2019 IL App (2d) 170833-U
No. 2-17-0833
Order filed August 2, 2019

IN THE

APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS, Plaintiff-Appellant, v. MICHAEL BUHRMAN, Defendant-Appellee.	)))))))))))	Appeal from the Circuit Court of Du Page County. No. 12-CF-934 Honorable Kathryn Creswell, Brian F. Telander, Judges, Presiding.

JUSTICE McLAREN delivered the judgment of the court.
Justices Hutchinson and Spence concurred in the judgment.

ORDER

¶ 1 *Held*: The trial court's grant of defendant's postconviction petition after a third-stage evidentiary hearing was not manifestly erroneous; trial counsel was ineffective for failing to present known evidence in mitigation at sentencing hearing held *in absentia*. Cause remanded for new sentencing hearing.

¶ 2 After a third-stage hearing, the trial court granted the postconviction petition of defendant, Michael Buhrman, and ordered a new sentencing hearing. We affirm.

¶ 3 I. BACKGROUND

¶ 4 In May, 2012, defendant was charged with one count of aggravated vehicular hijacking (720 ILCS 5/18-4-(a)(4) (West 2010)), one count of vehicular hijacking (720 ILCS 5/18-3(a) (West 2010)), and two counts of aggravated unlawful use of a weapon (720 ILCS 5/24-1.6(a)(1)(3)(A),(B) (West 2010)). The charges arose out of a May 10, 2012 incident in which defendant, while wearing a mask and brandishing a loaded handgun, highjacked a vehicle from a woman in a department store parking lot.

¶ 5 While out on bond, defendant sought permission from the court to travel out of state, which the court, Judge Creswell, presiding, granted over the objection of the State. Shortly thereafter, the State sought to increase and modify defendant's bail, as the State had learned from a girlfriend of defendant that he planned to flee to Chile. The trial court ordered that defendant be subject to home confinement, subject to GPS monitoring, and remain at least five miles away from any airport. In both instances, defense counsel raised defendant's lack of criminal history, his service in the United States Navy, and his employment in the nuclear industry during argument.

¶ 6 In September 2012, the State filed an application to revoke bond, as Pretrial Services received an alert that defendant's GPS tracking bracelet had been tampered with and defendant did not answer his door. The trial court granted the motion and issued a no-bond warrant. The case proceeded to a jury trial held in defendant's absence. The jury found defendant guilty of one count of aggravated vehicular hijacking and one count of vehicular hijacking. At the subsequent sentencing hearing (again held *in absentia*), trial counsel called no witnesses; however, counsel was allowed to "proffer some brief facts," including defendant's: (1) prior "top secret" nuclear security clearance and his training and employment in the nuclear industry; (2) personal background, including the facts that he had a minor child and had once been married

and owned his own home; (3) lack of criminal history; and (4) service in the United States Navy, including service on a nuclear submarine and his deployment "to the Gulf during war time." Counsel further stated that "we will maintain for the court record that we don't believe that [defendant] voluntarily left."

¶ 7 The State argued for the maximum 45-year sentence: 30 years plus a 15-year mandatory add-on for being armed with a firearm (see 720 ILCS 5/18-4(b) (West 2010)). Counsel emphasized that "there was no physical harm with respect to the firearm used" and defendant's lack of criminal history. When asked by the court whether the fact that "[defendant's] committing the offense of violation of his bail bond" should "go to [defendant's] character," counsel noted that defendant had not been charged with that offense and that there could be multiple reasons for his flight. Counsel asked for the minimum sentence of six years plus the 15-year add-on.

¶ 8 The trial court found mitigation in defendant's lack of criminal history, service in the Navy, and employment. However, the court sentenced defendant to 40 years in the Department of Corrections on the aggravated vehicular hijacking charge (25 years plus the 15-year add-on).

