2018 IL App (3d) 170050-U

Order filed May 24, 2018

IN THE

APPELLATE COURT OF ILLINOIS

THIRD DISTRICT

2018

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the Circuit Court
	)	of the 21st Judicial Circuit,
	)	Kankakee County, Illinois,
Plaintiff-Appellee,	)	
	)	Appeal No. 3-17-0050
v.	)	Circuit No. 99-CF-338
	)	
TERRENCE D. HAYNES,	)	Honorable
	)	Kathy S. Bradshaw-Elliott,
Defendant-Appellant.	)	Judge, Presiding.

JUSTICE LYTTON delivered the judgment of the court.
Presiding Justice Carter and Justice McDade concurred in the judgment.

ORDER

¶ 1 *Held*: Testimony of additional witnesses was newly discovered evidence warranting a new trial.

¶ 2 Defendant Terrence D. Haynes appeals the denial of his third postconviction petition. In August of 2000, defendant was convicted of first degree murder and sentenced to 45 years in prison. Defendant's conviction and sentence were affirmed by this court in 2011. *People v. Haynes*, 2011 IL App (3rd) 090513-U (unpublished under Supreme Court Rule 23). Defendant's first two petitions for relief from judgment were dismissed by the trial court, one was affirmed

on appeal (*People v. Haynes*, 2013 IL App (3d) 100758-U) and the second was dismissed on motion by defendant. The third petition, the postconviction petition at issue in this appeal, alleged actual innocence based on newly discovered eyewitness testimony and a due process violation by the State's subornation of perjury by a key witness at trial. The trial court denied the petition following an evidentiary hearing. We reverse and grant defendant a new trial.

¶ 3 BACKGROUND

¶ 4 On May 27, 1999, defendant shot and killed Cezaire Murrell on the front porch of his friend Gary Hammond, Jr.'s house. Murrell approached the porch and a verbal altercation between defendant and Murrell ensued. The fight ended with defendant shooting Murrell. Several people were present when defendant shot Murrell, including Gary Hammond, Marcus Hammond (Gary's ten-year-old brother), Darryl Haynes (defendant's cousin) and Willie Turner (a friend).

¶ 5 Marcus Hammond gave a statement to police later that evening. Marcus told the officers that defendant pulled a gun from the back of his pants and then Marcus "saw him pull the top part of the gun and it snapped back and [Marcus] heard it click." Murrell stepped toward defendant as if he was going to grab the gun. Defendant shot Murrell twice and then pointed the gun at Murrell again after he fell down the steps. Marcus did not mention that Murrell had a gun.

¶ 6 Gary Hammond talked to investigators five days after the shooting. In his statement, he said that Murrell showed up at his house and started a fight with defendant. Murrell told him he wanted his money and started yelling that something was going to happen. Seconds later, Gary heard two gunshots and saw Murrell fall down the steps. He noticed that Murrell had a gun in his hand. Darryl Haynes ran over and kicked it out of his hand, and it went into the grass.

Shortly after that, someone called the police, and Gary left. Four months later, Gary spoke with officers again. He gave a similar statement. He said he heard two gunshots and then saw Murrell start to fall. As he fell, Murrell grabbed the banister with one hand and grabbed the gun in his waistband with the other.

¶ 7 Darryl Haynes discussed the shooting with investigators seven days after the incident. He stated that he was standing on the porch with defendant when Murrell approached the porch and tried to start a fight. Murrell told defendant "something is getting ready to happen right now!" When defendant refused to move off the porch, Murrell lunged at him. At that point, both Darryl and defendant could see that Murrell had a gun. Darryl ran off the porch, and the next thing that he heard was a gunshot. Defendant shot Murrell twice before Murrell could get the gun out of his waistband. Darryl thought the gun Murrell had was a small one, something like a .380 caliber.

¶ 8 At trial, 11-year-old Marcus testified that he was on the front steps of the porch as Murrell approached. He witnessed Turner approach Murrell and then saw Murrell push Turner out of the way. At that point, Marcus started to walk down the sidewalk. As he walked away, he saw defendant pull a gun from behind his back. Murrell continued to walk toward defendant. Marcus then witnessed defendant "pull the top of the gun back" and shoot Murrell twice. Defendant ran away. Marcus testified that he only saw defendant with a gun. He did not see anything in Murrell's hands and did not see him holding a gun.

