a minor, as a Class A misdemeanor, I.C. § 35-46-1-8;

Count VI, furnishing alcoholic beverages to a minor, as a Class C misdemeanor, I.C. § 7.1-5-7-8; and Count VII, contributing to the delinquency of a minor, as a Class A misdemeanor, I.C. § 35-46-1-8. On March 14 and 17, 2005, the State filed additional Informations charging Howard with Count VIII, sexual misconduct with a minor, as a Class C felony, I.C. § 35-42-4-9(b), and Count IX, child exploitation, as a Class C felony, I.C. § 35-42-4-4, respectively. On April 27, 2005, the State filed a Motion to Dismiss Only Count I. On April 28, 2005, the State filed an amended Information charging Count IX, child exploitation, as a Class C felony, I.C. § 35-42-4-4. Counts II through IX were renumbered as Counts I through VIII.

On January 7, 2005, Howard filed a Motion to Suppress a statement he gave to the police. On March 21, 2005, Howard filed a second Motion to Suppress all evidence derived from a search of his home proscribed by warrant. Both motions were subsequently denied.

On May 4 through May 9, 2005, a jury trial was held. At the close of the evidence, the jury returned a guilty verdict on all Counts. On June 22, 2005, a sentencing hearing was held. For sentencing purposes, the trial court merged Counts III and IV, with Howard to be sentenced under Count IV, and merged Counts V and VI, with Howard to be sentenced under Count VI. At the end of the hearing, the trial court sentenced Howard to the Indiana Department of Correction (DOC) for ten years for Count I; ten years for Count II; six months for Count IV; six months for Count VI; four years for Count VII; and four years for Count VIII, all to run consecutive. Howard's executed portion was assigned as follows: five years for Count I; five years for Count II; two years for Count

VII; and two years for count VIII, for a total of fourteen years at the DOC, with fifteen years suspended.

Howard now appeals. Additional facts will be provided as necessary.

## DISCUSSION AND DECISION

### *I. Motion to Suppress*

Howard first argues the trial court improperly denied his Motion to Suppress evidence obtained as a result of a search warrant, and his Motion to Suppress the statement he made to the police. Specifically, Howard contends that (1) the information used to procure the search warrant for his home was stale and (2) he invoked his right to remain silent and his right to counsel.

#### *A. Standard of Review*

The admission or exclusion of evidence is a determination entrusted to the discretion of the trial court. *Farris v. State*, 818 N.E.2d 63, 67 (Ind. Ct. App. 2005), *trans. denied*. We will reverse a trial court's decision only for an abuse of discretion. *Id.* An abuse of discretion occurs when the trial court's action is clearly erroneous and against the logic and effect of the facts and circumstances before it. *Id.* The improper admission of evidence is harmless error if the conviction is supported by substantial independent evidence of guilt satisfying the reviewing court that there is no substantial likelihood the challenged evidence contributed to the conviction. *Beach v. State*, 816 N.E.2d 57, 59 (Ind. Ct. App. 2004).

#### *B. Search Warrant*

Howard claims that the information used to procure the search warrant for his home was based on stale information and as such did not constitute reasonable belief sufficient to support the granting of a search warrant. The State argues, however, that Howard waived review of this issue by not objecting to the search warrant on grounds of staleness in his Motion to Suppress or at trial. We agree with the State.

The failure to raise certain grounds in a Motion to Suppress and at trial results in waiver of an issue on appeal. *Johnson v. State*, 829 N.E.2d 44, 49, n.4 (Ind. Ct. App. 2005), *trans. denied*. In this case, our review of the record reveals that Howard argued in his Motion to Suppress that a nude photograph of A.Z. alone was an insufficient basis for issuance of the search warrant. Howard never argued the search warrant was improperly issued because the information supporting the search warrant was stale. Thus, we find Howard waived this argument for review on the basis of staleness. *See id.*

### C. *Howard's Statement*

Next, Howard argues that the relentless questioning by the police, after Howard invoked his right to remain silent, resulted in a violation of his *Miranda* rights and thus, should have been suppressed by the trial court. Conversely, the State maintains that Howard spoke voluntarily and never unequivocally asserted his right to remain silent or his right to an attorney. Furthermore, the State argues that any improperly admitted statement was harmless error.

