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Commonwealth Of Kentucky

Court of Appeals

NO. 2003-CA-001861-MR

CRYSTAL PLANK — APPELLANT

v.

APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE STEPHEN P. RYAN, JUDGE
ACTION NO. 02-CR-001146

COMMONWEALTH OF KENTUCKY — APPELLEE

OPINION
REVERSING IN PART,
VACATING IN PART,
AND REMANDING

** ** ** ** **

BEFORE: BUCKINGHAM, JOHNSON, AND SCHRODER, JUDGES.

SCHRODER, JUDGE: This is a direct appeal from a judgment in which appellant was convicted of facilitation of first-degree burglary and complicity to second-degree manslaughter. We reverse the facilitation of first-degree burglary conviction because there was no evidence that appellant aided her co-defendant in entering a dwelling or was in immediate flight therefrom when she drove co-defendant back to the area of a prior burglary after co-defendant had already made a safe escape

from that burglary. Due to improper statements made by the Commonwealth in its closing argument constituting prosecutorial misconduct, we vacate the complicity to second-degree manslaughter conviction and remand the case for further proceedings.

On May 7, 2002, appellant, Crystal Plank, who lived in California, was visiting her mother and little brother, Jasper Pollini, in Louisville. Sometime in the early morning hours of May 7, Jasper announced that he was going out to "make some money", which Crystal understood to mean that he was going out to steal. Jasper asked Crystal's boyfriend, Jason Edwards, if he wanted to come along or if he could borrow his car, but Edwards declined on both counts. Jasper then left by himself with a toolbox and proceeded on foot to the home of Brian Murphy. Jasper broke into Murphy's garage and stole a generator and some tools. However, the generator was too heavy to carry home, so he dragged it to the edge of the woods. After being gone for approximately two hours, Jasper returned to his home and asked Edwards if he would drive him back to the area and help him pick up the generator. Edwards agreed and the two proceeded in Edwards' car sometime between 4:00 and 4:30 a.m. to the woods and loaded the generator and tools into the trunk of Edwards' car. At that point, Jasper told Edwards to wait in the car while he checked out some other garages.

Jasper then broke into the garage of Daniel Ziegler's home. Sometime around 5:30 a.m., Ziegler's home alarm system beeped. Ziegler got out of bed to see what triggered the alarm. Ziegler went into his garage (which was attached to the house) and saw a thin white male with brown hair wearing a t-shirt. Ziegler testified that he thought the man had a weapon in his hand. Ziegler could not say for sure what the weapon was, but stated that it could have been a screwdriver. Ziegler told the man to get down or he would "blow his head off". Ziegler then ran into his kitchen, grabbed a carving fork and went back outside in pursuit of the intruder. Ziegler chased Jasper through his yard and down a hill, ultimately losing sight of him when he ran into some nearby woods. Ziegler heard a car drive away, and thereupon returned to his home where he called 911 to report the break-in. After calling 911, Ziegler called his neighbor Byron Pruitt and told him what happened.

Jasper got into Edwards' car and they returned to Jasper's house. The two unloaded the generator and tools out of the car and put them in a barn on the property. Edwards then covered his car with a white cover in order to disguise it. Edwards went into the house and went to sleep. Edwards had not been asleep very long when Jasper woke him and said something about going back to the gravel road because he could not find his toolbox. Edwards declined to take Jasper. At this point

the evidence is disputed as to whether Jasper then asked Crystal if she would take him to the store to get some blunts (cigars) or to get his toolbox back. When she refused, he asked if he could borrow her car. When she again refused, Jasper hounded her until she agreed to take him. According to Jasper's statement to police, it was at this point that Jasper first armed himself with a gun.

After getting into Crystal's car, Jasper told her to drive through their neighbors', the Summerfields', side yard which led to a utility easement. Jasper told Crystal they were taking a shortcut that she had never used before. Once they were through the utility easement, at the next cul-de-sac, Jasper told Crystal to turn right. According to Crystal's testimony at trial, she asked at that point, "What the hell is going on?" Jasper again responded that it was a shortcut. Next, Jasper directed Crystal down a private drive that forked into a gravel road and a blacktop road. Jasper told her to turn left down the gravel road and turn her lights out. According to Crystal's testimony at trial, it was not until this point that Jasper told her that he wanted to retrieve his toolbox from earlier in the evening. As they were driving with the lights out, they saw what appeared to be a man with a flashlight coming toward them on the gravel road. According to Jasper's statement, the man yelled, "Stop or I'll blow your fuckin' heads

off," and Jasper screamed for Crystal to back up. As Crystal was backing up, she heard a gunshot. Crystal testified that when she then looked at Jasper, he pulled a gun into the car through the window. According to Crystal's testimony, she did not know that Jasper had a gun until this time.