¶ 9 Several police officers testified that when they arrived at the house they found Murrell on the ground in front of the steps, gasping for air. No guns were found at the scene. Officer Kenneth Lowman testified that he interviewed Marcus that evening. Marcus gave a statement in the presence of his mother. Both Marcus and his mother signed the written statement.

¶ 10 Forensic pathologist Bryan Mitchell testified that Murrell sustained two gunshot wounds, one in the chest and one in the shoulder. He opined that the shooter was standing in front of Murrell and that Murrell was standing upright when he was shot in the chest and was bent over when he was shot in the shoulder. Dr. Mitchell could not tell which shot hit Murrell first.

¶ 11 Defendant presented his brother, Jemiko Bates, as a witness. Bates testified that a week before the shooting, Murrell "jumped" defendant in a store at the mall. Defendant corroborated his brother's story. He stated that Murrell attacked him in a Foot Locker store about a week before the shooting.

¶ 12 Defendant testified that on the day of the shooting, Murrell came to defendant's door. When defendant saw who it was, he shut the door and Murrell eventually left. A few hours later, Murrell approached defendant at Gary's house. He said that defendant owed him money, but defendant did not know what he was talking about. Murrell threatened to kill defendant. Defendant responded that Murrell was not going to do anything to him. While Murrell was standing on the sidewalk, defendant noticed that he had a gun in the right side of his waistband. At that point, defendant picked up a gun that was underneath a shirt on the porch and placed it in his back pocket. Murrell started running toward defendant with his right hand on his gun. Defendant testified that he was afraid Murrell was going to shoot him. Defendant pulled his gun from his back pocket, closed his eyes, and fired twice in Murrell's direction. Murrell fell backward and rolled down the stairs. Defendant took the gun from Murrell and ran away. He gave the guns to Turner. Turner was murdered shortly after the incident and did not tell defendant the exact location of the guns. On cross-examination, defendant stated that he was scared when Murrell pointed the gun at him, but he did not fear for his life.

¶ 13 In closing arguments, the State argued to the jury that defendant shot an unarmed man. ASA Jeneary stated that defendant "gunned down" an unarmed man and argued that defendant's actions were not justified because Murrell was "unarmed." In response, the defense argued a theory of self-defense. Counsel maintained that the State was required to prove that defendant's act of shooting Murrell was not justified and they failed to meet that burden. The jury found defendant guilty of first degree murder, and the trial court sentenced him to 45 years in prison.

¶ 14 In a posttrial motion, defendant alleged that counsel was ineffective for failing to call several witnesses. At the *Krankel* hearing, defendant testified that he sent counsel a list of potential witnesses, including Gary Hammond, Darryl Haynes, Lance Crowell, Jackie Speed and Toya Williams, but trial counsel never contacted them. Trial counsel testified that defendant told him about the witnesses but claimed that defendant also said that Lance Crowell, Jackie Speed and Toya Williams did not witness the actual shooting. Counsel acknowledged that he did not interview Gary or Darryl but testified that he reviewed their statements to police multiple times. He considered calling them as witnesses, but both men were in custody on criminal charges at the time of trial. He decided that their testimony would do more harm than good because they told police that Murrell did not pull a gun until after defendant shot him. The trial court denied defendant's motion for a new trial, and we affirmed on appeal, holding that trial counsel's performance was not deficient because he made a strategic decision not to call the witnesses. See *People v. Haynes*, 2011 IL App (3d) 090513-U, ¶ 16.

¶ 15 In January 2008, defendant filed a petition for relief from judgment (735 ILCS 5/2-1401 (West 2008)), alleging that his due process rights were violated when the State's Attorney's Office failed to disclose that Marcus Hammond was the cousin of Assistant State's Attorney (ASA) Michael Jeneary, one of the attorneys assigned to prosecute defendant. The trial court

dismissed the petition, and we affirmed, holding that although the prosecution erred by failing to disclose the familial relationship, defendant failed to establish prejudice. See *People v. Haynes*, 2013 IL App (3d) 100758-U, ¶2-7.[1]

¶ 16 In November 2012, defendant filed a postconviction petition, alleging that the prosecution suborned perjury when Marcus testified that Murrell was unarmed when defendant shot him. Attached to the petition was an affidavit from Marcus stating that Murrell also had a gun and that he was told not to say that Murrell had a gun at trial. The circuit court summarily dismissed the petition. On appeal, we reversed and remanded for the appointment of counsel and second-stage proceedings. See *People v. Haynes*, 2015 IL App (3d) 130091, ¶ 9.

