Rel: August 14, 2020

ALABAMA COURT OF CRIMINAL APPEALS

OCTOBER TERM, 2019-2020

CR-19-0157

Jon Rodney Bowden

v.

State of Alabama

Appeal from Jefferson Circuit Court
(CC-18-2373)

KELLUM, Judge.

Jon Rodney Bowden was convicted of intentional murder in connection with the murder of Theresa Lynn Miller. See § 13A-6-2(a)(1), Ala. Code 1975. The trial court sentenced him, as

a habitual felony offender, to life imprisonment without the possibility of parole.

The evidence adduced at trial indicated the following. In early 2017, Miller and Bowden began dating. Bowden moved in with Miller later that year. Donald Vargas, a friend of Miller's, testified that, on one occasion when he and Miller got together for lunch, he noticed that Miller "had a black eye and she had some bruises on her arms, and stuff." (R. 196.) Barbara Snider, Miller's mother, also testified that she had noticed Miller with a black eye and "bruises up and down her arms." (R. 111.) Snider further testified that Miller had telephoned her one day and told her about an incident between Miller and Bowden that had occurred a few weeks earlier. According to Snider, Miller said:

> "'Well, I want you to know that I ended up cutting [Bowden] on the arm with a knife because he was hitting me in the head, and I told him that if he came at me 1 more time ... If he came at me 1 more time that I was going to cut him, and he did it ... I could have stuck it right in his chest, Mom, but I didn't. I just cut his arm to get him away from me. The minute I did, I put a tourniquet on it and I took him to the hospital.'"

(R. 113-14.)

Snider last saw Miller the night of Friday, March 16, 2018. She and Miller's three daughters, who were living with Miller's ex-husband, were supposed to meet Miller for dinner at 6 p.m. and were at the restaurant when Snider received a text message from Miller that said "'I'm sorry, Mom, I can't come. [Bowden] showed up.'" (R. 115.) Snider said that, at that point, Bowden was no longer living with Miller but would often spend the night with her. After dinner, Snider and Miller's children took food to Miller at her home in Gardendale, and Snider told Miller that she was afraid that Bowden would kill Miller or that Miller would be forced to kill Bowden. Miller's oldest daughter was also afraid for Miller and tried to convince her to leave with them, but she refused. Miller told her daughters and Snider not to worry about her because she could take care of herself, and she told them that she would see them the following morning.

When Miller did not show up the next morning and Snider was unable to contact her, Snider "started feeling something was amiss." (R. 117.) Snider told her husband, Mark, that she was afraid that Bowden had hurt Miller, and Mark agreed to go to Miller's house to check on her when he got off work at 4

p.m. When Mark arrived at Miller's house, Miller's pick-up truck was not in the driveway, and he assumed she was not home. Before he could even get out of his vehicle to check, however, Bowden came out of the house and told Mark that he and Miller were "'finished'' and that he would be "'gone [by] Monday.'" (R. 131.) Mark, who said that he did not have a good relationship with Bowden, told Bowden that he would be back on Monday to make sure Bowden was gone. Mark then left.

When they still had not heard from Miller by Sunday, March 18, 2018, Snider, Mark, and Miller's daughters went to Miller's house to check on her. Miller's pick-up truck was, again, not in the driveway, the house was locked, and they received no response when they knocked on the door. Gardendale police officer Arthur Culpepper happened to be driving down the street at the time, and Snider flagged him down, telling him that she was worried about her daughter. When Off. Culpepper indicated that he could not enter the house, Mark went to the back of the house, removed the glass from the back door, entered, and then let Snider in through the side door. Snider and Mark searched the house. In one of the bedrooms, they saw what appeared to be a pile a blankets

in the middle of the floor, but when Mark pulled them back, they found Miller's body. Snider "screamed and was wailing ... [and] crying." (R. 138.) Upon hearing Snider scream, Off. Culpepper entered the house, escorted Snider and Mark outside, and then secured the scene until additional officers arrived.

At the scene, officers found an aluminum baseball bat with what appeared to be blood and hair on it. Subsequent testing confirmed that the blood on the bat contained Miller's DNA. In the master bedroom, a kitchen knife was on the nightstand; Miller's DNA was found on the handle of the knife. The bed was stripped and there was a large stain that appeared to be blood on the mattress, a pool of what appeared to be blood on the floor next to the bed, and what appeared to be blood spatter on the headboard, wall, and blinds near the bed. There were also bloody "drag marks" on the floor leading from the master bedroom to the bedroom where Miller's body was found. (R. 154.) On the kitchen table, there was a notepad with a 10-page note written by Bowden; some of the pages had what appeared to be bloodstains on them.