Jasper later told police that when he saw the man approaching with a gun, he (Jasper) fired his gun once out the car window only to scare the man. The victim was Byron Pruitt, Dan Ziegler's neighbor, who lived off the gravel road. Pruitt later died of a gunshot wound to the chin. The autopsy revealed that Pruitt had been shot with a 9 mm handgun.

After the shooting, Jasper gave the gun, a 9 mm, to Crystal who concealed it in a shoebox. The following evening, Jasper and Crystal learned from watching the news that the victim of the shooting had died. Jasper then put the 9 mm and another gun in the trunk of Crystal's car. Edwards put a third gun in the trunk. Edwards and Jasper also loaded Crystal's car with the stolen property from the previous evening to get it out of the house. Crystal called her best friend April Wright and told her what had happened. Thereafter, Crystal, Jasper, Edwards, and Jasper's girlfriend, Crystal Sanders, drove to Wright's apartment in two cars. Based on a tip from Jasper's neighbor, the police were watching Jasper's house and followed the cars to Wright's apartment. Once there, the police entered

Wright's apartment and asked Crystal Plank if she would come to the police station and give a statement. She agreed. Lieutenant Steve Green then asked if they had any guns in the apartment, and Crystal told him that the gun was in the trunk of her car.

While investigating the scene of the crime, the police found a red toolbox on a garbage can outside Ziegler's garage. Inside the toolbox was a small paper bag containing less than $5.00 in change. Also, in the vicinity of the shooting, a flashlight, a gun holster, and a .25-caliber pistol which belonged to Pruitt were found.

On May 20, 2002, the Jefferson County Grand Jury returned a two-count indictment charging Jason Edwards, Jasper Pollini, and Crystal Plank with complicity to capital murder (KRS 507.020; KRS 502.020) and complicity to first-degree burglary (KRS 511.020; KRS 502.020). The indictment alleged the intentional or wanton murder of Byron Pruitt, and the burglary of Ziegler's home while armed with a deadly weapon, or threatening use or use of a deadly weapon against Pruitt, or causing physical injury to Pruitt. On August 23, 2002, the Commonwealth filed notice of aggravating circumstances, and notice of intent to prosecute the case as a capital offense.

Prior to Jasper's and Crystal's trial, Edwards pled guilty to facilitation to murder, one count of first-degree

burglary, one count of second-degree burglary, and one count of receiving stolen property over $300. The joint trial of Jasper Pollini and Crystal Plank began on June 4, 2003, and concluded on June 20, 2003. Jasper was found guilty of complicity to murder, first-degree burglary, second-degree burglary and receiving stolen property. Crystal was found guilty of complicity to second-degree manslaughter and facilitation of first-degree burglary. She was sentenced to five years' imprisonment on the burglary conviction and ten years' imprisonment on the manslaughter conviction, to be served concurrently for a total of ten years. This appeal by Crystal followed.

The first issue we shall address is whether the trial court erred in failing to direct a verdict for Crystal on the facilitation of first-degree burglary charge. On motion for directed verdict, the trial court must draw all fair and reasonable inferences from the evidence in favor of the Commonwealth, and if the evidence is sufficient to induce a reasonable juror to believe beyond a reasonable doubt that the defendant is guilty, a directed verdict should not be given. Commonwealth v. Benham, 816 S.W.2d 186 (Ky. 1991). "On appellate review, the test of a directed verdict is, if under the evidence as a whole, it would be clearly unreasonable for a

jury to find guilt, only then the defendant is entitled to a directed verdict of acquittal." Id. at 187.

KRS 511.020(1) provides:

> A person is guilty of burglary in the first degree when, with the intent to commit a crime, he knowingly enters or remains unlawfully in a building, and when in effecting entry or while in the building or in the immediate flight therefrom, he or another participant in the crime:
>
> (a) Is armed with explosives or a deadly weapon; or
>
> (b) Causes physical injury to any person who is not a participant in the crime; or
>
> (c) Uses or threatens the use of a dangerous instrument against any person who is not a participant in the crime.