¶ 9 Three years later, defendant (then in custody), filed a petition for relief pursuant to the Post-Conviction Hearing Act (725 ILCS 5/122-1 *et seq*. (West 2016)), alleging that he had received ineffective assistance of counsel in that counsel: (1) failed to inform him of a plea offer; and (2) failed to call family members and two mental health professionals who had evaluated defendant before he fled to testify at the sentencing hearing. The trial court, Judge Telander, presiding, found that the petition stated the gist of a constitutional claim and denied the State's motion to dismiss. The trial court then held an evidentiary hearing on the petition.[1]

[1] During the evidentiary hearing, defendant withdrew the portion of the petition alleging

¶ 10 At the hearing, Richard Blass testified that he was defendant's counsel throughout the course of the case. He referred defendant to Dr. Jane Velez and Dr. Mitchell Hicks for evaluation and counseling, and it was his intent to potentially use the evaluations for the purposes of plea discussions, mitigation, and sentencing. He had highlighted to the trial court defendant's military record and lack of criminal history when he successfully prevented the State from raising defendant's bond when the State alleged that defendant planned to flee to Chile (although the court did modify defendant's bond by placing him on home confinement with a GPS device and requiring him to surrender his passport). Blass did not present the reports of Dr. Velez or Dr. Hicks at sentencing because, "[i]n thinking it over and as a matter of strategy, in talking to other attorneys in my office, I felt that their opinion may change because of the—of him leaving."

¶ 11 Blass did not tender actual physical documents regarding defendant's military service because he had already made the trial court aware of the military service several times. However, he acknowledged that he never mentioned the medals and commendations that defendant had received that were contained in military records that he had in his possession. Blass agreed that he did not present testimony of defendant's family members because he thought that "it would be damaging to the credibility" he had built up with the court.

¶ 12 Dr. Jane Velez testified that she had met with defendant four times in the summer of 2012 to perform a psychological evaluation. She was advised that the evaluation would be used in defendant's criminal case. Velez administered various tests to defendant, reviewed police reports, and interviewed both defendant and his mother. She diagnosed defendant as having

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that counsel had failed to inform him of a plea offer.

generalized anxiety disorder, post-traumatic stress disorder (PTSD), obsessive-compulsive disorder, and recurrent major depressive episodes.

¶ 13 According to Velez, defendant suffered from PTSD since he returned from military service in 2005. He had seen "some really grisly deaths "that were really—a lot of them were accidental and based on human error, rather than war heroism, which makes them even more senseless and difficult to***rationalize." Those deaths included two friends, one of whom had his head chopped off by a helicopter blade and the other who fell between two ships and was crushed. Other "stressors" in defendant's life included the sudden death of his grandfather, a break-up with his girlfriend, and financial problems in the period just before the crime. Defendant was sleeping only two to three hours per night and had begun drinking heavily. He was also experiencing a lot of suicidal ideation.

¶ 14 Velez opined that defendant was suffering from these symptoms at the time of the offense, describing his condition at that time as "a perfect storm." She would not expect defendant to reoffend, based on his lack of criminal history and honorable discharge after six years of military service. Defendant also expressed "[h]orrible remorse" for his behavior. Even knowing the allegations that defendant had since cut off his GPS bracelet and fled the country would not affect Velez's diagnosis or opinion of defendant's mental health condition at the time of the offense. She would have testified about her evaluation had she been asked to.

¶ 15 Dr. Mitchell Hicks testified that he began providing psychotherapy to defendant in August 2012, as a result of the mental health issues identified by Velez. He met with defendant four times. He agreed with Velez's assessment regarding PTSD and major depressive disorder. In addition to the stressors identified by Velez, Hicks identified the possibility of incarceration as another stressor and an area in which he needed to help defendant cope. Much of Hicks'

testimony mirrored that of Velez, especially regarding defendant's military service as a cause of PTSD, the additional stressors that exacerbated the PTSD, the alcohol usage, depression, and suicidal thoughts. When asked how defendant's mental health affected his conduct on the night of the incident, Hicks stated that, as defendant's symptoms "continued to get worse, Mr. Buhrman was looking for experiences that helped basically give him a sense of mastery." Further, "that pursuit of mastery did not or that he was [*sic*]—got caught up in a play almost is I guess the best way to talk about it, a play to try to master these traumatic experiences."