The note indicated that it had been written over the course of two days -- Saturday, March 17, 2018, and Sunday, March 18, 2018. On Saturday, Bowden wrote that his and Miller's relationship was plagued with "tons of issues that was bound for trouble" (State's Exhibit 7); that Miller constantly reminded him of his issues; and that "[s]he didn't deserve this at all, but she just wouldn't shut her mouth, and [he] simply lost it." (State's exhibits 7-8.)[1] Bowden wrote that, during the evening of Friday, March 16, 2018, Miller told him that she was going to cut his throat while he slept and that he could not sleep that night because he was scared, and that, when Miller woke around 5:30 a.m. on Saturday, March 17, 2018, to use the bathroom, she "wouldn't shut up and [he] sn[ap]ped. It happened so quick that it was over before it started [and he] decided to just take [his own] life." (State's Exhibit 9.) Bowden said that "[t]he thought of killing her only entered [his] mind around 5:30-6." (State's Exhibit 12.) Bowden also said that he was going to purchase and use $200 worth of drugs to end his life; that he "[n]ever"

[1]Each page of the note was photographed separately and those photographs were introduced into evidence at trial as separate exhibits.

thought he "could hurt her like this" (State's Exhibits 11-12); that it was his fault, not hers; that he was sorry for Miller's children but that Miller had "hurt [him] with her verbal abuse daily [and they] were toxic" together (State's Exhibit 13); and that, approximately two months earlier, Miller had "cut" him and he was "surprised that [he] didn't lose complete control that night." (State's Exhibits 13-14.) Bowden apologized "[t]o everyone on [his] side of the family that gave up on" him and said "that also played a role in this decision." (State's Exhibit 13.) On Sunday, Bowden wrote that his attempt to overdose had not been successful and that his "DNA is all over" (State's Exhibit 15); he reiterated that he had "just snapped after so much mental [sic] [because] anybody that knows [Miller] knows that her mouth is sometimes more than anyone can handle" (State's Exhibits 15-16); and he said that his "intentions weren't to hurt her at all." (State's Exhibit 16.)

Dr. Daniel Atherton, a forensic pathologist, performed the autopsy on Miller. Miller's blood-alcohol level was 0.19 grams per deciliter. Dr. Atherton testified that Miller had at least three blunt-force injuries to the left side of her

head and two contusions on her right elbow. The injuries to Miller's head lacerated the skin, fractured her skull, and resulted in brain hemorrhaging. The blows to her head were so forceful that the fractures to her skull radiated from the left side of her head across the back, top, and front of the skull to the right side of her head. Dr. Atherton testified that all three of the injuries to Miller's head were "very severe" and that any of the blows likely would have been "immediately incapacitating," rendering Miller unable to move after the first blow. (R. 270.) Dr. Atherton opined that the cause of Miller's death was blunt-force injuries to the head and that the manner of death was homicide.

Bowden fled the scene on Sunday, March 18, 2018, before Miller's body was found. During their investigation, police obtained a telephone number they believed was associated with someone who was friends with Bowden. They called the number, and a person they believed to be Bowden hung up on them, but they were able to trace the call and find the location of the telephone. They went to that location and, after speaking with the owner of the telephone, began searching a nearby

wooded area using tracking dogs. Approximately 12 hours later, Bowden was apprehended.

Bowden testified on his own behalf that he had hit Miller only to defend himself when she lunged at him with a knife. Bowden testified that the night before her death, Miller was intoxicated, was acting erratically, was verbally abusing him, and was throwing things at him. When they woke the following morning, Bowden said, Miller continued verbally abusing him, and they argued while in bed. According to Bowden, Miller lunged at him with a knife that had been on the nightstand next to her and he jumped off the bed and grabbed a baseball bat that was in the corner of the bedroom. When Miller lunged at him a second time, Bowden said, he hit Miller in the head with the baseball bat. He did not dispute Dr. Atherton's testimony that he hit Miller three times. Bowden said that Miller was still holding the knife when he hit her and that, after he killed her, he "must have" removed the knife and placed it back on the nightstand where the police later found it. (R. 360.) After he killed Miller, Bowden wrapped her in bedding from their bed and dragged her body to another room. He then left Miller's house and purchased and injected a large

quantity of heroin in an attempt to overdose but was unsuccessful. Bowden admitted that he did not telephone emergency 911 after he hit Miller and that he had lied to Mark when Mark stopped by Miller's house on Saturday afternoon, telling Mark that Miller was not home.

