

# Commonwealth Of Kentucky

## Court Of Appeals

NO. 96-CA-2669-MR

HERBERT DUGGER

APPELLANT

v. APPEAL FROM PULASKI CIRCUIT COURT  
HONORABLE WILLIAM T. CAIN, JUDGE  
ACTION NO. 95-CR-0109

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION AFFIRMING IN PART,  
VACATING IN PART, and REMANDING

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BEFORE: GUDGEL, Chief Judge, ABRAMSON, and GUIDUGLI, Judges.

ABRAMSON, JUDGE: Herbert Dugger appeals from a September 22, 1996, judgment of Pulaski Circuit Court convicting him, in accord with a jury verdict, of manslaughter in the second degree (KRS 507.040) and sentencing him to ten years in prison. Dugger was accused of murder for having fatally shot Joseph Bryant. Dugger presented a justification defense and now claims that he was unfairly tried because (1) potential jurors were improperly dismissed from the venire, (2) the trial court made incorrect evidentiary rulings and (3) the trial court failed to direct a verdict in his favor. Dugger also claims that he was unlawfully

denied an opportunity for probation. Having concluded that Dugger was fairly tried, we affirm the portion of the judgment convicting him of manslaughter in the second degree. We are persuaded, however, that Dugger was eligible to be considered for probation and, accordingly, vacate his sentence and remand for re-sentencing after due consideration of that option.

In September 1995, the Pulaski Grand Jury charged Dugger with murder in the April 25, 1995 shooting death of Joseph Bryant. Dugger was then 17 years old and was living in Somerset, Kentucky with his mother, Betty Dugger. At trial both sides acknowledged that Dugger shot Bryant at Betty Dugger's home during an altercation that involved Dugger, his mother, Bryant, and Bryant's girlfriend, Tracy Proffitt. The two sides also agreed that the altercation arose from a dispute over money which Bryant and Proffitt claimed Dugger owed them. There was little agreement on any other aspect of the incident. Because an understanding of the parties' specific testimony is necessary to resolution of the issues presented, we must review the testimony in some detail.

Proffitt testified that on April 23, two days before the shooting, Bryant had loaned Dugger \$40 and that on the night of April 24 or early in the morning of April 25 and again in the afternoon of April 25 she and Bryant had seen Dugger and demanded that he repay the loan. She further testified that between 5:00

and 6:00 pm on April 25 she had returned a phone call from Dugger who told her to come pick-up the money at his house.

Proffitt claimed that she and Bryant went immediately to the Duggers' residence where, soon after Betty Dugger invited them inside, Mrs. Dugger accused them of having beaten Dugger the night before. According to Proffitt, Betty Dugger proceeded to attack Proffitt physically, calling out to her son for help as she did so. According to Proffitt, when Dugger entered the room in response to Mrs. Dugger's call, he was armed with a shotgun which he pointed at Bryant. Proffitt testified that she managed to extricate herself from Mrs. Dugger and that she and Bryant, trying to escape through the kitchen, had passed from the living room into the kitchen, almost to the door, when Dugger shot Bryant in the back. Bryant fell, pulling Proffitt down with him. When they regained their feet Bryant was facing Dugger, who shot him a second time in the abdomen. Bryant fell again, but Proffitt helped him to his feet and out of the house to a neighbor's yard, where he collapsed and remained until an ambulance arrived.

Two police officers testified, the officer who examined the scene, Detective Vito, and the officer ultimately in charge of the investigation, Officer Jones. Detective Vito testified that he found virtually all of the evidence of the shooting in or near the kitchen. The evidence included shotgun wadding, two spent shells, an unspent shell, and blood. He found the unspent

shell in the living room, where he also found an empty styrofoam cup. He found two spent shells in the hallway between the living room and the kitchen, wadding in the same hallway and in the kitchen, and several areas of blood in the kitchen. He found no blood spots or any other sign of a shotgun blast in the living room. Detective Vito also testified that he examined the caller identification device attached to the Duggers' phone and found Tracy Proffitt's phone number recorded therein. Officer Jones testified by avowal concerning the investigation into Bryant's background.

The medical examiner confirmed that Bryant had been shot once in the back and once in the abdomen, but he could not determine which injury had occurred first. He testified that either shot could have caused Bryant's death.