The instructions given on facilitation to first-degree burglary were as follows:

> You shall find [Crystal Plank] guilty under this Instruction if, and only if, you believe from the evidence beyond a reasonable doubt all of the following:
>
> A. That in this county on or about May 7th, 2002, she transported Jasper Pollini to 7613 Parkridge Trace;
>
> AND
>
> B. That when she did so, she intended to aid Jasper Pollini in the unlawful entry of that building;
>
> AND
>
> C. She knew he did so with the intent to commit a crime therein
>
> AND
>
> D. That while effecting entry, inside the building, or in immediate flight therefrom, Jasper Pollini was armed with a gun.

It is undisputed that when Jasper went back to the area the third time, neither he nor Crystal went into a dwelling. The evidence established that the toolbox which Jasper wanted to retrieve was located outside Ziegler's garage on a garbage can. Nor was there any evidence that the toolbox contained anything that had been stolen from the dwellings that had been burglarized that evening.

Throughout the prosecution of the case the Commonwealth's theory of the case was that when Crystal took Jasper to the gravel road to get his toolbox, that constituted a continuation of the burglary of the Ziegler residence and that when Pruitt was shot, Crystal and Jasper were in "immediate flight" from the burglary. As to what constitutes "immediate flight" pursuant to KRS 511.020(1), the Court in Baker v. Commonwealth, 860 S.W.2d 760, 761 (Ky. 1993), stated:

> We have not found any Kentucky cases defining the precise limits in time and space of "immediate flight." But the provisions of the penal code should be construed "according to the fair import of their terms, to promote justice, and to effect the objects of the law." KRS 500.030.

"Immediate" is defined in WEBSTER'S NEW WORLD DICTIONARY OF THE AMERICAN LANGUAGE 701 (2d college ed. 1978) as, "a) not separated in space; in direct contact; closest; nearest; . . . b) not separated in time; acting or happening at

once; without delay; instant." In Baker, the defendant was adjudged to be in "immediate flight" from a house he had burglarized when he was apprehended three tenths of a mile from the house and fifteen to twenty minutes after leaving the house. In the instant case, Jasper and Crystal were very near the dwelling Jasper had earlier burglarized. Further, according to the times of the 911 calls placed by Mr. Ziegler, approximately sixteen minutes elapsed between the Ziegler break-in and the shooting. However, unlike the facts in Baker, between the time Jasper and Edwards fled the vicinity of the Ziegler break-in and Jasper and Crystal returned to the area, Jasper had made a safe return to his house where he and Edwards unloaded the stolen property. Edwards then covered up his car and Jasper and Crystal returned to the area in a different car. In our view, returning to the scene of a break-in after making a safe escape therefrom could not, as a matter of law, constitute "immediate flight" because the safe return home was a break in the chain of events, separating the burglary in time and space from anything occurring thereafter. See Oggletree v. State of Texas, 851 S.W.2d 367 (Tex.App.-Hous.[1st Dist.], 1993) (defendant held to be in "immediate flight" from robbery when he remained in the vicinity of the robbery without accomplishing a successful escape and returned to the scene a short time later). The "immediate flight" from the Ziegler break-in occurred when

Jasper and Edwards drove back to Jasper's house. At that point, the burglary of the Ziegler home was completed, and any crime that was perpetrated thereafter was a new crime. Accordingly, because there was no evidence that Crystal aided Jasper in entering a dwelling or that they were in immediate flight therefrom,the judgment convicting Plank of facilitation of first-degree burglary is reversed.

We would note that the jury even expressed concern and confusion about the above issue when they asked the court to answer the following question during their deliberations: "By law returning for the toolbox, does this constitute a continuation of the burglary?" The court replied, "You have all the evidence you can consider and all the legal instructions I can give you. Read the instructions carefully so as to make those determinations."