Bowden testified that he was a drug addict and that, although his addiction began with prescription medication, it had devolved to the use of illegal narcotics. Bowden also said that Miller was addicted to alcohol. Bowden admitted that he relied on Miller for a place to stay and for money to buy drugs. According to Bowden, he and Miller "got along great" when they were sober, but when they were both impaired they argued and Miller was verbally abusive. (R. 294.) Over time, Bowden said, their arguments escalated and sometimes became physical and "it's definitely not anything I'm proud of." (R. 294.) Bowden stated that, during one verbal argument a few weeks before Miller died, Miller had grabbed a knife and stabbed him in the arm, after which she took him to the hospital for treatment.

After both sides rested and the trial court instructed the jury on the applicable principles of law, including self-

defense and the lesser-included offense of provocation (heat-of-passion) manslaughter,[2] the jury found Bowden guilty of intentional murder as charged in the indictment. This appeal followed.

Although Bowden raises several issues on appeal, because of our disposition of this case we need address only two of those issues. Bowden contends that the trial court erred in overruling his objection and allowing Snider to testify to Miller's statement to her that she had previously stabbed Bowden in self-defense because Bowden had been hitting her. Bowden argues, as he did at trial, that Miller's statement to Snider was inadmissible hearsay and did not fall within any exception to the hearsay rule. The State did not dispute that it was offering Miller's statement to Snider for the truth of the matter asserted, i.e., that Miller had stabbed Bowden in self-defense because Bowden had been hitting her, and that it was therefore hearsay. The State argued, however, that the statement fell within the state-of-mind exception to the

[2]Provocation (heat-of-passion) manslaughter "'is designed to cover those situations where the jury does not believe a defendant is guilty of murder but also does not believe the killing was totally justified by self-defense.'" Williams v. State, 675 So. 2d 537, 541 (Ala. Crim. App. 1996) (quoting Schultz v. State, 480 So. 2d 73, 76 (Ala. Crim. App. 1985)).

hearsay rule, see Rule 803(3), Ala. R. Evid.; the trial court overruled Bowden's objection and admitted it under that exception.

"'Hearsay' is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." Rule 801(c), Ala. R. Evid. Hearsay is generally not admissible unless it falls within one of the exceptions in Rules 803 and 804, Ala. R. Evid. See Rule 802, Ala. R. Evid. ("Hearsay is not admissible except as provided by these rules, or by other rules adopted by the Supreme Court of Alabama or by statute.") Rule 803(3), Ala. R. Evid., provides an exception to the hearsay rule for

> "[a] statement of the declarant's then existing state of mind, emotion, sensation, or physical condition (such as intent, plan, motive, design, mental feeling, pain, and bodily health), but not including a statement of memory or belief to prove the fact remembered or believed unless it relates to the execution, revocation, identification, or terms of declarant's will."

(Emphasis added.) Here, according to Snider, Miller had telephoned her and told her about the stabbing a couple of weeks after it had happened. Thus, it is clear that Miller's statement to Snider was a statement of memory or belief, not

a statement of her then existing state of mind, and did not fall within Rule 803(3).

We note that the State concedes on appeal that Miller's statement to Snider was hearsay and, specifically, that it did not fall within the purview of Rule 803(3), but it argues that the statement was nonetheless properly admitted under Rule 404(b), Ala. R. Evid., to show Bowden's intent and motive. See, e.g., Boyle v. State, 154 So. 3d 171, 211 (Ala. Crim. App. 2013) ("Alabama has long held that in a murder trial prior acts of violence or cruelty to the victim are admissible to show intent and motive."), overruled on other grounds by Towles v. State, 263 So. 3d 1076 (Ala. Crim. App. 2018). However, merely because the statement may have been relevant and admissible under Rule 404(b) does not make it admissible under the hearsay rule. See Ex parte Baker, 906 So. 2d 277 (Ala. 2004) (holding that testimony from several witnesses about out-of-court statements the victim had made to them describing prior altercations between her and the accused, although relevant to show the accused's intent to terrorize, an essential element of the charged offense of capital murder during a kidnapping, was inadmissible hearsay that did not