¶ 16 Hicks prepared a report in December 2012, both as to his evaluation of defendant for treatment purposes and to be used at sentencing. He sent it to trial counsel and spoke to him about it. He was available to testify on defendant's behalf, but was never asked to do so. Had he testified at the sentencing hearing, he would have stated his opinion that, with proper treatment, defendant "was at a far lower chance to recidivate." His opinions and diagnosis would not have changed if he had learned that defendant had voluntarily left before trial; he knew that defendant was "quite scared of going to prison." Hicks "would have said at the time that I believe it's possible that this is—that running out of fear would have been something that one could have expected with PTSD or that it was—Let me rephrase it. It is a reasonable explanation for why that might have happened."

¶ 17 After being told specific facts regarding the planning that went into defendant's flight, Hicks was asked if, assuming all that information was true, that would "in any way cause someone in your mind to be of a higher risk to re-offend?" Hicks replied that he did not know; he "would have needed to know more information in order to come to a conclusion about that."

¶ 18 Timothy Stroh testified as a 10-year military veteran who reviewed defendant's Department of Defense form 214, which he described as "a snapshot of the service record of the

individual," including pay grades, unit and personal awards, and types of positions held. Stroh noted that defendant left the military at a pay grade of E-6, which was not typical for someone retiring after six years; it usually took longer to reach that level. In addition, to progress beyond E-4, "you have to distinguish yourself or pass exams." Stroh specifically identified and explained each of the 12 ribbons or medals that defendant had received during his service. Stroh opined, based on his review of the Department of Defense form and his knowledge regarding the various commendations, ribbons, and medals, that defendant "served excellently and that he was a good soldier. He was a good seaman. He did his job; and, you know, I don't notice anything negative throughout."

¶ 19 Defendant's mother, Vickie Buhrman, testified that, growing up, defendant was a "perfectionist," a straight A student who never got into trouble.[2] Defendant joined the Navy in order to go into nuclear engineering without putting a financial burden on his parents. She perceived changes in defendant's personality during his time in the military. After his graduation from boot camp, defendant was "[v]ery controlling," and, after his return from his second deployment during wartime, he seemed "[v]ery protective" and "very regimented." Defendant "always had OCD" and had been very structured; the longer he was in the military, the more he came back "very very structured."

¶ 20 Vickie and her husband visited defendant the weekend before his arrest. Vickie sensed that something was wrong. Normally, defendant's house was "perfect;" defendant "obsessively" cleaned up small messes. On that weekend, Vicky noticed that the house was dusty and that her

[2] The parties also stipulated that defendant's stepfather and sister would have testified consistent with their affidavits and substantially the same as Vicky Buhrman.

grandson's bathroom towel was "crooked" and had had toothpaste on it, and defendant "never moved it." The behavior exhibited by defendant in committing this crime was unusual for him.

¶ 21 Vicky testified that she had contacted Blass to see if she, her husband, and her daughter should come in from Nebraska for defendant's trial. She was told that it would not be necessary. She also told Blass that they were willing to and able to come to Illinois to testify at the sentencing hearing; according to Vickie, Blass told her, "It would not make a difference. Do not waste your time. It's not necessary."

¶ 22 Attorney Daniel Cummings testified as an expert in the field of criminal practice and was found by the court to be qualified to give an opinion. He had been involved in approximately 500 criminal trials and hundreds of sentencing hearings, although he had never represented a defendant who was tried or sentenced *in absentia*.