An assertion of *Miranda* rights must be clear and unequivocal, and in determining whether a person has asserted his or her rights, the defendant's statements are considered as a whole. *Clark v. State*, 808 N.E.2d 1183, 1190 (Ind. 2004). A person must do more

than express reluctance to talk to invoke his right to remain silent. *Id.* However, as we previously stated, an error in admitting evidence is to be disregarded as harmless error unless it affects the substantial rights of a defendant. *Beach*, 816 N.E.2d at 59. If a defendant's conviction is supported by substantial independent evidence of guilt, then there is no substantial likelihood that the questioned evidence contributed to the conviction. *Cook v. State*, 734 N.E.2d 563, 569 (Ind. 2000).

Howard argues that the following statement constituted an assertion of his right to remain silent: "I guess this will be the point where I don't want to say anything." (Appellant's App. p. 89). Although the interview did not end there, as the police continued to ask questions and Howard continued to answer, based on our review of the record, any error in admitting the portion of Howard's statement following the alleged assertion of his right to remain silent was harmless. The remainder of the interview offers no proof of guilt or admissions.

## II. *Presenting a Defense*

Howard next asserts he was prevented from presenting a defense. In particular, Howard argues that his disallowed testimony, the answer to "What did [A.Z.] tell you?" was not being offered to prove the truth of the matter asserted, and as such was not hearsay. (Jury Trial Tr. p. 268). Rather, he contends the testimony was being offered to prove Howard's intent, or lack thereof. The State contends that Howard waived any error by not making a proper offer to prove, which preserves an error in its exclusion. Additionally, the State claims that the trial court properly excluded the testimony because it was hearsay.

The purpose of an offer of proof is to convey the point of the witness's testimony and provide the trial judge the opportunity to reconsider the evidentiary ruling. *State v. Wilson*, 836 N.E.2d 407, 409 (Ind. 2005), *reh'g denied*. Equally important, it preserves the issue for review by the appellate court. *Id.* Failure to make an offer of proof of the omitted evidence renders any claimed error unavailable on appeal unless it rises to the level of fundamental error. *Young v. State*, 746 N.E.2d 920, 924 (Ind. 2001). To qualify as fundamental error, “an error must be so prejudicial to the rights of the defendant as to make a fair trial impossible.” *Brown v. State*, 799 N.E.2d 1064, 1067 (Ind. 2003) (quoting *Mitchell v. State*, 726 N.E.2d 1228, 1236 (Ind. 2000)(citations omitted)).

Here, Howard failed to make an offer of proof with respect to the excluded testimony. As such, Howard did not preserve any error by the trial court for our review. In addition, any error by the trial court in excluding the testimony does not rise to the level of fundamental error, as the testimony was clearly hearsay, as it concerned an out-of-court statement made by A.Z. to him. *See* Ind. Rules of Evid. 803(c). And, Howard did not argue that the hearsay testimony was admissible under any exception to the hearsay rule. Thus, Howard waived any error the trial court made by excluding the contentious testimony.

### III. *Prosecutorial Misconduct*

Howard also argues the State committed misconduct during final arguments by stating “I don’t buy it, neither should you,” with respect to Howard’s claim that he did not engage in sexual conduct with A.Z. (Jury Trial Tr. pp. 322-23). Howard claims that the State’s statement was an inappropriate interjection of personal opinions into final

argument. Conversely, the State asserts that Howard waived the issue for review because he did not request an admonishment or move for a mistrial.

In *Flowers v. State*, 738 N.E.2d 1051, 1058 (Ind. 2000), our supreme court found that “to preserve an issue regarding the propriety of a closing argument for appeal, a defendant must do more than simply make a prompt objection to the argument.” A defendant must also request an admonishment, and if further relief is desired, the defendant must move for a mistrial. *Id.* Failure to request an admonishment results in waiver of the issue for appellate review. *Id.* Here, as in *Flowers*, although Howard objected to the prosecutor's remarks during the closing argument, he failed to request an admonition. *See id.* at 1059. Thus, this issue is waived.