fall within the state-of-mind exception to the hearsay rule); and Laney v. State, 643 So. 2d 1024 (Ala. Crim. App. 1994) (holding that testimony from a witness about an out-of-court statement the victim had made to her describing prior altercations with the accused, although relevant to the show the accused's intent in entering the victim's apartment, an essential element of the charged offense of burglary, was inadmissible hearsay that did not fall within any exception to the hearsay rule). Indeed, the Alabama Supreme Court has recognized that "[s]tatements made by a homicide victim introduced for the purpose of showing the intent of the accused do not fall within an exception to the hearsay rule." Ex parte Bryars, 456 So. 2d 1136, 1138 (Ala. 1984). Therefore, Miller's out-of-court statement to Snider was inadmissible.

Bowden also contends that, once the trial court admitted Miller's statement to Snider about the stabbing, it further erred in refusing to allow him to impeach that statement under Rule 806, Ala. R. Evid., with a prior inconsistent statement Miller had made about the stabbing to medical personnel when she had taken Bowden to the hospital for treatment. Bowden

sought to introduce his medical records relating to the stabbing and, although the trial court ruled that the records were generally admissible, the trial court, over Bowden's objection, ordered Bowden to redact from those records Miller's statement to medical personnel that the stabbing was the result of a "'drug deal gone bad.'"[3] (Court's Exhibit 1.)

Rule 806 provides, in relevant part:

> "When a hearsay statement, or a statement described in Rule 801(d)(2)(C), (D), or (E), has been admitted in evidence, the credibility of the declarant may be attacked, and if attacked may be supported, by any evidence which would be admissible for those purposes if the declarant had testified as a witness. Evidence of a statement or conduct by the declarant at any time, inconsistent with the declarant's hearsay statement, is not subject to any requirement that the declarant must have been confronted with the circumstances of the statement or afforded an opportunity to admit or deny the statement."

"Alabama case law has long embraced the Rule 806 concept that one may impeach an unavailable hearsay declarant as if that declarant had appeared as a witness in the present trial." Advisory Committee's Notes to Rule 806. This is so because "[w]hen [hearsay] statements of unavailable or nontestifying

[3]The medical records do not refer to Miller by name. Rather, they refer to Bowden's "significant other." (Court's Exhibit 1.) However, there is no dispute that the "significant other" was Miller.

declarants are admitted, the declarant is just as much a witness against the objecting party as if the declarant were orally testifying." Id.

On appeal, the State does not dispute that Rule 806 permits impeachment of a hearsay statement with a prior inconsistent statement made by the declarant. However, it argues that the trial court properly excluded the statement in this case under Rule 403, Ala. R. Evid., because, it says, the probative value of the statement was far outweighed by the danger of unfair prejudice to Bowden.[4] Specifically, the State asserts that Miller's statement to medical personnel had little probative value because Bowden's medical records also showed that he had told medical personnel that he had cut himself when he fell and hit a wall, which was inconsistent

[4]We note that the State does not argue that allowing Bowden to impeach Miller's out-of-court statement to Snider with her inconsistent statement to medical personnel would have prejudiced its case. Bowden points out in his reply brief that "the typical application of [Rule 403] requires a determination of whether the offered impeachment evidence prejudices the party it is offered against and not the party seeking to admit the impeachment evidence." (Bowden's reply brief, p. 12; emphasis added.) For purposes of this opinion, we assume, without deciding, that Rule 403 permits the exclusion of evidence offered by a party on the ground that the probative value of the evidence is outweighed by the danger of unfair prejudice to the party offering the evidence.

with his testimony at trial that Miller had stabbed him. The State further asserts that the statement was highly prejudicial because it suggested that Bowden was "a violent drug abuser." (State's brief, p. 22.)