The Commonwealth also called Betty Dugger. She testified that on April 25 when Bryant and Proffitt had appeared at her door, she had been surprised to see them because of an incident between them and Dugger the night before. Before she could elaborate about the alleged incident, she was asked instead to describe the shooting. She testified that she had invited Proffitt and Bryant into her living room, and Proffitt had told her that she had given Herbert some marijuana and wanted either Herbert or Mrs. Dugger to pay for it. Mrs. Dugger refused to pay, and when she threatened to call the police, Proffitt threw soda pop in her face and attacked her. Mrs. Dugger claimed that

she called for Dugger. She also struggled against Proffitt, but as soon as she began to get the better of Proffitt, Bryant joined the attack. He pulled her hair, hit her in the back of the head, and threatened her with a pistol.

While that was happening, Dugger came into the room with the shotgun. He told Bryant to get away from Mrs. Dugger, and, when Bryant did not do so, Dugger shot him. The shot knocked Bryant down, but he immediately got back up, pulled a knife from his pocket, and advanced on Dugger, swearing to kill him. Dugger then shot him again. This shot stunned Bryant, but Proffitt reached him before he fell and helped him to the kitchen where he fell on the table. Proffitt helped him to stand, and the two of them managed to leave the house. Mrs. Dugger also testified, over objection, that Dugger was 17 years old when he shot Bryant and was not enrolled in school.

Dugger was the lone witness for the defense. He testified that he had become acquainted with Proffitt, who was in her thirties, more than a year before the shooting and that his relationship with her had been cordial. She had helped his family when their home was damaged by a fire, and she also regularly made him welcome at her home, where, Dugger claimed, he had often obtained illegal drugs. About a month before the shooting, Proffitt and Bryant had begun to live together. Dugger had encountered Bryant at Proffitt's house and had been

frightened by Bryant's threatening manner and by his sinister tattoos.

Two days before the shooting, Proffitt, in the course of house cleaning, had found a small bag of marijuana. She gave this marijuana to Dugger, which he believed was a gift. The next night, however, when Dugger and a friend stopped by Proffitt's house, Bryant angrily told Dugger that the marijuana had been his and that he wanted \$40 for it. When Dugger explained that he could not pay and tried to leave, Proffitt and Bryant detained him and his friend. They beat him, Dugger claimed, and threatened to cut off his fingers. Dugger eventually escaped and ran all the way home. He told his mother that Bryant and Proffitt were after him and armed himself with the shotgun his mother kept for protection. Mrs. Dugger took the gun from him and called the police, who, apparently, checked for Dugger's friend at Proffitt's house, but found nothing amiss. Mrs. Dugger also took her son to the hospital where he was examined, both physically and mentally, and released.

The next day, Dugger testified, he had gone in the early afternoon to a pool hall in hopes of meeting up with his friend of the previous night. He was waiting outside the building when Proffitt and Bryant drove up. Bryant leapt from the car and came after him. Dugger fled to a store nearby where he met a policeman who gave him a ride home. There, Dugger admitted, he found Proffitt's phone number recorded on his phone's caller identification device. He called that number, he

claimed, and spoke to one of Proffitt's roommates. He denied having spoken to Proffitt on the phone that afternoon and denied having told her to come to his house for the money.

He was in the basement later that day repairing a window, he said, when he heard his mother calling for help. When he arrived upstairs he saw Proffitt and Bryant in the living room beating her. He immediately retrieved and loaded the shotgun, went to the living room, told them to get away from his mother, and shot Bryant. Dugger could not remember where he shot Bryant, but the shot seemed only to stun him momentarily. It knocked him back a step or two, but then Bryant swore and, wielding what Dugger believed was a knife, came at him. Dugger reloaded the single-shot gun as fast as he could and shot again. He was not sure what had happened next. He remembered trying to find the phone to call for help, and he remembered Bryant lying in the kitchen. He claimed that Proffitt removed something from Bryant's pocket, left the house, then returned to help Bryant out the door.

Dugger complains that the trial court failed to enter its reasons for excusing several members of the jury panel, as required by KRS 29A.100, and thus presumptively deprived him of a properly constituted jury. He preserved this error by moving, just prior to voir dire, to dismiss the allegedly tainted panel.