Waiver notwithstanding, Howard would not prevail on the merits. An expression of a personal opinion is not improper where the prosecutor is commenting on the credibility of the evidence as long as there is no implication that he had access to special information outside the evidence presented to the jury and that such outside information convinced the prosecutor of the guilt of the accused. *Miller v. State*, 623 N.E.2d 403, 408 (Ind. 1993), *reh'g denied*. We conclude that the litigious statement, “I don’t buy it, neither should you,” does not imply that the State had access to any information outside of the evidence presented at trial. (Tr. pp. 322-23). Thus, we find there is no prosecutorial misconduct.

#### IV. *Final Jury Instruction No. 20*

Next, Howard claims the trial court abused its discretion by giving Final Jury Instruction No. 20 (the Instruction) on mistake of belief, alleging it improperly shifted the

burden of proof to Howard. The State, however, argues that the Instruction did not improperly shift the burden of proof because it informs the jury of a statutory defense available to Howard, rather than requiring him to disprove an essential element of the crime charged.

The manner of instructing a jury is left to the sound discretion of the trial court. *Patton v. State*, 837 N.E.2d 576, 579 (Ind. Ct. App. 2005). Its ruling will not be reversed unless the instructional error is such that the charge to the jury misstates the law or otherwise misleads the jury. *Id.* In reviewing a trial court's decision to give or refuse a tendered instruction, we will consider: (1) whether the instruction correctly states the law; (2) whether there is evidence in the record to support the giving of the instruction; and (3) whether the substance of the tendered instruction is covered by other instructions that are given. *Id.* Before a defendant is entitled to a reversal, he must affirmatively show the instructional error prejudiced his substantial rights. *Id.*

Howard directs our attention to *McCorker v. State*, 797 N.E.2d 257 (Ind. 2003), where our supreme court discusses jury instructions that improperly shift the burden of proof from the State on an essential element of the charged offense to the defendant in light of *Sandstrom v. Montana*, 442 U.S. 510 (1979). In *Sandstrom*, the United States Supreme Court held that, “the United States Constitution requires the State to prove beyond a reasonable doubt every material element of a crime, and [] a jury instruction that shifts that burden to the defendant violates the defendant’s due process rights.” *Id.* The issue in *Sandstrom* was whether an instruction could be “understood by the jury as either (1) an irrebuttable direction by the [trial] court to find intent once convinced that

defendant's actions were voluntary or (2) a direction to find intent upon proof of the defendant's voluntary actions (and their 'ordinary' consequences), unless the defendant proved the contrary by some quantum of proof greater than the law requires." *McCorker*, 797 N.E.2d at 265. While jury instructions contain many mandatory presumptions as to what the law requires once the jury has found certain facts, a jury instruction cannot require a jury to find that the State has met its burden of proof on an element of the charged offense. *Id.* "That is for the jury to decide; it cannot be mandated or presumed." *Id.*

Sexual misconduct with a minor is defined by I.C. § 35-42-4-9 as:

(a) A person at least eighteen (18) years of age who, with a child at least fourteen (14) years of age but less than sixteen (16) years of age, performs or submits to sexual intercourse or deviate sexual conduct commits sexual misconduct with a minor, a Class C felony. However, the offense is:

(1) A Class B felony if it is committed by a person at least twenty-one (21) years of age.

The Instruction reads, "for the defense of mistaken belief to prevail, the defendant bears the burden of proving by a preponderance of the evidence that: (1) [Howard] had the actual belief that [A.Z.] was sixteen years or older; and (2) the belief was reasonable under the circumstances." (Appellant's App. p. 297(A)). Thus, the Instruction simply parses out the statutory defense to sexual misconduct with a minor, which states, "It is a defense that the accused person reasonably believed that the child was at least sixteen (16) years of age at the time of the conduct." I.C. § 35-42-4-9(c). Like in *McCorker*, we do not find that the Instruction shifted the burden of proof in this case, from the State on an essential

element of the charged offense. *See McCorker*, 797 N.E.2d at 263. The Instruction did not relieve the State of its burden of proving any element of the charged crime, sexual misconduct with a minor. We therefore find that the Instruction merely informs the jury that, as to the charged offense, the statute provides a possible defense for Howard, which he must prove by a preponderance of the evidence. It does not shift the burden of proof from the State on an essential element of the charged offense.