Contrary to the State's belief, the fact that Bowden's medical records showed that he had made a statement to medical personnel that was inconsistent with his trial testimony has no bearing on the probative value of Miller's statement to medical personnel, especially in light of the fact that Bowden's inconsistent statement was not redacted from his medical records before they were introduced into evidence. In this case, the only issue before the jury was whether Bowden had acted in self-defense or heat of passion when he killed Miller. The fact that Miller had previously stabbed Bowden supported his claim that Miller had lunged at him with a knife and that he had killed her in self-defense or heat of passion while Miller's out-of-court statement to Snider that she had stabbed Bowden in self-defense not only tended to rebut Bowden's version of the stabbing but also tended to rebut Bowden's claim of self-defense by suggesting that Miller would not have attacked Bowden with a knife unless Bowden was the

initial aggressor. Thus, Miller's inconsistent statement to medical personnel that Bowden had been stabbed during a drug deal was highly probative as impeachment because it called into question the veracity of Miller's statement to Snider that she had stabbed Bowden in self-defense. Moreover, although we agree with the State that Miller's statement to medical personnel suggested that Bowden was a drug addict, Bowden's being stabbed during a drug deal does not necessarily suggest that Bowden was violent, only that the person who stabbed him was violent. In any event, Bowden's own testimony at trial painted him in that same light, thus limiting the prejudicial effect of Miller's statement to medical personnel. Bowden admitted at trial that he was a drug addict; that he purchased illegal drugs off the street; and that he had had physical altercations with Miller. Under these circumstances, we cannot say that the probative value of Miller's statement to medical personnel was outweighed by its prejudicial effect.

We note that, in excluding Miller's statement to medical personnel, the trial court also expressed concern that the statement was not relevant to any issue in the case and that it might confuse the jury. However, Bowden offered Miller's

statement to medical personnel as impeachment evidence, not as substantive evidence. See, e.g., Varner v. State, 497 So. 2d 1135, 1137 (Ala. Crim. App. 1986) ("[P]rior inconsistent statements of a witness may be used to impeach the credibility of the witness but, generally, may not be considered as substantive evidence."). "Impeachment evidence is evidence that undermines the credibility of a witness; as such, it need not be relevant or material to the issues in the case." Ex parte Willimon, [Ms. 1180439, January 24, 2020] ___ So. 3d ___, ___ (Ala. 2020). Moreover, had Bowden been permitted to introduce Miller's statement to medical personnel as impeachment, he would have been entitled to a limiting instruction, if requested, that the jury could consider the statement only as impeachment, which would have been sufficient to eradicate any confusion on the part of the jury on how it could consider the statement. Cf. Sheffield v. State, 87 So. 3d 607, 636 (Ala. Crim. App. 2010) ("[T]he trial court does not have a duty, sua sponte, to inform the jury that evidence of inconsistent statements may be considered only for the purpose of impeaching a witness's credibility.

... Instead, counsel must request any cautionary or limiting instructions.").

Because Miller's out-of-court statement to Snider that she had previously stabbed Bowden in self-defense was inadmissible hearsay, the trial court erred in allowing it into evidence and, once the trial court admitted Miller's out-of-court statement to Snider, it further erred in refusing to allow Bowden to impeach that statement with Miller's prior inconsistent statement to medical personnel. Moreover, under the circumstances in this case, we agree with Bowden that those errors were not harmless. Rule 45, Ala. R. App. P., provides:

> "No judgment may be reversed or set aside, nor new trial granted in any civil or criminal case on the ground of misdirection of the jury, the giving or refusal of special charges or the improper admission or rejection of evidence, nor for error as to any matter of pleading or procedure, unless in the opinion of the court to which the appeal is taken or application is made, after an examination of the entire cause, it should appear that the error complained of has probably injuriously affected substantial rights of the parties."

"The purpose of the harmless error rule is to avoid setting aside a conviction or sentence for small errors or defects that have little, if any, likelihood of changing the result of

the trial or sentencing." Davis v. State, 718 So. 2d 1148, 1164 (Ala. Crim. App. 1995), aff'd, 718 So. 2d 1166 (Ala. 1998).