¶ 23 Cummings reviewed the postconviction petition, "some pleadings" from the State, affidavits from defendant's family, the reports from Hicks and Velez, bond motions that had been filed by defendant, the transcript of the sentencing hearing and some of the trial, and the Department of Defense document relating to defendant's military service. He also reviewed transcripts of the testimony provided by Blass, Hicks, Stroh, and Buhrman from the postconviction proceedings. In Cummings' professional opinion, Blass' failure to present any testimony or the documentation regarding the mental health evaluations and defendant's military service was not reasonable trial strategy, "especially for the reasons that he gave when he testified." He explained:

> "I am basing my opinion on kind of, globally, the fact that he didn't call any of these people, in terms of the narrative that he should have been trying to bring to the trial

court so the trial court could have some understanding of this defendant, what this defendant's problems were, what his background what was, what his history was."

¶ 24 Cummings opined that defendant's military service "appeared to be above and beyond the ordinary" and was "something that you would want to advise the Court of." Further, while the trial court had been apprised that defendant had even seen combat, "there wasn't anything about him actually seeing death, seeing friends decapitated and things of this nature which would have been important kind of to connect up the post traumatic stress syndrome and the other problems, as well."

¶ 25 At sentencing, the trial court "was left with a completely incomplete picture of" defendant. While the court knew something about defendant's military service and that defendant had a family, it "knew nothing about any psychological conditions that he had, not one thing." This would have affected the court's ability to assess defendant's rehabilitative potential.

¶ 26 Blass had testified that he thought his actions were the result of trial strategy because he had spoken to some attorneys and thought that defendant's absence may adversely affect the opinions of Hicks and Velez. However, Cummings testified that the only way to determine, "in terms of trial strategy," whether the opinions would change was to consult with the doctors and ask if the new information regarding defendant's absence would affect their opinions. "That was never done." When asked if Blass should have reached out to Velez after defendant left to obtain an updated opinion, Cummings stated, "I completely absolutely believe that. If I believe anything in this case, I believe that." Defendant's absence made life more difficult for Blass as his attorney; however, it did not make it harder to present psychological reports and evidence at the sentencing hearing or to present witnesses in mitigation. In fact, an attorney with an absent

defendant might want to present more witnesses in mitigation. In Cumming's professional opinion, Blass did not engage in sound trial strategy:

> "I think he made, honestly, a colossal error. And the judge, Judge Creswell, was not given a complete and full picture of this defendant and the issues that this defendant was dealing with."

¶ 27 On cross-examination, Cummings was asked whether "the grieving mother or the family member of the defendant [is] an effective mitigation witness." Cummings replied, "No. But that's not what she would have been providing in this case."

¶ 28 After hearing argument, the trial court, stated:

> "I've considered all of the testimony and considered all of the case law, and I've thought carefully about what was done and, probably more importantly what wasn't done, and I've also added into something I think is the most important and that's fairness.
>
> Based on the totality of the testimony, which I've reviewed, based on everything that I've seen, I believe that the petition for post-conviction relief, I believe that the standard has been met and the defendant is entitled to a new sentencing hearing. I am going to grant the petition with respect to the new sentencing hearing."

The trial court vacated defendant's sentence and ordered a new pre-sentencing investigation and sentencing hearing. The State's motion to reconsider was denied, and this appeal followed.

¶ 29 II. ANALYSIS

¶ 30 The State now contends that the trial court erred in granting defendant's petition. A trial judge's ruling on a postconviction petition is entitled to substantial deference. *People v. Jones*, 2012 IL App (1st) 093180, ¶ 49. When, as here, a postconviction petition is advanced to a third-stage evidentiary hearing, where fact-finding and credibility determinations are involved, we will

not reverse a circuit court's decision unless it is manifestly erroneous. *People v. Pendleton*, 223 Ill. 2d 458, 473 (2006). "The burden of convincing a reviewing court that a trial court's decision was manifestly erroneous is a heavy one." *Jones*, 2012 IL App (1st) 093180, ¶ 49. A manifest error is one that is clear, plain, evident and undisputable. *Id*. For this court to find that a trial judge's decision is manifestly erroneous, we must find that the decision is not based on the evidence, is arbitrary and is unreasonable. *Id*.