#### V. Sentencing

Lastly, Howard claims he was improperly sentenced. Particularly, Howard contends the trial court (1) improperly imposed consecutive sentences, (2) improperly recognized aggravators, and (3) imposed a sentence that is inappropriate in light of the nature of the offense and the character of the offender.

It is well established that sentencing decisions lie within the discretion of the trial court and will be reversed only for abuse of discretion. *White v. State*, 846 N.E.2d 1026, 1034 (Ind. Ct. App. 2006). In *Rodriguez v. State*, 785 N.E.2d 1169, 1179 (Ind. Ct. App. 2003), *trans. denied*, we held that when considering the appropriateness of the sentence for the crime committed, courts should initially focus upon the presumptive penalties.<sup>1</sup> Trial courts may then consider deviation from this presumptive sentence based upon a balancing of the factors, which must be considered pursuant to I.C. § 35-38-1-7.1(a), together with any discretionary aggravating and mitigating factors found to exist. *Id.* For

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<sup>1</sup> Public Law 71-2005, abolishing “presumptive sentences” in favor of “advisory sentences,” is not applicable in the instant case since its effective date was April 25, 2005, whereas the commission of the offense for this case was prior to April 25, 2005. *See Richards v. State*, 681 N.E.2d 208, 213 (Ind. 1997).

a trial court to impose a sentence, other than the presumptive, it must (1) identify the significant aggravating factors and mitigating factors; (2) relate the specific facts and reasons that the court found to those aggravators and mitigators; and (3) demonstrate that the court has balanced the aggravators with the mitigators. *White*, 846 N.E.2d at 1034. A single aggravating factor is sufficient to support the imposition of both an enhanced and consecutive sentence. *Cannon v. State*, 839 N.E.2d 185, 193 (Ind. Ct. App. 2005). In addition, Indiana Appellate Rule 7(B) gives us authority to review and revise sentences to ensure that they are appropriate in light of the nature of the offense and character of the offender.

Here, the trial court sentenced Howard to an executed sentence of five years for sexual misconduct with a minor, as a Class B felony; five years for sexual misconduct with a minor, as a Class B felony; two years for sexual misconduct with a minor, as a Class C felony; and two years for child exploitation, as a Class C felony, all to run consecutive.

#### A. *Consecutive Sentences*

Howard first alleges the trial court improperly imposed consecutive sentences. In particular, he claims that Counts I and II, the reciprocal acts of oral sex, constituted a single episode of criminal conduct. Furthermore, Howard argues that it was improper to run any of the sentences consecutive as the trial court failed to find any proper aggravators per *Blakely v. Washington*, 542 U.S. 296 (2004).

A single episode of criminal conduct is defined by I.C. § 35-50-1-2(b) as “offenses or a connected series of offenses that are closely related in time, place, and

circumstance.” According to the Indiana supreme court, if conduct does constitute a single episode of criminal conduct, the statute limits the total sentence that can be imposed for all of the charges comprising the episode, aside from murder and other crimes of violence, to no “greater than the presumptive sentence for a felony which is ‘one (1) class of felony higher than the most serious of the felonies for which the person has been convicted.’” *Smith v. State*, 770 N.E.2d 290, 293 (Ind. 2002) (quoting I.C. § 35-50-1-2(c)); *see* I.C. § 35-50-1-2(a).

While sexual misconduct with a minor is not statutorily defined as a crime of violence, the propriety of Howard’s sentence hinges upon whether his convictions arose from more than one episode of criminal conduct. *See Harris v. State*, 749 N.E.2d 57, 60 (Ind. Ct. App. 2001). In *Harris*, the defendant pled guilty to having sexual intercourse with two girls on the same evening in the same apartment. *See id.* We held that “neither of the defendant’s acts of sexual misconduct was a necessary prerequisite for the other,” and that “[e]ach act was an occurrence that may be viewed as distinctive and apart from the other, notwithstanding the fact that the acts were both part of a more comprehensive series.” *Id.*