With respect to the improper admission of evidence, "the harmless error rule excuses the error of admitting inadmissible evidence only [if] the evidence was so innocuous or cumulative that it could not have contributed substantially to the adverse verdict." Ex parte Baker, 906 So. 2d 277, 284 (Ala. 2004). "'The question is whether there is a reasonable probability that the evidence complained of might have contributed to the conviction.'" Id. at 287 (quoting Fahy v. Connecticut, 375 U.S. 85, 86-87 (1963)). With respect to the "improper denial of a defendant's opportunity to impeach a witness ... [t]he correct inquiry is whether, assuming that the damaging potential of the cross-examination were fully realized, a reviewing court might nonetheless say that the error was harmless beyond a reasonable doubt." Delaware v. Van Arsdall, 475 U.S. 673, 684 (1986). In determining whether the admission or exclusion of evidence, including impeachment evidence, is harmless, we consider a myriad of factors, such as the importance of the evidence to the party's case, whether

the evidence was cumulative, the presence or absence of evidence corroborating or contradicting the evidence, the extent of cross-examination and/or impeachment otherwise permitted, and the strength of the prosecution's case. See Van Arsdall, 475 U.S. at 684; and Featherston v. State, 849 So. 2d 217, 222 (Ala. 2002).

It is well settled that "the burden is on the State to prove beyond a reasonable doubt that the defendant did not act in self-defense," Smith v. State, 279 So. 3d 1199, 1205 (Ala. Crim. App. 2018), and "'to prove beyond a reasonable doubt the absence of the heat of passion on sudden provocation.'" Ex parte McGriff, 908 So. 2d 1024, 1033 (Ala. 2004) (quoting Mullaney v. Wilbur, 421 U.S. 684, 704 (1975)). As already noted, there was no dispute that Bowden killed Miller; the only issue in this case was whether he had done so in self-defense or heat of passion. The statements at issue here were clearly important to both parties on that critical issue. Not only was Miller's statement to Snider about her stabbing Bowden the only evidence the State presented about that stabbing, but without Miller's statement that she had stabbed Bowden in self-defense, evidence of the prior stabbing would

have been of little value to the State's case and, in fact, would have supported Bowden's claim of self-defense or heat of passion. Miller's statement that she had stabbed Bowden in self-defense, however, tended to rebut Bowden's claim that he had acted in self-defense or heat of passion when he killed her, which, in turn, made it all the more important for Bowden to have the opportunity to impeach that statement with Miller's prior inconsistent statement to medical personnel. Additionally, Miller's statement to Snider rebutted Bowden's own version of the stabbing that Miller had grabbed a knife and stabbed him while they had been arguing. As the trial court noted, "which version" of the stabbing to believe was for the jury to determine. (R. 52.) "'[W]here, as here, the outcome hinges largely on the credibility of the witnesses, evidence concerning credibility is particularly important.'" State v. Larkin, 206 Vt. 535, 544, 183 A.3d 589, 596 (2018) (quoting State v. Covell, 146 Vt. 338, 341, 503 A.2d 542, 545 (1985)).

Moreover, neither of Miller's statements was cumulative to other evidence; other than Bowden's own version of the stabbing, there was otherwise no evidence presented about the

stabbing. Because Miller's out-of-court statement that she had stabbed Bowden in self-defense was hearsay, there was also no other cross-examination, and Miller's prior inconsistent statement to medical personnel was the only opportunity for Bowden to impeach the statement.

Finally, to the extent that Bowden admitted that he had killed Miller, the State's case could be considered strong. However, as already explained, the issue in this case was not whether Bowden had killed Miller but whether he had done so in self-defense or heat of passion. Although there was evidence other than Miller's out-of-court statement that she had stabbed Bowden in self-defense that tended to rebut Bowden's claim of self-defense or heat of passion -- such as Bowden's removing the knife from Miller's hand, dragging her body to another room, and fleeing, actions that are not consistent with someone who acted in self-defense or out of heat of passion -- that evidence was not so strong and cogent as to render innocuous the admission of Miller's out-of-court statement to Snider or to allow us to conclude that the trial court's refusal to allow Bowden to impeach that statement was harmless beyond a reasonable doubt. Simply put, under the

specific facts and circumstances in this case, we cannot say that the trial court's errors in allowing the admission of Miller's out-of-court statement to Snider about the stabbing and then refusing to allow Bowden to impeach that statement did not contribute to the jury's rejecting Bowden's claim that he acted in self-defense or heat of passion or that those errors were harmless beyond a reasonable doubt.

Based on the foregoing, the judgment of the trial court is reversed and this cause remanded for proceedings consistent with this opinion.

REVERSED AND REMANDED.

Windom, P.J., and McCool, Cole, and Minor, JJ., concur.