¶ 17 On remand, postconviction counsel filed an amended postconviction petition arguing that (1) the prosecution suborned perjury when Marcus testified that Murrell was unarmed, and (2) defendant was actually innocent based on new statements from several witnesses, including Marcus, Gary Hammond, Darryl Haynes, Jackie Speed and Debra Williams. The postconviction court advanced both claims to the third stage.

¶ 18 At the evidentiary hearing, Marcus, now 27-years old and on parole for a felony in Kentucky, recanted his trial testimony and stated that Murrell was pulling a gun out of his waistband when defendant shot him. He claimed he told ASA Jeneary and ASA Frank Astrella that Murrell had a gun when he met with them before trial, but they told him not to mention a gun because he did not claim that Murrell was armed in his statement to police. Marcus also claimed that his father was present with him when made the statement to Lowman, not his

[1] In 2014, defendant filed a second section 2-1401 petition, alleging that ASA Jeneary and Marcus Hammond had a close relationship. The trial court denied the petition. Defendant appealed but then filed a motion to voluntarily dismiss the appeal, which we granted.

mother. The trial court admitted Marcus's statement as evidence. The statement was signed by Officer Lowman, Marcus and his mother, Vickie Curwick.

¶ 19 Defendant also presented Gary Hammond as a witness. He testified that he saw Murrell running toward the porch. As he ran toward defendant, Murrell was reaching for something on his right side. Gary heard two shots, and Murrell started to fall down the stairs. As he got closer, Gary noticed that Murrell was holding the banister with his left hand and a gun in his right hand.

¶ 20 Darryl Haynes testified that he was on the porch with defendant when Murrell ran up the sidewalk. As he was running, he could see that Murrell had a gun in his waistband. Murrell pulled it out of his waistband, and defendant shot him. Darryl acknowledged that in the statement he gave to police a few days after the shooting he said that the gun was still in Murrell's waistband when defendant shot him. He claimed that he told the officers that Murrell was pulling the gun out when defendant shot him, but they failed to include that information in his written statement.

¶ 21 Jackie Speed is Gary and Marcus's sister. She testified that she saw Murrell lift up his shirt and show a gun during the incident. She was standing on the sidewalk at the corner with friends and she witnessed Murrell approach defendant and start an argument. She saw Murrell "pulling up his shirt and he had a gun" on the back right side of his pants. Jackie turned back to talk to her friends and heard shots. Jackie did not testify at defendant's trial.

¶ 22 Debra Williams said that Murrell was at her home immediately before the murder. Murrell told her that he was going to someone's house to collect some money, and he showed Debra a gun in his waistband. Moments after Murrell left her apartment, she heard gunfire down the street. Debra testified that no one spoke with or asked her to testify at defendant's trial.

¶ 23 Defendant also testified at the hearing. He stated that he was on the front porch on the day in question with Gary, Darryl, Marcus and Willie Turner. Murrell approached the house and displayed a gun on his right side. Turner grabbed Murrell and attempted to pull him back, but Murrell broke away. Murrell said he wanted $4,000 from defendant to fix his car because someone shot it. Defendant denied any knowledge of the damage. Murrell said that when he caught defendant he would kill him. As Murrell pushed past Turner, he had his right hand on his gun, which was still in his waistband. Defendant pulled a gun from his back pocket, closed his eyes and shot Murrell. Defendant stated that Murrell was just starting to pull his gun out when he fired.

¶ 24 On cross-examination, defendant admitted that Murrell did not take his gun out of his waistband before defendant shot him. Defendant was also impeached with his trial testimony stating that Murrell's gun was still in his waistband when defendant fired his gun. The trial court directly questioned defendant regarding what he saw before shooting Murrell. Defendant stated that Murrell's gun was starting to emerge from his waistband when defendant closed his eyes and fired the gun.

