DIVISION ONE
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PHILIP G. URRY, CLERK
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IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE

STATE OF ARIZONA,	)	1 CA-CR 08-0823
	)	
Appellee,	)	DEPARTMENT C
	)	
v.	)	**MEMORANDUM DECISION**
	)	(Not for Publication –
DARRIN WILES,	)	Rule 111, Rules of the
	)	Arizona Supreme Court)
Appellant.	)	
	)	

Appeal from the Superior Court in Maricopa County

Cause No. CR2007-006039-001 DT

The Honorable James T. Blomo, Judge *Pro Tempore*

AFFIRMED

Terry Goddard, Attorney General — Phoenix
by Kent E. Cattani, Chief Counsel,
Criminal Appeals/Capital Litigation Section
and Robert A. Walsh, Assistant Attorney General
Attorneys for Appellee

Maricopa County Public Defender — Phoenix
By Spencer D. Heffel, Deputy Public Defender
Attorneys for Appellant

I R V I N E, Presiding Judge

¶1 Defendant, Darrin Wiles, appeals from his convictions on three counts of sexual conduct with a minor, each a class 2

felony and dangerous crime against children; and nine counts of sexual exploitation of a minor, each a class 2 felony and dangerous crime against children. He maintains that the trial court (1) abused its discretion when it denied his motion to sever the sexual exploitation charges from the sexual conduct charges for trial; (2) committed reversible error when it permitted the State's witness to answer a jury question and (3) when it permitted the same witness to comment on truthfulness of hearsay statements. For reasons set forth more fully below, we affirm.

FACTS[1] AND PROCEDURAL HISTORY

¶2 On a weekend between August 15, 2005, and her birthday on September 28, the victim, Carly, visited her "best friend" Mariah, at a trailer home in Phoenix, where Mariah and her mother, Jenny, resided with Wiles. At some point, Jenny went outside to wash her car. At trial, Carly testified that Wiles began showing her a videotape of "these funny two girls that kept banging their heads together." He placed her on his lap at his desk to watch the video and then placed his hands inside her pants and began touching her with his fingers inside her vagina. Wiles stopped only when Carly got up and went to the bathroom.

[1] We view the facts in the light most favorable to sustaining the jury's verdicts and resolve all reasonable inferences against defendant. *State v. Vandever*, 211 Ariz. 206, 207 n.2, 119 P.3d 473, 474 n.2 (App. 2005).

¶3 Carly returned from the bathroom and went and sat on the couch. Wiles picked her up and again placed her on his lap at his desk and once more inserted his fingers into her vagina. Wiles asked Carly if it felt good. Wiles did not stop even though Carly said no. Wiles only stopped when Mariah asked Carly if she wanted to play hide-and-seek, and Carly said yes and moved away.

¶4 Carly went outside and climbed into a "trash can Dumpster" near Wiles's trailer to hide from Mariah, who was "It." Wiles joined Carly in the dumpster and again inserted his hands inside her pants and his fingers inside her vagina. Wiles moved his fingers while they were inside her vagina; Carly testified that it felt "not good."

¶5 Carly found Mariah's mother, Jenny, and asked her to take her home, which Jenny did. When she got home, Carly did not immediately tell her mother what had happened because she was "scared." She eventually told her brother Dusty who told their parents on September 9, 2005. They called the police the next morning.

¶6 The Phoenix Police Department was unable to locate Wiles until November 28, 2006, approximately sixteen months after these incidents occurred. At that time, Wiles lived at an apartment in Glendale with a new girlfriend, Tonya, Tonya's children, and a friend of Tonya's, Leonard Valentine. Detective

G. McK. of the Crimes Against Children Unit interviewed Wiles at ChildHelp; the interview was surreptitiously videotaped.[2]

¶7 Upon being told about the reasons for the interview by McK., Wiles wondered "which girl" McK. was talking about. After being shown a tape of Carly's interview, Wiles stated, "[y]es, that's the girl that I'm talking about." Wiles initially denied any wrongdoing. McK. used several interview techniques, including "baiting techniques" to elicit incriminating statements from Wiles. Wiles eventually admitted that it was possible that his thumbs could have had contact with Carly's vagina while he was lifting her above the rafters in the kitchen so she could play hide-and-seek with Mariah. He thought it was "very possible" that his thumbs may have digitally penetrated her vagina. He stated that he asked Carly if he'd hurt her, and claimed that she told him she was "okay" because her brother touched her there. He also claimed that Carly told him that her brothers entered her bedroom at night, fondled her vagina, made her play with their penises and perform oral sex on them, and laid on top of her.