We next turn to Crystal's argument that the trial court should have likewise entered a directed verdict on the charge of complicity to second-degree manslaughter. KRS 507.040 provides that a person is guilty of second-degree manslaughter when "he wantonly causes the death of another person." The complicity statute, KRS 502.020, states as follows:

> (1) A person is guilty of an offense committed by another person when, with the intention of promoting or facilitating the commission of the offense, he:

> (a) Solicits, commands, or engages in a conspiracy with such other person to commit the offense; or
>
> (b) Aids, counsels, or attempts to aid such person in planning or committing the offense; or
>
> (c) Having a legal duty to prevent the commission of the offense, fails to make a proper effort to do so.
>
> (2) When causing a particular result is an element of an offense, a person who acts with the kind of culpability with respect to the result that is sufficient for the commission of the offense is guilty of that offense when he:
>
> (a) Solicits or engages in a conspiracy with another person to engage in the conduct causing such result; or
>
> (b) Aids, counsels, or attempts to aid another person in planning, or engaging in the conduct causing such result; or
>
> (c) Having a legal duty to prevent the conduct causing the result, fails to make a proper effort to do so.

Crystal argues that there was no evidence that she was engaged in a conspiracy to kill Pruitt or that she in any way intended to aid Jasper in killing Pruitt. Subsection (1) of the above complicity statute, which encompasses "complicity to the act", contains the element of intent. Harper v. Commonwealth, 43 S.W.3d 261 (Ky. 2001). "To be guilty under subsection (1) for a crime committed by another, a defendant must have *specifically intended* to promote or facilitate the commission of *that* offense." Id. at 264 (quoting KRS 502.020, Official Commentary). However, under subsection (2), which sets out

"complicity to the result", proof of intent is not necessary. Subsection (2) requires only proof of the state of mind necessary for the alleged offense which produced the result, whether it be intentional, reckless, or wanton. Tharp v. Commonwealth, 40 S.W.3d 356, 360 (Ky. 2000), cert. denied, 534 U.S. 928, 122 S. Ct. 289, 151 L. Ed. 2d 213 (2001).

According to Harper, 43 S.W.3d at 267, to prove that Crystal was guilty of complicity to second-degree manslaughter under KRS 502.020(2), the Commonwealth need only prove: (1) that Jasper killed Pruitt; (2) that Crystal actively participated in Jasper's actions which resulted in Pruitt's death; and (3) that Crystal acted wantonly. It was undisputed that Jasper killed Pruitt. It was also undisputed that Crystal drove Jasper to the scene, was driving the car when Pruitt was shot, drove Jasper back to their house after the shooting, and thereafter hid the gun. We believe proof of those actions was sufficient to show that Crystal actively participated in Jasper's actions which resulted in Pruitt's death. As to proof of a wanton state of mind, KRS 501.020(3) defines "wantonly" as follows:

> A person acts wantonly with respect to a result or to a circumstance described by a statute defining an offense when he is aware of and consciously disregards a substantial and unjustifiable risk that the result will occur or that the circumstance exists. The risk must be of such nature and degree that disregard thereof constitutes a gross deviation from the standard of conduct that

> a reasonable person would observe in the situation.

In viewing the evidence in the light most favorable to the Commonwealth, we believe there was sufficient evidence that a reasonable juror could find that Crystal acted wantonly. See Benham, 816 S.W.2d 186. It is a well settled rule that a conviction may be obtained on circumstantial evidence. Pruitt v. Commonwealth, 490 S.W.2d 486, 488 (Ky. 1972). Although she denied the following, the jury could believe via circumstantial evidence that Crystal knew: she was taking Jasper back to the scene of the burglary; that Jasper had been caught, threatened and chased by a property owner earlier in the evening; and that Jasper had a gun when she took him back to the scene. Crystal was home when Jasper left the first time by himself and each time he came back. Crystal admitted in her statement to police and at trial that she knew Jasper had been out “jacking” or stealing on the night in question. She was also aware that Jasper and Jason had gone back to retrieve stolen property and had unloaded it in her mother’s barn when they got back. It would not be a stretch to believe that Jasper or Jason had likewise informed her that Jasper had been caught, chased and threatened by a property owner. Further, it would not have been unreasonable for a juror to believe that Crystal knew that Jasper was armed with a gun when she took him back to the scene.

In fact, in her statement to police, when asked “did you know that Jason had a, or Jasper had a gun when you all went up there?”, Crystal replied, “I don’t know.”