¶ 31 At the third-stage hearing, defendant proceeded only on the allegation that trial counsel was ineffective for failing to call the witnesses to testify at the sentencing hearing. In evaluating a claim of ineffective assistance of counsel, this court applies the two-component standard set forth in *Strickland v. Washington*, 466 U.S. 668 (1984) and adopted by our supreme court in *People v. Albanese*, 104 Ill.2d 504 (1984). A defendant making such a claim must show that: (1) counsel's performance was deficient; and (2) he was actually prejudiced by the deficient representation he received. *People v. Fillyaw*, 409 Ill. App. 3d 302, 311-12 (2011).

¶ 32 The State first argues that the trial court's finding of deficient performance is unsupported. Counsel's performance is deficient where he makes errors so serious that he was not functioning as the "counsel" guaranteed the defendant by the Sixth Amendment." *Fillyaw*, 409 Ill. App. 3d at 312. Counsel's conduct is afforded a strong presumption that it constitutes sound trial strategy; however, this presumption may be overcome where no reasonably effective criminal defense attorney, confronting the circumstances of the defendant's trial, would engage in similar conduct. *Id*.

¶ 33 According to the State, trial counsel's decision not to present the testimony at the sentencing hearing "was not irrational or unreasonable because it was supported by caselaw." The State cites to *People v. Condon*, 272 Ill. App. 3d 437 (1995) *overruled on other grounds by*

People v. Philips, 242 Ill. 2d 189 (2011) for support. In *Condon*, the defendant similarly was tried and sentenced in absentia and filed a postconviction petition alleging, *inter alia*, ineffective assistance of counsel for failure to notify family members of the sentencing date and failure to present evidence in mitigation. The trial court (with an exception not relevant here) dismissed the postconviction petition. *Condon*, 272 Ill. App. 3d at 440. On appeal, the defendant argued that the failure to present family and friends as character witnesses "evinced a lack of diligence." *Id*. This court disagreed:

> "The record does not indicate a lack of diligence. Counsel knew petitioner's family and had continuing contact with them. It appears he recognized that the court would probably doubt the veracity of testimony to petitioner's dependability and respect for the law, in light of his continued absence. Counsel chose not to parade these people before the court, where doing so would only exacerbate the fact of petitioner's continued absence." *Id*. at 443.

¶ 34 However, the evidence that was not presented in the case before us is not merely regarding defendant's dependability and respect for the law. Here, defendant's family members' testimony would have included evidence of his life-long OCD, the change in his personality during and after his time in the military and his wartime deployments, and defendant's "unusual" behavior the weekend before he committed the offense. The reports of Velez and Hicks involved findings of anxiety disorder, PTSD, OCD, and recurrent major depressive episodes, and opinions that defendant was unlikely to reoffend. Stroh's testimony detailed defendant's atypical achievement of rank and distinguished service. As the *Condon* court noted, if the defendant "wanted a say in counsel's tactical approach to sentencing, he should have attended the hearing."

Id. However, even that acerbic comment does not relieve trial counsel from presenting such important and far-reaching evidence as Blass had in this case.

¶ 35 The State argues that "counsel was not deficient for weighing the proposed evidence and deciding the risk outweighed any potential benefit" and that counsel "attempted to avoid potential admission of prejudicial facts and harmful opinions." We disagree. Blass had the psychological reports of Velez and Hicks that, as written, were of great potential benefit. He did not present the reports or live testimony regarding the reports because he "felt that their opinion[s] may change" because of defendant's absence, yet he did not even bother to ask the two doctors if their opinions would change. The State can find no way to address this fact, other than to say that Hicks, at the time of the evidentiary hearing, "no longer was certain in his assessment that Defendant was a low risk to re-offend." In this, the State misrepresents Hicks' actual testimony. Hicks initially stated that his opinions and diagnosis would *not* have changed if he had learned that defendant had voluntarily left before trial. He later stated that he did not know if the specifics of defendant's flight would have changed his mind, as he "would have needed to know more information in order to come to a conclusion about that." Hicks never evidenced a lack of certainty. He responded to a counterfactual situation, and even when asked to assume the truth of all the alleged facts, he answered "I don't know" to the question of whether his opinion would change. Blass could not weigh the potential risks and benefits of the evidence when he did not even ascertain that the potential risks existed.