¶8 At one point in the interview, Wiles contended that Carly had made him believe that she wanted him to touch her like her brothers did. On further questioning by McK., Wiles

[2] A redacted version of the videotaped interview was played for the jury at trial.

expounded on this version of events, adding that Carly had a "very forward" disposition and that, "when he patted her abdominal region and asked her how she felt, she grabbed his hand and pulled it down toward her groin."

¶9 When McK. left the interview room at one point, Wiles telephoned his girlfriend Tonya and asked her to get his two computers and take them to her mother's house because "he didn't want the cops to have his stuff." McK. only became aware of Wiles's conversation when he reviewed the interview tape on the following morning. McK. contacted Tonya that same day and asked her to come to his office to speak with him. When McK. confronted her about the computers, Tonya initially "defended" Wiles and denied that he owned any computers. She subsequently "told [McK.] everything – where everything was" and led him to her vehicle where she relinquished a "white Gateway computer tower" and a "black generic-type computer" that belonged to Wiles.

¶10 The computers were given to Detective L.C., an expert in computer forensics, for analysis. When he examined the white Gateway computer, L.C. found six videos and three still images containing child pornography involving young girls. Located on the same hard drive where the child pornography was found, L.C. also located pictures of Wiles as well as copies of his driver's license and social security card. A pediatrician who reviewed

all of the pornographic images determined that the girls depicted ranged in age from less than five years of age to less than thirteen years of age.

¶11 The State charged Wiles with three counts of sexual conduct with a minor, each a class 2 felony and dangerous crime against children; and nine counts of sexual exploitation of a minor, each also a class 2 felony and dangerous crime against children.[3] A jury found Wiles guilty of all of the offenses as charged.

¶12 On September 22, 2008, the trial court sentenced Wiles to life imprisonment without the possibility of parole prior to serving 35 years on each of the sexual conduct charges and 17 years in prison on each of the sexual exploitation charges, and ordered the charges to be served consecutively. Wiles timely appealed. We have jurisdiction pursuant to the Arizona Constitution, Article 6, Section 9, and Arizona Revised Statutes ("A.R.S.") sections 12-120.21(A)(1) (2003), 13-4031 and 13-4033 (2010).

DISCUSSION

(1) *Denial of Motion to Sever*

¶13 Prior to trial, Wiles moved to sever the counts alleging sexual exploitation from those alleging sexual conduct with a minor pursuant to Rule 13.4(b) of the Arizona Rules of

[3] Prior to trial, the State dismissed count 7 with prejudice.

Criminal Procedure. Wiles maintained that he was entitled to severance as a matter of right because the State had joined the offenses only because the offenses were "of the same or similar nature." The State opposed the motion, arguing that the charges were properly joined because the acts were admissible under Rule 404(c) of the Arizona Rules of Evidence and/or admissible to prove the "motive, intent, identity and predisposition of the person who committed the other counts." Attached to its motion, the State attached a copy of the grand jury transcript, which outlined the factual basis for both sets of charges.

¶14 At a hearing on October 29, 2007, defense counsel reminded the trial court that it had not yet ruled on the motion to sever but stated that he did not believe they needed any oral argument on it. The trial court announced that it was prepared to rule on the matter, as it had reviewed the motions, and summarily denied severance. Defense counsel did not ask the trial court to set forth either the factual findings for or the reasoning behind its ruling.

¶15 The case was tried before a different trial judge. Defense counsel renewed his motion for severance at the conclusion of the State's case-in-chief, however, the trial court reaffirmed the prior judge's denial of the motion. On appeal, Wiles argues for the first time that the trial court abused its discretion because it denied the motion to sever

without "hearing any testimony" or making any determination regarding the credibility of witnesses and/or without making any "specific" findings regarding the prerequisites for admission of Rule 404(c) evidence.