The evidence as to whether or not Crystal knew that she was taking Jasper to get his toolbox when she first agreed to drive him was conflicting. According to Jasper’s statement and Crystal’s trial testimony, Jasper had asked her to take him to the store to get blunts and she did not know she was taking Jasper to get his toolbox until they were en route to the gravel road. However, in her statement to police, Crystal twice indicated that she knew from the outset that she was taking Jasper to get his toolbox:

> Crystal: . . . And then my brother left again for a little while and then when he came back he asked me to take him to go get the toolbox. . . .
>
> . . .
>
> Det.: . . . Okay, um, do you know where Jason, or, uh, Jasper went when he left the second time, after Jason brought him and he left again, do you have any idea where he went?
>
> Crystal: Probably to get in another garage. I don’t know though. I’m not sure.
>
> Det.: Okay . . .
>
> Crystal: He didn’t tell me.

> Det.: . . . then when he came back he asked you to take him back to get his toolbox, right?
>
> Crystal: Um-hum.

It was undisputed that Crystal drove an unconventional route - through their neighbor's yard and a utility easement - in taking the "shortcut" to their destination. There was also evidence that the gravel road where the shooting took place was a private drive marked with a sign reading "Keep Out".

From all of the above, a reasonable juror could conclude that when Crystal took Jasper back to the scene, Crystal knew there was a substantial and unjustifiable risk that they could be caught and confronted by a property owner, which might result in a violent altercation. And Crystal's disregard of this risk constituted wanton conduct. Accordingly, the trial court did not err in failing to direct a verdict on the complicity to second-degree manslaughter charge.

The next issue we shall address is Crystal's argument that certain statements made by the Commonwealth during its closing argument constituted prosecutorial misconduct which was prejudicial to Crystal. During their closing argument as to Crystal (the Commonwealth made two separate closing arguments, one relative to Crystal's guilt and one relative to Jasper's

guilt, by two different prosecutors), the prosecution stated the following:

> Commonwealth: Only issue is this, depending on which way you decide, you can sign your verdict form. If Ms. Plank go [sic] out that night with Mr. Pollini to get the blunts? Or did she go out to get the toolbox? That's the real issue, and if you decide she went out that night to go get the blunts, find her not guilty. I'm not afraid to say that. My job here is not to secure a conviction of Ms. Plank, I'm proud to say my job here is to do justice.
>
> Plank defense counsel: Objection!
>
> Court: Overruled.
>
> Commonwealth: If you find that she did not go out that night to get the toolbox, find her not guilty. That's the fair thing to do. However, if you find that she did go out that night to get the toolbox, you must find her guilty of complicity to murder and complicity to burglary in the first degree.

Another objection was thereafter made by Crystal's defense counsel and a bench conference ensued. Crystal's defense counsel argued that the above comments were improper as misstatements of the law. The court disagreed, adjudging that that prosecution was merely stating its interpretation of the facts. The court overruled the objection and cautioned Crystal's defense counsel not to object anymore during the Commonwealth's closing argument unless he had a "valid objection".

On appeal, Crystal argues that the Commonwealth's statement - "if you find that she did go out that night to get the toolbox, you must find her guilty of complicity to murder and complicity to burglary in the first degree" – improperly redefined the law for the jury. A prosecution's misstatement of law during closing argument is considered prosecutorial misconduct. Mattingly v. Commonwealth, 878 S.W.2d 797 (Ky.App. 1993). It should be noted that the Commonwealth failed to address this specific issue in their appellate brief. From our review of the trial in this case, we agree with Crystal that the above statement made by the Commonwealth was a misstatement of the law and not simply the Commonwealth's interpretation of the facts.

If the jury believed that Crystal went out that night to take Jasper to get his toolbox, there were other possible conclusions that the jury could have reached relative to Crystal's guilt beyond finding her guilty of complicity to murder and complicity to burglary in the first degree. For instance, if they believed that Crystal took Jasper to get his toolbox without knowing that Jasper had been caught and threatened earlier in the evening or that he had a gun, the jury could have found that her conduct was not wanton (did not constitute complicity to wanton murder or second-degree manslaughter) or was not with the further intent to aid Jasper

in entering a dwelling or in the immediate flight therefrom (did not constitute complicity to burglary). Accordingly, the above statement constituted prosecutorial misconduct. We now must determine whether such error was reversible.