¶ 25 The State called ASA Jeneary, who assisted in prosecuting defendant. Jeneary testified that he is Marcus Hammond's first cousin, but at the time of the murder he had only seen Marcus six or seven times in his life. He had no relationship with either Marcus or his mother. Jeneary and Astrella met with Marcus twice before defendant's trial. They told him to tell the truth and asked Marcus if everything in his statement was accurate. Marcus confirmed that it was accurate. On cross-examination, Jeneary acknowledged that Turner, Gary, Darryl and defendant had all informed police that Murrell had a gun. He did not think they were lying, but he also noted that defendant's trial testimony was that Murrell pulled his gun out of his waistband only

after he shot him. Jeneary said that the prosecution's theory at trial was that defendant shot an "unarmed" man because the State did not think any of the witnesses who said Murrell had a gun were credible.

¶ 26 The trial court denying defendant's amended postconviction petition. In its written order, the court found no credible evidence demonstrating that the prosecution suborned perjury and no credible evidence establishing defendant's actual innocence.

¶ 27 ANALYSIS

¶ 28 Defendant claims that the trial court erred in rejecting his claim of actual innocence where multiple witnesses testified that Murrell had a gun when defendant shot him and their testimony supported his trial theory of self-defense.

¶ 29 When a postconviction petition is advanced to the third-stage evidentiary hearing, as in this case, a reviewing court will not reverse the circuit court's decision unless it is manifestly erroneous. *People v. Pendleton*, 223 Ill. 2d 458, 473 (2006). A decision is manifestly erroneous if it contains an error that is clearly evident, plain and indisputable. *People v. Tyler*, 2015 IL App (1st) 123470, ¶ 152.

¶ 30 The Post-Conviction Hearing Act (Act) (725 ILCS 5/122-1 *et seq*. (West 2012)) generally limits a defendant to the filing of one postconviction petition and expressly provides that any claim of substantial denial of constitutional rights not raised in the original or amended petition is waived. 725 ILCS 5/122-1(f), 122-3 (West 2012). Notwithstanding this procedural bar, claims in successive petitions may be reviewed when the proceedings on the original petitions are deficient in some fundamental way.

¶ 31 The due process clause of the Illinois Constitution affords a postconviction petitioner the right to assert a claim of actual innocence based on newly discovered evidence at any time.

People v. Ortiz, 235 Ill. 2d 319, 333 (2009). "The elements of a claim of actual innocence are that the evidence in support of the claim must be 'newly discovered'; material and not merely cumulative; and of such conclusive character that it would probably change the result on retrial." *People v. Edwards*, 2012 IL 111711, ¶ 32. "New" means the evidence was discovered after trial and could not have been discovered earlier through the exercise of due diligence. *People v. Burrows*, 172 Ill. 2d 169, 180 (1996). "Material" means the evidence is relevant and probative of the petitioner's innocence. *People v. Coleman*, 2013 IL 113307, ¶ 96. "Not cumulative" means the evidence adds to what the jury heard. *People v. Molstad*, 101 Ill. 2d 128, 135 (1984). And "conclusive" means the evidence, when considered along with the trial evidence, would probably lead to a different result on retrial. *Ortiz*, 235 Ill. 2d at 336-37.

¶ 32 Evidence is not "newly discovered" when it presents facts already known to the defendant at or prior to trial, even though the source of those facts may have been unknown or unavailable. *People v. House*, 2015 IL App (1st) 110580, ¶ 40. However, a witness's recantation may be newly discovered evidence if it was not available at the defendant's original trial and due diligence would not have discovered it sooner. *People v. Morgan*, 212 Ill. 2d 148, 154-55 (2004) (recantation of eyewitness 17 years after defendant's conviction was newly discovered evidence because the recanted testimony was not available at trial and defendant could not have compelled the witness to testify truthfully).

¶ 33 A colorable claim of actual innocence "must raise the probability that it is more likely than not that no reasonable juror would have convicted him in the light of the new evidence." *Edwards*, 2012 IL 111711, ¶ 33. Courts should consider other evidence presented at trial in deciding whether the "newly discovered" evidence is of such a conclusive character that it would probably change the result on retrial. *Coleman*, 2013 IL 113307, ¶ 96.

¶ 34 On appeal, defendant contends that the statements of Marcus Hammond, Gary Hammond, Darryl Haynes, Jackie Speed and Debra Williams sufficiently supported his claim of actual innocence. He argues that the trial court's rejection of his claim was manifestly erroneous because the witnesses provided new evidence that was material to the issue of self-defense and directly contradicted the State's trial theory that he shot an unarmed man.