¶16 Not having raised his arguments below and not having asked the trial court to make specific findings, Wiles has forfeited relief on these issues on appeal unless he can establish that fundamental error exists and that it prejudiced him in his case. *State v. Henderson*, 210 Ariz. 561, 567, ¶ 19, 115 P.3d 601, 607 (2005). The burden lies with defendant to prove that fundamental error exists and that it is of such magnitude that he could not have received a fair trial. *Id.* at ¶ 20, 115 P.3d at 607. This burden is imposed on defendants to discourage them from taking a chance on a favorable verdict only to then argue for reversal on appeal for a matter that was curable at trial. *Id.* at ¶ 19, 115 P.3d at 607.

¶17 Before we undertake fundamental error review, we must ascertain that the trial court committed some error. *State v. Lavers*, 168 Ariz. 376, 385, 814 P.2d 333, 342 (1991). We find that the trial court committed no error in denying the motion to sever, let alone fundamental error.

¶18 Arizona Rule of Criminal Procedure 13.3(a)(1) permits the joinder of two or more offenses if they are "of the same or similar character." A defendant is entitled to severance "as of

right" of offenses joined under Rule 13.3(a)(1) "unless evidence of the other offense or offenses would be admissible under applicable rules of evidence if the offenses were tried separately." Ariz.R.Crim.P. 13.4(b). "Generally, a trial court possesses broad discretion in the area of joinder and severance." *State v. Stein*, 153 Ariz. 235, 239, 735 P.2d 845, 849 (App. 1987) (citation omitted). On appeal, this court will not find reversible error in the trial court's denial of a motion to sever absent a clear abuse of that discretion. *See State v. Comer*, 165 Ariz. 413, 418, 799 P.2d 333, 338 (1990).

¶19 If evidence of one charge is admissible with regard to the other charges, it is not an abuse of discretion to try the charges together. *See id*. at 338-39, 799 P.2d at 418-19. While evidence of other crimes is not admissible to prove the general character of an accused or that the accused acted in conformity therewith, it is admissible to prove intent, knowledge, identity or absence of mistake. Ariz.R.Evid. 404(b). Evidence of other crimes is also admissible under Arizona Rules of Evidence 404(c) in a case in which a defendant is charged with a sexual offense if it is relevant to show that the defendant has a character trait giving rise to an aberrant sexual propensity to commit the offense charged. To find other act evidence admissible under Rule 404(c)(1), a trial court must first find: (A) that the evidence is sufficient to permit the trier of fact to find that

the defendant committed the other act; (B) that the commission of the other act provides a reasonable basis from which to infer that the defendant had a "character trait giving rise to a aberrant sexual propensity to commit the crime charged;" and (C) that the evidentiary value of proof of the other act is not substantially outweighed by the danger of unfair prejudice, confusion of issues, or other issues mentioned in Rule 403. Ariz.R.Evid. 404(c)(1).

¶20 Wiles faults the trial court for relying on the pleadings and the grand jury transcripts alone to determine the cross-admissibility of other acts evidence. He notes that none of these included the testimony of the victim and that, without such testimony, the trial court could not properly make the requisite determination regarding credibility. He also notes that the trial court failed to specifically determine if the evidence clearly demonstrated that he had committed the other acts.

¶21 Wiles, however, never challenged or contradicted the evidence of the other acts that is contained in the transcript of the grand jury proceedings and, in fact, informed the court that there was no need for a hearing on the motion, implying that the court could proceed on the pleadings alone. Thus, the trial court committed no error in relying upon the unchallenged information provided in the grand jury transcript. The

transcript contains the report Carly gave of the incidents during her forensic interview at ChildHelp. It also describes the pornographic materials that were located on Wiles's computer as well as the fact that the same hard drive also contained a scan of Wiles's driver's license and social security card and photographs of Wiles. This information, unchallenged, provided a sufficient basis for the trial court to have found by "clear and convincing evidence" that Wiles had committed both the sexual misconduct and the sexual exploitation offenses. *See State v. Terrazas*, 189 Ariz. 580, 582, 944 P.2d 1194, 1196 (1997) (profferer must prove by clear and convincing evidence that other acts occurred and that defendant committed the acts).