Reversal on grounds of prosecutorial misconduct in a closing argument is warranted only if the conduct is "flagrant" or if each of the following three conditions is satisfied:

> (1) Proof of defendant's guilt is not overwhelming;
> (2) Defense counsel objected; and
> (3) The trial court failed to cure the error with a sufficient admonishment to the jury.

Barnes v. Commonwealth, 91 S.W.3d 564, 568 (Ky. 2002) (quoting United States v. Carroll, 26 F.3d 1380, 1390 (6th Cir. 1994)). As in Barnes, we need not decide whether the misconduct was "flagrant" because each of the above three conditions were met in the present case. Defense counsel objected to the statement at issue during the Commonwealth's closing argument and the trial court overruled the objection, thus precluding an admonition.

The proof of Crystal's guilt was not overwhelming. As discussed earlier, the evidence was conflicting on certain key issues and, depending on which version of facts jurors believed, more than one legal conclusion could be drawn therefrom. Further, Crystal was convicted as an accomplice, and we view the

concept of accomplice liability (especially the concept of "complicity as to the result" as set out in KRS 502.020(2) and the definition thereof submitted in the instructions in this case) to be complicated and sometimes confusing. Accordingly, we deem the prosecutorial misconduct in this case to be reversible error. Thus we vacate the complicity to second-degree manslaughter conviction and remand for further proceedings.

The final issue we will address is relative to the third question asked by the jury during their deliberations. The jury asked four questions during their deliberations. When the first, second, and fourth questions were asked, the court gave notice to all parties and their counsel and, on the record, discussed the questions and answers he was inclined to give. However, when the third question was asked, the court apparently answered the question off the record, without notice to either party or counsel. According to Crystal's counsel, he did not know of the existence of a third question until the trial was over and he discovered the piece of paper containing the question and the answer in the exhibit box. The question was, "Does there exist a transcript of the Plank conversation w/Police? Difficult to locate on tape. If so, can we pls request?" In response to the question, the trial judge wrote, "There's None Available".

It must be noted that during the trial, Crystal's defense counsel had a transcript of Crystal's statement to police prepared and sought to have it admitted as evidence along with the tape of Crystal's statement which was admitted. The court denied admission of the transcript on grounds that defense counsel did not cite adequate legal authority for its admission and/or because the Commonwealth had not had the opportunity to certify the transcript. (The prosecution admitted that they had received the transcript prior to trial, but claimed they had failed to certify it because they were aware that Jasper's counsel opposed the admission of the transcript of Crystal's statement.) The trial court stated that the jury would have the tape of Crystal's statement for its deliberations and they could play it as many times as they wished. It must also be noted that the Commonwealth blew up a portion of this very transcript of Crystal's statement and used it during its closing argument devoted to the case against Crystal.

RCr 9.74 provides:

> No information requested by the jury or any juror after the jury has retired for deliberation shall be given except in open court in the presence of the defendant (unless the defendant is being tried in absentia) and the entire jury, and in the presence of or after reasonable notice to counsel for the parties.

The Commonwealth's position on this issue is that the trial court correctly answered the jury's question (since the transcript of Crystal's statement was not admitted into evidence, it was not available) and thus no information was given to the jury such that the notice requirements of RCr 9.74 would have been invoked. We disagree that the notice requirements of RCr 9.74 were not applicable in this case. In our view, the court's answer, "There's None Available", was itself information given to the jury that required notice to the parties and to counsel. The trial court was most assuredly aware of the desire of Crystal's counsel to have this transcript before the jury and it is very bothersome to this Court that counsel was never even given notice that they had requested the transcript. This is especially true in light of the following: the Commonwealth used a selected portion of this very transcript in its closing argument; there were questions regarding the audibility of the audiotape of Crystal's statement; and dicta in Perdue v. Commonwealth, 916 S.W.2d 148, 155 (Ky. 1996), regarding the jury's access to transcripts of tape recordings. Given our rulings above, however, we need not proceed to an analysis of whether this error warranted reversal in this case.

All of Crystal's remaining arguments are without merit or are rendered moot by our rulings above. For the reasons stated above, the facilitation of the first-degree burglary

conviction is reversed and the complicity to second-degree manslaughter conviction is vacated and the cause remanded for further proceedings consistent with this opinion.

ALL CONCUR.

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