Here, we analogize with *Harris* and find that each act of oral sex may be viewed as “distinctive and apart from the other.” *Id.* While both acts of oral sex were performed in the same hotel room on the same evening, Howard’s performing oral sex on A.Z. was

not dependent upon A.Z.'s performing oral sex on Howard. Thus, we find that Howard's sentence arose from more than one episode of criminal conduct.<sup>2</sup> *See id.*

Additionally, Howard claims the trial court relied on improper aggravators to justify imposing consecutive sentences. Specifically, Howard argues that the trial court failed to find proper aggravators under *Blakely*, and as such consecutive sentences should not have been imposed. However, in *Smylie v. State*, 823 N.E.2d 679, 686 (Ind. 2005), our supreme court noted that because there is "no language in *Blakely* or in Indiana's sentencing statutes that requires or even favors concurrent sentencing," Indiana's discretionary scheme of imposing consecutive sentences was not invalidated by *Blakely*. *See Bryant v. State*, 841 N.E.2d 1154, 1157 (Ind. 2006). We note, though, that if sentences are made consecutive due to aggravating circumstances, the trial court must state the reasons underlying the sentencing decision. *May v. State*, 578 N.E.2d 716, 723 (Ind. Ct. App. 1991). In the absence of reasons underlying the consecutive sentence, we may change a consecutive sentence to concurrent, or remand for a more detailed statement, or examine the record for indications that the trial court engaged in the required evaluative process. *Id.* We also note that where a trial court finds that aggravating and mitigating circumstances are in equipoise, the supreme court has required concurrent sentences. *See Smylie*, 823 N.E.2d at 686.

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<sup>2</sup> Notwithstanding that the two acts of oral sex were separate episodes of criminal conduct, the entire sentence imposed by the trial court was for twenty-nine years; the highest felony of which he was convicted was a Class B felony; and the presumptive sentence for a Class A felony is thirty years. *See* I.C. §35-50-2-4. Therefore, despite the trial court's imposition of consecutive sentences, Howard's sentence did not exceed the presumptive sentence for the next highest felony.

While it is entirely appropriate for trial courts to impose consecutive sentences, the trial court here found that “the aggravators and mitigators balance.” (Sentencing Hearing Tr. p. 30). As such, it is inappropriate for the trial court to then impose consecutive sentences. *See Smylie*, 823 N.E.2d at 686. For that reason alone, we order that all counts run concurrent to one another.

#### B. *Appellate Rule 7(B)*

Lastly, Howard contends his sentence is inappropriate in light of the nature of the offense and character of the offender. As support, Howard argues that he has no criminal record, and that the trial court found no valid aggravators. Thus, Howard asserts the trial court improperly sentenced him to a twenty-nine year sentence.

Indiana Appellate Rule 7(B) gives us the authority to revise a sentence authorized by statute if, after due consideration of the trial court’s decision, we find that the sentence is inappropriate in light of the nature of the offense and the character of the offender. The presumptive sentence is meant to be a starting point for the trial court’s consideration in determining an appropriate sentence. *Rodriguez*, 785 N.E.2d at 1179.

The trial court recognized aggravators and mitigators, and found them to be in balance. Howard was subsequently sentenced to the presumptive sentence for each felony count, and now complains he has been inappropriately sentenced in light of the nature of the offense and his character. However, Howard cites no facts, citations to the record, or case law and makes no separate argument beyond a short paragraph. *See Saylor v. State*, 765 N.E.2d 535, 553 (Ind. 2002). Despite his failing to present any cogent argument in support of this contention, effectively waiving this issue for review,

we find the trial court did not err in sentencing Howard because trial courts are advised to initially focus upon the presumptive penalties. *See* Ind. Appellate Rule 46(A)(8); *see also Saylor*, 765 N.E.2d at 553; *Rodriguez*, 785 N.E.2d at 1179.

### CONCLUSION

Based on the foregoing, we find that (1) the trial court did not err by denying Howard's Motions to Suppress, (2) Howard was not prevented from presenting a defense, (3) there was no prosecutorial misconduct during final arguments, (4) Final Instruction No. 20 was properly given, and (5) all sentences should run concurrent to each other due to the trial court's finding that the aggravators and mitigators balance. Howard was properly sentenced with respect to Counts III through VIII.

Affirmed in part, reversed in part, and remanded with instructions.

VAIDIK, J., and DARDEN, J., concur.