¶22 Wiles acknowledges that the trial court's failure to make specific findings under Rule 404(c) does not automatically warrant reversal if the record otherwise establishes that the other act evidence meets the requirement of that rule. *See State v. Marshall,* 197 Ariz. 496, 499-500, ¶ 7, 4 P.3d 1039, 1042-43 (App. 2000) (finding trial court's failure to make formal findings under Rule 404(c) harmless). We do not find they warrant reversal in this case. Not only was there sufficient evidence that the acts occurred and that Wiles committed them, as discussed above, the evidence was also admissible under Rule 404(c) as proof that Wiles had a "character trait giving rise to an aberrant sexual propensity" to commit both the sexual conduct

with a minor offenses and the sexual exploitation of a minor offenses. The fact that Wiles possessed pornographic materials depicting adult sexual acts, including intercourse, with young girls between the ages of five and thirteen was relevant and probative of the fact that he had an aberrant sexual propensity that led him to engage in sexual conduct with Carly, a six-year-old. Similarly, the fact that Wiles engaged in sexual conduct with a six-year-old was relevant and probative of the fact that Wiles had an aberrant sexual propensity that led him to possess sexually exploitative materials involving young girls. Severance was thus properly denied on this basis alone. Ariz.R.Crim.P. 13.4(b). It also would have been admissible pursuant to Arizona Rule of Evidence 404(b) to show intent, motive, or knowledge in light of Wiles's claims that his penetration of Carly was accidental or a lie and his claims that someone else had placed the pornographic materials on his computer.

¶23 Nor has Wiles proven any unfair prejudice in this case. Relevant evidence may be excluded if, among other things, "its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury." Ariz.R.Evid. 403. While relevant evidence of other acts logically brings with it some prejudice to a defendant, it is only excludable if it presents a danger of "unfair prejudice." *See, e.g., State v. Mills*, 196 Ariz. 269, 275, ¶ 28, 995 P.2d

705, 711 (App. 1999) (holding that while the prior act evidence was prejudicial, it was not unduly so as it did not suggest a decision on an improper basis).

¶24 We agree with the State that the evidence of guilt in this case was overwhelming. The victim testified at trial about how Wiles had penetrated her vagina with his fingers three separate times despite her repeated efforts to avoid contact with him. The jury was able to judge her credibility as well as Wiles's. *See State v. Reynolds*, 108 Ariz. 541, 543, 503 P.2d 369, 371 (1972) (jurors are the triers of fact and they are free to judge the credibility of all witnesses and draw ultimate conclusions as to disputed facts).

¶25 Regarding the sexual exploitation charges, the State's expert testified that the same hard drive that contained the pornographic materials contained photographs of Wiles as well as scanned copies of his driver's license and his social security card. Wiles's ex-wife testified that Wiles owned the white Gateway computer and that she had seen him looking at pictures of "nude women" on it, both "adults [and] children," when they lived together between 2002 and 2004. Wiles's girlfriend Tonya testified that, to her knowledge, Wiles was the only one who used the white computer when he lived with her between August 2006 and his arrest.

¶26 Furthermore, the trial court in this case properly instructed the jurors that each count charged a "separate and distinct offense" and that they were to "decide each count separately on the evidence with the law applicable to it, uninfluenced by [their] decision on any other count." Jurors are presumed to follow a trial court's instructions. *State v. LeBlanc*, 186 Ariz. 437, 439, 924 P.2d 441, 443 (1996). Our view of the record convinces us that the trial court committed no error, let alone fundamental error, in denying Wiles's motion to sever in this case.

(2) *Admission of Hearsay Evidence/Juror Question*

¶27 Wiles argues that the trial court violated his Sixth Amendment Confrontation Clause rights when it permitted Detective McK. to answer a question from the jury concerning his baiting of Wiles with "hearsay." We review a trial court's ruling on the admission or exclusion of evidence for an abuse of discretion. *State v. Tankersley*, 191 Ariz. 359, 369, ¶ 37, 956 P.2d 486, 496 (1998). We will not reverse a trial court's ruling on issues of the relevance of evidence absent an abuse of its considerable discretion. *State v. Alatorre*, 191 Ariz. 208, 211, ¶ 7, 953 P.2d 1261, 1264 (App. 1998) (citation omitted).