KRS Chapter 29A provides for the selection of grand and petit juries. Section 29A.080 invests the chief circuit judge

with discretion to determine which potential jurors are disqualified from service, and section 29A.100 authorizes the chief circuit judge (or, if appropriate, the trial judge) to excuse jurors "upon a showing of undue hardship, extreme inconvenience or public necessity." KRS 29A.100 further provides that "[w]hen excusing a juror, the judge shall record the juror's name, as provided in KRS 29A.080, and his reasons for granting the excuse." To ensure compliance with these and the other jury selection provisions of KRS Chapter 29A, our Supreme Court has held that, assuming proper preservation, a judge's substantial deviation from the statutory requirements is presumptively prejudicial and necessitates reversal. Minor errors in jury selection, on the other hand, are reversible only upon a showing of actual prejudice. Commonwealth v. Nelson, Ky., 841 S.W.2d 628 (1992); Robertson v. Commonwealth, Ky., 597 S.W.2d 864 (1980).

In Nelson, supra, a substantial deviation from the mandated procedure was found where the chief circuit judge improperly delegated the exercise of discretion to non-judges, and in Robertson, supra, a jury selection procedure significantly at odds with the requirements of KRS 29A.060 and RCr 930(1)(a) was deemed to require reversal even absent a showing of prejudice. In Smith v. Commonwealth, Ky., 734 S.W.2d 437 (1987), however, a judge's minimal noncompliance with the notation requirement in KRS 29A.100 (the same deficiency alleged here) was held not to be a substantial deviation from the jury selection



rules. The Court noted that proper explanations had been recorded next to the names of most of the excused jurors and that no juror had been shown to have been improperly excused.

In light of these precedents, we are not persuaded that Dugger is entitled to relief on this ground. Dugger complains that of ten potential jurors excused (out of 67), the trial court provided explanations for only three. It appears from the record, however, that two of the jurors apparently excused without explanation did, in fact, participate in voir dire. The remaining five jurors excused without explanation were excused, according to the court's notation, only during August of the July-September term. The record does not suggest, and Dugger has not shown, that any of these temporary dismissals was improper. Although it would have been better practice for the trial judge to have explained these absences, his failure to do so was not so egregious an abuse of discretion as to justify reversal absent a showing of prejudice, and Dugger has shown none. In particular he has not shown that any significant group was disproportionately excluded from the jury panel or from his jury. His reliance on authority prohibiting invidious discrimination in jury selection, therefore, is not apt.

Dugger also complains about three of the trial court's evidentiary rulings. The court erred, he maintains, by excluding evidence of the victim's criminal history, by permitting hearsay testimony concerning a phone call the victim's girlfriend

allegedly made to Dugger, and by permitting the Commonwealth to elicit irrelevant testimony that characterized Dugger unfairly.

During cross-examination of Officer Jones (ostensibly to show that the investigation of this matter had not been thorough), Dugger sought to question him concerning the police inquiry into Joe Bryant's criminal record. The trial court permitted Dugger to ask if such an inquiry had been made, but did not allow the introduction of any of the details of Bryant's history. That history, introduced by avowal, consisted of several felony charges and convictions, including convictions for a drug offense and for assault. Dugger claims that his trial was rendered unfair by the exclusion of this evidence of Bryant's criminal record.

Ordinarily in self-defense cases, evidence of specific acts or conduct is not admissible to show the violent character of the deceased. Thompson v. Commonwealth, Ky., 652 S.W.2d 78 (1983) (overruled on other grounds in Shannon v. Commonwealth, Ky., 767 S.W.2d 548 (1988)); Parrish v. Commonwealth, Ky., 581 S.W.2d 560 (1979), U.S. cert. denied at 444 U.S. 966, 100 S. Ct. 454, 62 L. Ed. 2d 378 (1979). If the defendant claiming self-defense was aware of the decedent's reputation for violence, however, or knew of specific violent acts by the decedent, such evidence may be admissible to show the defendant's fear of the victim at the time of the incident. Wilson v. Commonwealth, Ky.

App., 880 S.W.2d 877 (1994) (citing Robert G. Lawson, The Kentucky Evidence Law Handbook (3rd ed. 1993)).