¶ 35 We find that the statements made by Gary Hammond, Darryl Haynes and Jackie Speed were not new evidence. Defendant knew all three individual were at the scene when he shot Murrell, and he was aware of Gary and Darryl's statements to police prior to trial. Moreover, he admitted at his sentencing hearing that he believed they would provide favorable testimony when he alleged that trial counsel should have called them as witnesses. Thus, their testimony was already known to defendant at or prior to trial. See *House,* 2015 IL App (1st) 110580, ¶ 33. But we agree with defendant's argument that Marcus and Debra offered affidavits and supporting testimony that is newly discovered evidence.

¶ 36 First, we consider Marcus Hammond's statements. He testified at trial that Murrell did not have a gun in his hand when defendant shot him and that he only saw one gun. Almost nine years after trial, Marcus recanted his testimony in an affidavit. Marcus stated that Murrell also had a gun and that he was told to testify that there was only one. At the evidentiary hearing, Marcus testified that he saw Murrell charge up the stairs and reach behind his back as he pulled out a gun. Marcus explained that when he told the prosecutor there were two guns, the prosecutor told him to testify consistently with his written statement to police, which did not mention that Murrell had a gun.

¶ 37 Generally, evidence is not newly discovered when it presents facts already known to the defendant at trial. See *People v. Barnslater*, 373 Ill. App. 3d 512, 523-24 (2007). And, here,

Marcus was a witness at trial. Therefore, defendant would have known whether Marcus falsely testified. However, a recantation of trial testimony may still be considered new evidence in certain cases. See *Morgan*, 212 Ill. 2d at 154 (noting that defendant is not precluded from presenting witness's recantation as newly discovered evidence even though he knew the witness to be perjuring himself); see also *Barnslater*, 373 Ill. App. 3d at 524. In this case, defendant did not have evidence available at the time of trial to demonstrate that Marcus was lying when he testified that Murrell did not have a gun. Moreover, given Marcus's testimony that the prosecutor told him not to mention a second gun, due diligence could not have compelled him to testify that Murrell was armed at trial.

¶ 38 Debra Williams' testimony is also new evidence. Debra was not an eyewitness to the shooting. Her name does not appear in any of the investigator's reports, and she was not called as a witness at trial. The State does not claim that defendant knew of her or could have discovered her through the exercise of due diligence. Debra testified that Murrell was at her house immediately before going to Gary's house. She said that Murrell showed her that he had a gun in his waistband and said he was going to collect some money as he left her house. Minutes later, she heard two shots down the block. Her testimony therefore qualifies as newly discovered evidence.

¶ 39 In addition to being newly discovered, evidence in support of an actual innocence claim must be material to the issue and not cumulative of other evidence presented at trial. Evidence is considered merely cumulative when it adds nothing to the evidence already before the jury. *Molstad*, 101 Ill. 2d at 135. In *Molstad*, our supreme court held that eyewitness testimony that is material and relates to an ultimate issue in the case is not cumulative. There, the defendant's conviction for criminal battery was based largely on the testimony of the State's eyewitness who

identified the defendant and his five co-defendants. The defendant denied he was present during the crime and presented alibi testimony from his parents. In posttrial proceedings, the defendant presented affidavits from all five co-defendants, stating that the defendant was not present when they attacked the victim. The *Molstad* court held that the new testimony was not cumulative because it went to an ultimate issue in the case – whether the defendant was present during the attack – and would create new questions for the trier of fact to consider. *Id.* at 135.

¶ 40 Here, the testimony of Marcus and the corroborative statements by Debra are not cumulative. Their testimony would create new questions in the mind of the trier of fact because it goes to the ultimate issue in the case – was defendant's act of shooting Murrell justified? See *Molstad*, 101 Ill. 2d at 135. In addition, the State's only eyewitness to the shooting recanted his trial testimony, and Debra's statements support Marcus's recantation and defendant's claim that Murrell was, in fact, armed.