¶28 We review a Confrontation Clause challenge to admissibility de novo. *State v. King*, 213 Ariz. 632, 636, ¶ 15, 146 P.3d 1274, 1278 (App. 2006). Confrontation Clause and

hearsay rule violations are subject to harmless error analysis. *See State v. Bass*, 198 Ariz. 571, 580-81, ¶ 39, 12 P.3d 796, 805-06 (2000) (considering whether admission of evidence that violated hearsay rule and Confrontation Clause was harmless). Our review reveals no abuse of discretion or reversible error in the trial court's ruling.

¶29 During the State's case-in-chief, Detective McK. testified that he used various techniques, such as "rapport building," and "confrontation," when he interviewed suspects. The videotape of McK.'s interview of Wiles was played for the jury while McK. remained on the witness stand.

¶30 After playing the tape, the prosecutor noted that McK. appeared to be trying to give Wiles an opportunity to "explain how something may have happened." In response, McK. explained that he sometimes tried to "minimize conduct" or "place some of the blame on another human being" to "mak[e] [Wiles] a little more likely to tell more" and he also employed "baiting techniques" to elicit comments. When asked by the prosecutor to explain what he intended by "baiting techniques," McK. responded:

> [F]or instance, the jury might have heard me imply [to Wiles]: Well, what if there was injury? Could that type of touch have caused an injury to a child's vaginal area? That's a baiting technique.

> And, in this case, [Wiles] said; Well, yeah. He tried to explain away an injury that could have been present by this accidental touch. So that's what I mean by a baiting technique.

¶31 On cross-examination, defense counsel elicited from McK. the testimony that the baiting technique he employed was actually "tell[ing] little lies" to suspects and that the question McK. had asked concerning vaginal injuries was in fact fabricated because a medical examination of Carly had revealed no injuries.

¶32 Wiles testified at trial and denied that any of the self-incriminating statements he had made to McK. during his interview were true. According to Wiles, those statements were the result of McK.'s "baiting" him and pushing him "rather aggressively" and the fact that McK. had led him to believe if he gave McK. "some kind of explanation" McK. would allow him to go home. Wiles testified that McK. specifically stated, "[i]f you give me an explanation or give me some kind of thing, you can go home today."

¶33 The State recalled McK. to rebut Wiles's testimony that McK. had promised Wiles that he could go home if Wiles "told [him] something" as well as to rebut a prior inconsistent statement Wiles had made about owning a computer.

¶34 Defense counsel then cross-examined McK. at greater length, focusing on the deceptive practices that he employed to

elicit statements. Counsel described some of McK.'s techniques, such as baiting, as giving defendants "false hope" and providing "incentive" for making incriminating statements. He asked, "[i]f you see the bait is working a little bit, you might give them a little more rope[]" to which McK. replied, "[i]f the bait is working, I – you know, he answered the way he did." Counsel then noted:

> What you said *wasn't exactly true*; correct? *Some of the things that you told [Wiles] weren't exactly true?* If he did tell you that Carly was sexualized or something like that, you wouldn't think him, well, not as bad; correct?

The State did not ask any questions of McK. on redirect, however, the jury submitted two questions, one of which was:

> On the interview, you discussed Carly's behavioral changes after this incident. Was this baiting? What changes did Carly exhibit after this incident?

Wiles objected to answering the question, arguing that the question would require McK. to rely on hearsay to answer it and, thus, deprive Wiles of his Sixth Amendment right to confront the person who had actually told McK. about the behavioral changes.

¶35 Before permitting McK. to answer the jury question, the trial court questioned McK. and ascertained that the particular question was not baiting and Carly's teacher and social worker had informed McK. about some behavioral changes in Carly. The State argued that the first part of the question

should be answered because Wiles had "opened the door" by implying that everything McK. had said to Wiles was false, which is "what he wants to be able to argue" in closing. Wiles agreed that his "sideways questions" were due to the fact that he wanted to be able to argue in closing argument that there was no testimony about any behavioral problems.

¶36 The trial court allowed the first part of the jury question over Wiles's objection. It reasoned that the answer was not hearsay because it was not being offered for the truth of the matter asserted but as the result of a tool used to elicit information from Wiles. It also found that the answer was admissible because defense counsel had "opened the door" to it through his repeated examination of McK. -- including counsel's most recent cross-examination -- concerning the fact that McK. had continuously lied to Wiles to "get him to answer certain questions."

¶37 The court then asked McK., "[o]n the interview, you discussed Carly's behavioral changes after this incident. Was this baiting?" McK. replied, [n]o.