Apparently Bryant's record includes at least one assault conviction and charges or convictions for other offenses that may be characterized as violent. Dugger, however, has not claimed to have known of those offenses at the time of the shooting, a necessary condition for the admissibility of that evidence. The trial court did not err, therefore, by deeming the details of Bryant's criminal history inadmissible as evidence relevant to Dugger's fear of Bryant or of his need for self-defense.

Additionally, Dugger claims that the evidence of Bryant's criminal past was admissible, not to bolster his defense, but to rebut the Commonwealth's case by showing the police investigators' lack of diligence. If we understand Dugger's argument, he claims that if the jury had been made aware of the investigators' dilatoriness in obtaining Bryant's criminal record, it is likewise apt to have attributed the failure to locate the weapons Bryant allegedly wielded during the confrontation with Dugger, as well as other evidence, to the investigators' lack of thoroughness instead of, perhaps, to Dugger's lack of credibility. Dugger notes in this regard that broad scope has been accorded a defendant's right to impeach the witnesses against him.

KRE 404(b) provides for the admission of evidence of a person's crimes or wrongs if offered, not to show action in conformity with a criminal or malicious disposition, but "for some other purpose. . . ." As Dugger notes, evidence of prior crimes, inadmissible for other purposes is sometimes admissible for impeachment. Admissibility under KRE 404, however, is subject to the general rule that relevant evidence "may be excluded if its probative value is substantially outweighed by the danger of undue prejudice, confusion of the issues, or misleading the jury . . ." KRE 403; Haight v. Commonwealth, Ky., 938 S.W.2d 243 (1996). These determinations are assigned to the discretion of the trial judge and may be reversed on appeal only for an abuse thereof. Brock v. Commonwealth, Ky., 947 S.W.2d 24 (1997).

We are not persuaded that the trial court abused its discretion here. The relevance of Bryant's criminal history to the thoroughness of the police investigation is slight. Although Dugger claimed that Bryant was armed, that Tracy Proffitt concealed that evidence, and that the police did not try seriously to find it, he has not suggested that the information in Bryant's criminal record is apt to have led to the discovery of the "missing" evidence or would otherwise have borne directly on the facts of this case. Nor was that evidence necessary for Dugger to substantiate his claim of a lax investigation. If the investigation was truly lax, other evidence was available.

Dugger was permitted to show for example, that the police did not inquire about Bryant's record until they were ordered to do so. Also, in response to a question by Dugger's counsel, Tracy Proffitt testified that the police did not search her following the shooting. Dugger was free to ask what steps the investigators took and why they did not take others. He had a fair opportunity to present this issue to the jury. This line of inquiry would have been so marginally advanced by the admission of Bryant's criminal record, however, that the probative value of that evidence was substantially outweighed by the clear risk of undue prejudice to the Commonwealth. The trial court did not err by so ruling.

Dugger further claims that the trial court erred by admitting into evidence hearsay evidence concerning an alleged phone call from Tracey Proffitt to Dugger. Proffitt testified that on the day of the shooting, not long before it occurred, she and Bryant had gone out to a restaurant. They had encountered Dugger on their way, she said, and had repeated their demand that he pay them for the marijuana. When she and Bryant returned to Proffitt's house, one of Proffitt's roommates told her that Dugger had telephoned. Proffitt claimed to have returned Dugger's call by using a phone company service, "star 69," which recalls the phone number of the last caller to a phone. When she placed a call to the number so provided that evening, she said, Dugger answered and told her that if she wanted the money she

would have to come to his house to get it. Dugger, who denied having talked to Proffitt on the phone and telling her to come to his house, maintains that Proffitt's references to the housemate's message and to the automated phone service were hearsay that should not have been admitted.

Additionally, one of the investigating officers, Detective Vito, testified that in response to information he had received from Proffitt he had checked the "caller identification" device attached to Dugger's phone. "Caller ID," another phone company service, displays for the recipient of a phone call the phone number from which the call is coming and also records that number. Officer Vito said that the Duggers' caller ID device had recorded Tracy Proffitt's phone number, indicating that there had in fact been a call from Proffitt's phone to the Duggers'. Dugger claims that Detective Vito should not have been permitted to testify concerning what Proffitt told him and that his testimony about the caller ID device was tainted by the hearsay.