¶ 41 The State's theory at trial was that defendant's act of shooting Murrell was not justified because he shot an "unarmed" man. The State supported this theory by calling one eyewitness to the shooting, a ten year old boy who has since testified under oath that he lied when he said Murrell did not have a gun. Further, during closing argument, the prosecutor repeatedly mentioned that defendant gunned down an unarmed man. It is difficult to see how new evidence that Murrell had a gun in his waistband as he approached defendant would not add anything to what was already presented to the trier of fact. Based on the decision in *Molstad*, we find that the testimony of these three witnesses is not cumulative.

¶ 42 Also, it is more likely than not that the testimony of these witnesses would change the result on retrial. At retrial, the evidence of that defendant acted in self-defense would be much stronger. The State's only eyewitness at the original trial testified that Murrell did not have a

gun. In a second trial, Marcus would testify that both defendant and Murrell had guns. Defendant would also be able to offer the testimony of Debra Williams. Although Debra did not witness the shooting that day, her statements become relevant when viewed in conjunction with Marcus's testimony at the evidentiary hearing that he saw Murrell reach behind his back and start to pull out a gun as he approached defendant. All of this evidence corroborates defendant's original statement that Murrell rushed up the porch steps with one hand on his gun in his waistband and the other hand extended toward defendant. Thus, at retrial, evidence that defendant acted in self-defense would be stronger when weighed against the recanted statement of the State's only eyewitness.

¶ 43 Typically, the trial court reviews the evidence presented at the evidentiary hearing to determine whether it was new, material, and noncumulative. If it was, the trial court then must consider whether that evidence places the evidence presented at trial in a different light and undermines the court's confidence in the authenticity of the guilty verdict. *Coleman*, 2013 IL 113307, ¶ 97. This is a comprehensive approach and involves credibility determinations that are generally within the discretion of the trial court to make. *Morgan*, 212 Ill. 2d at 155. But the trial court should not redecide the defendant's guilt in deciding whether to grant relief. See *Molstad*, 101 Ill. 2d at 135-36.

¶ 44 In this case, the trial court concluded that the witnesses were not credible and ultimately denied defendant's petition on that basis. In concluding that their testimony was insufficient to support defendant's claim of actual innocence, the trial court found that their statements lacked credibility in comparison to evidence from forensic pathologist Bryan Mitchell.

> "Dr. Mitchell also testified that, based on the location of the bullets, Murrell had to be bent over at the time he was shot, therefore making the Petitioner's witnesses

and the Petitioner's statements not credible, and not corroborated by the physical evidence."

Mitchell testified that for Murrell to sustain his shoulder wound, he would have been bent over, assuming the shooter was of similar height. He also stated that when Murrell sustained the chest wound, he would have been standing upright, and he specifically acknowledged that he could not determine the order of the wounds. Contrary to the trial court, this court is not persuaded that the witnesses who testified at the evidentiary hearing lacked credibility based on Dr. Mitchell's testimony at trial. His testimony is entirely consistent with defendant shooting Murrell as Murrell came toward him. The trajectory of the shoulder wound is consistent with Murrell leaning forward as he reached for defendant, as the witnesses described. Moreover, Dr. Mitchell's trial testimony confirmed that Murrell was standing up, facing the shooter, when the chest wound was inflicted. Thus, the trial court's conclusion that the physical evidence did not corroborate defendant's witnesses and called their credibility into question was manifestly erroneous. See *Coleman*, 2013 IL 113307, ¶ 97 (trial court should not redecide defendant's guilt in determining whether to grant postconviction relief).

¶ 45 Here, defendant has met the criteria to warrant a new trial based on the evidence supporting his actual innocence claim. However, a new trial based on newly discovered evidence is simply that—a new trial. " '[T]his does not mean that [defendant] is innocent, merely that all the facts and surrounding circumstances, including the testimony of [defendant's witnesses], should be scrutinized more closely to determine the guilt or innocence of [defendant].' " *Ortiz*, 235 Ill. 2d at 337 (quoting *Molstad*, 101 Ill. 2d at 136). On remand, the trier of fact will be responsible for determining the witnesses' credibility and weighing the conflicting eyewitness accounts in light of the newly discovered evidence.

¶ 46 Because we have determined that newly discovered evidence warrants a new trial, we need not address defendant's alternative claim for a new trial based on the State's subordination of perjury by Marcus.

¶ 47 CONCLUSION

¶ 48 We reverse the judgment of the circuit court of Kankakee County and remand the cause for a new trial.

¶ 49 Reversed; cause remanded.