¶38 On appeal, Wiles argues this was an abuse of discretion because allowing McK. to reply no permitted McK. to present improperly admitted hearsay that also informed the jury that his comments regarding Carly's behavioral changes were the truth. We disagree.

¶39 Hearsay evidence is defined as "a statement, other than one made by the declarant while testifying at a trial or hearing, offered in evidence to prove the truth of the matter asserted." Ariz.R.Evid. 801(c). In general, hearsay evidence is not admissible except as provided by applicable constitutional provisions, statutes, or rules. Ariz.R.Evid. 802.

¶40 Here, the evidence that McK.'s questioning of Wiles regarding behavioral changes was not baiting is not hearsay because the information was not offered to prove any of the alleged behavioral changes asserted during the interview. Instead, it was simply offered to respond to the question of whether or not McK. had been baiting or lying to Wiles when he asked it. Any inferences to be drawn from that reply was a matter for the jury to consider, but that does not transform the answer itself into hearsay testimony as it was not offered as evidence to prove the truth of any matters asserted.

¶41 Furthermore, we agree with the trial court that defense counsel "opened the door" to the jury question through his sustained questioning of McK. about his deceptive practices in questioning Wiles and the general theory of Wiles's case that any incriminating statements that he may have made were attributable solely to McK.'s overbearing tactics and his use of ruses and deceptions.

¶42 Finding no hearsay violation, we conclude that the trial court did not abuse its discretion in permitting the jury question to be asked and answered. We consequently find no violation of Wiles' Confrontation Clause rights.

¶43 Wiles also complains of the fact that McK. was allowed to go on to "make clear that the technique of baiting involve[d] false information." We note that the comments to which Wiles refers were elicited by defense counsel during his follow-up questioning of McK. Generally, a party who participates in or contributes to an error cannot complain about it. *State v. Islas*, 132 Ariz. 590, 592, 647 P.2d 1188, 1190 (App. 1982). Wiles cannot now complain that the comments were improperly admitted.

(3) *Improper Comment on Truthfulness of Hearsay*

¶44 Wiles also contends that the trial court committed reversible error when it permitted McK. to answer the jury question because it thereby permitted McK. to "give the jury his opinion that [Carly] truly experienced dramatic behavioral changes after the alleged incident." He equates McK.'s answer with "expert or lay evidence concerning the truthfulness of a witness." The State responds that, by failing to raise this issue before the trial court, Wiles has forfeited relief on this issue on appeal unless he can prove that fundamental error occurred.

¶45 We find that Wiles sufficiently raised this issue at trial. Wiles argued to the trial court that part of the problem with allowing McK. to answer was that, in effect, McK. was "going to be testifying to whether the statement [about the behavioral changes] is true." In any case, the issue is moot because we find we no error occurred, fundamental or other. *Lavers*, 168 Ariz. at 385, 814 P.2d at 342.

¶46 First, as we noted, the answer was not hearsay evidence in that it was not offered to prove the truth of Carly's alleged behavioral problems. Furthermore, McK. was never presented to the jury as an expert witness, nor was his response intended as a comment on the credibility of the allegations regarding Carly's behavioral problems or of any persons who may have reported those problems. *See, e.g., State v. Doerr*, 193 Ariz. 56, 63, ¶ 26, 969 P.2d 1168, 1175 (1998) (officer's reasons why he did not believe defendant not intended as comment on defendant credibility; merely officer's reasons for not believing defendant's story). *See also State v. Boggs*, 218 Ariz. 325, 334-35, ¶¶ 37-39, 185 P.3d 111, 120-21 (2008) (finding officers repeated accusations that defendant lying in taped interrogation interview not fundamental error because it was interrogation technique and not made for purpose of giving opinion testimony at trial regarding veracity). McK.'s response did not constitute an opinion on the truthfulness of the

statements about Carly's behavior in this case. Consequently, we find no error in admitting his answer to the jury question on this basis.

CONCLUSION

¶47 For the foregoing reasons, we affirm Wiles' convictions and sentences.

/s/
_____
PATRICK IRVINE, Presiding Judge

CONCURRING:

/s/
_____
MICHAEL J. BROWN, Judge

/s/
_____
DONN KESSLER, Judge