The alleged statement of Proffitt's roommate, as alluded to by Proffitt, and Proffitt's alleged statement to Detective Vito were hearsay as defined by KRE 801. Those statements were inadmissible, therefore, under KRE 802, unless one of the many exceptions to that rule applied. Detective Vito did not report a particular statement by Proffitt, but said, "based on information received from Tracy Proffitt, I checked the Duggers' caller ID box." The trial court apparently ruled that

Detective Vito's reference to what Proffitt told him was permissible to explain why he examined the Duggers' phone.

Our Supreme Court has held that where the taking of a certain action by a police officer is an issue in the case, "hearsay may be admissible to prove why the police acted in a certain manner, but not to prove the facts given to the officer." Gordon v. Commonwealth, Ky., 916 S.W.2d 176, 179 (1995). Because Detective Vito's examination of the Duggers' phone was not an issue in this case, we are not persuaded that it provided a basis for an exception to the hearsay rule. There was no need for Detective Vito to justify this examination, and he could easily have introduced it without mentioning Proffitt. Nevertheless, we do not believe that Dugger is entitled to relief on this ground. The error here, if any, was minimal and harmless. The hearsay was strictly circumscribed and did not directly implicate Dugger in any criminal activity. Proffitt herself testified to the same effect, moreover, and was subject to cross-examination. RCr 9.24, the harmless error rule, precludes relief in these circumstances. Allgeier v. Commonwealth, Ky., 915 S.W.2d 745 (1996).

For the same reason, Dugger is not entitled to relief because of Proffitt's scant reference to her roommate. Dugger admitted having phoned Proffitt's residence and having spoken with her roommate on the day of the shooting. Proffitt's hearsay testimony merely indicated that her roommate let her know of

Dugger's call; it did not characterize Dugger in any way, include the roommate's actual comments, or suggest what Dugger had said. While it is true that the roommate did not testify, Dugger has not claimed that she was unavailable. Even if the trial court erred by admitting Proffitt's reference to her roommate, therefore, the error was harmless. RCr 9.24.

Finally, we are not persuaded that Proffitt's description of the "star 69" system implicated the hearsay rules, but even if it did, and even if there is a foundational prerequisite for such evidence which the Commonwealth failed to satisfy, Dugger did not adequately preserve the error by objecting specifically on those grounds. Tucker v. Commonwealth, Ky., 916 S.W.2d 181 (1996); Bell v. Commonwealth, Ky., 473 S.W.2d 820 (1971). Furthermore, Dugger's admission that he had phoned Proffitt's residence that day rendered Proffitt's testimony concerning the "star 69" system cumulative and harmless. RCr 9.24.

Dugger next claims that the trial court erred by permitting the Commonwealth to question Dugger's mother concerning the fact that Dugger had left school at age 16. Dugger contends that this testimony was irrelevant and prejudicial in that it tended to characterize him unfavorably.

Dugger correctly insists that irrelevant evidence is inadmissible and that even relevant evidence should be excluded if it is unduly prejudicial. KRE 401-403. Even though its



relevance may be tenuous, however, a limited amount of background evidence is permissible to enable the jury to understand the context and the nature of the alleged crime. Campbell v. Commonwealth, Ky., 788 S.W.2d 260 (1990). In assessing the propriety of such evidence, the trial court must guard against characterizations of either the victim or the defendant apt to inflame or otherwise mislead the jury. Commonwealth v. Johnson, Ky., 777 S.W.2d 876 (1989); Sanborn v. Commonwealth, Ky., 754 S.W.2d 534 (1988). Application of these rules is entrusted to the discretion of the trial court. Dunbar v. Commonwealth, Ky., 809 S.W.2d 852 (1991). We are not persuaded that the trial court abused its discretion here.

Mrs. Dugger's testimony concerning Dugger's age and school status was relevant as background evidence; it shed light on the relationship between Dugger and his mother and helped to provide a context for his interactions with Proffitt and Bryant. The Commonwealth elicited this information during the early, background phase of Mrs. Dugger's testimony without emphasizing that Dugger had left or been removed from school. Furthermore, other evidence, uncontested, established Dugger's age and implied that he was not attending school during the period of these events. We believe that Mrs. Dugger's testimony on these matters was not so prejudicial as to require its exclusion.

Dugger claims that he was entitled to a directed verdict of acquittal. Our Supreme Court has noted that a

defendant relying upon a self-protection defense will rarely be entitled to that result:

Only in the unusual case in which the evidence conclusively establishes justification and all of the elements of self-defense are present is it proper to direct a verdict of not guilty. . . . [I]f there is other evidence from which the jury could reasonably conclude that some element of self-defense is absent, a directed verdict should not be given. While the Commonwealth always bears the burden of proving every element of the crime charged, a defendant relying upon self-defense bears the risk that the jury will not be persuaded of his version of the facts.

West v. Commonwealth, Ky., 780 S.W.2d 600, 601 (1989).

Dugger admitted that he shot Bryant twice, once, he claimed, in defense of his mother and again when Bryant turned his attack against him. The evidence established that Bryant died as a result of these gunshots. The evidence contrary to Dugger's version of the shooting included the testimony of Tracy Proffitt, who denied that Bryant had been armed or had threatened Dugger, and who claimed that Dugger had shot him as she and Bryant were attempting to leave Dugger's house. Other contrary evidence was the fact that there was no evidence of the shooting--no blood spots and no signs of the shotgun blasts--in the room where Dugger claimed the shooting occurred and the fact that the weapons Bryant allegedly brandished were not discovered. Finally, Dugger admitted that he had wanted to shoot Bryant the previous night and that he was under the influence of marijuana at the time of the shooting or had been shortly before. Dugger's

assertion notwithstanding, this countervailing evidence is sufficient to support a reasonable belief that Dugger did not act in self-defense and so justified the denial of his directed verdict motions. Commonwealth v. Benham, Ky., 816 S.W.2d 186 (1991).

Finally, Dugger claims that because he was a juvenile at the time of the offense, it was palpable error for the trial court not to consider him for probation. The trial court ruled that KRS 635.020(4) required that Dugger be treated as an adult for all aspects of sentencing, and so applied the provision of KRS 533.060 which disqualifies firearms offenders from eligibility for probation to Dugger's case. Our Supreme Court has recently addressed this issue as follows:

KRS 635.020(4) does not create a new category of adult offender that precludes children transferred to circuit court pursuant to it from eligibility for the ameliorative provisions of KRS 640.040. Rather, . . . that subsection(4) of KRS 635.020 was designed merely to facilitate transfer of juveniles accused of committing a felony with a firearm to the circuit court by bypassing the proof required under KRS 640.010.

Britt v. Commonwealth, Ky., 965 S.W.2d 147 (1998). Among the ameliorative provisions of KRS 640.040 is preservation, KRS 533.060 notwithstanding, of a youthful offender's right to be considered for probation.

Britt renders the trial court's construction of KRS 635.020(4) palpably erroneous, but because Dugger did not preserve this issue (in fact he concurred in the trial court's

reading of the statute), we can address it only if the error has resulted in a manifest injustice, one so serious that Dugger is entitled to relief despite his failure to object. We believe that relief is necessary.

The General Assembly has provided for individualized criminal sentencing. In accord with this legislative intention, our Supreme Court has held that the validity of a sentence depends not only upon its not exceeding the range of authorized penalties, but also upon the trial court's compliance with sentencing procedure, such as having pre-sentence reports prepared and considering, in most instances, an array of sentencing alternatives. KRS 532.050; KRS Chapter 533; KRS 640.040; RCr 11.02; Hughes v. Commonwealth, Ky., 875 S.W.2d 99 (1994); Edmonson v. Commonwealth, Ky., 725 S.W.2d 595 (1987); Wellman v. Commonwealth, Ky., 694 S.W.2d 696 (1985). Because Dugger was improperly denied an opportunity to be considered for probation, his sentence is invalid and must be reassessed. We do not believe that Dugger's good-faith interpretation of KRS 635.020(4) before the trial court precludes this result. Contrary to the Commonwealth's assertions, Dugger's trial counsel's agreement with the trial court that Dugger did not have a right to be considered for probation was not a strategic maneuver which he now would disavow, nor was it a typical waiver, which is the voluntary relinquishment of a known right. Rather, it was an instance of dealing candidly with the trial court, as

required by our Supreme Court Rules (SCR 3.1, 3.3), and should not be needlessly penalized.

For these reasons we affirm the September 22, 1996 judgment of Pulaski Circuit Court as to Dugger's conviction, but vacate his sentence and remand for resentencing in accord with this opinion.

ALL CONCUR.

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