¶ 36 In addition, while Blass raised defendant's military service several times earlier in the proceedings, he acknowledged at the evidentiary hearing that he never mentioned the medals and commendations that defendant had received. It is unclear how this additional information could have been prejudicial or harmful to defendant's cause during sentencing.

¶ 37 The State next argues that the trial court should have granted "little weight" to Cummings' testimony. First, we note that this court will not substitute its judgment for that of the trial court, particularly as to matters of the credibility of witnesses and weight of testimony. See, *i.e.*, *People v. Lofton*, 303 Ill. App. 3d 501, 505 (1999). Amongst the several alleged deficiencies in Cummings testimony raised by the State is the fact that Cummings testified that he had no experience in cases involving an absent defendant, while Blass testified that he spoke with several attorneys to determine his sentencing strategy. Even if we were to question how much weight the trial court should have granted to Cummings' testimony, missing from the State's argument are the names of these other attorneys, their experience, and what they said to Blass. Blass merely stated that he had talked to other attorneys in his office. This entire line of argument is without merit.

¶ 38 Blass' decision to not present any evidence at the sentencing hearing was not a rational and reasonable decision, and his representation of defendant was deficient. We must then examine the issue of prejudice.

¶ 39 The State first argues that the proposed evidence was "cumulative," although the question of "Cumulative to what?" is not addressed. Counsel did bring up defendant's military service in his "proffer" of "brief facts" at sentencing, four lines in one page of transcript. Clearly, Stroh's testimony regarding defendant's military service given at the evidentiary hearing was not merely cumulative to what Blass offered at sentencing; it was of magnitudes greater in detail and information. The State argues that "defendant did not show how counsel could have" called more attention to his military service. Again, Stroh gave extensive testimony at the evidentiary hearing; that is exactly how Blass could have drawn more attention to defendant's military service at sentencing.

¶ 40 The State next argues that mental health issues are not always considered mitigating. See, *i.e.*, *People v. Pulliam*, 206 Ill. 2d 218, 241 (2002) ("Initially, we note that evidence of a turbulent and abusive childhood or of psychological and developmental problems is not inherently mitigating.") The State also correctly points out that, at the time of defendant's sentencing in 2013, mental health was not considered a mitigating factor under section 5-5-3.1 of the Unified Code of Corrections. See 730 ILCS 5/5-5-3.1 (West 2013 supp., 2016). However, a defendant's mental health has long been a proper consideration in mitigation. See *People v. Perruquet*, 68 Ill. 2d 149, 154 (1977) (in determining a sentence, a trial court must consider, along with the particular circumstances of the case, other factors such as "the defendant's credibility, demeanor, general moral character, mentality, social environment, habits, and age."); *People v. McWilliams*, 348 Ill. 333, 336 (1932) (in search for facts that may aggravate or mitigate the offense, trial court "may inquire into the general moral character of the offender, his mentality, his habits, his social environments, his abnormal or subnormal tendencies***."). Our supreme court has found evidence of a defendant's mental or emotional problems to be of "critical importance." See *People v. Morgan*, 187 Ill. 2d 500, 552 (1999). The fact that mental health was not statutorily recognized as a factor in mitigation at the time of defendant's sentencing is of little import; the importance of mental health evidence was well-established.

¶ 41 Further, in addition to detailing defendant's mental health issues, both Hicks and Velez opined that defendant was unlikely to re-offend. Certainly, those opinions would be considered mitigating, not aggravating. The State asserts that these opinions "were based on misleading and inaccurate statements from Defendant and without knowledge of all the facts." However, this is an attack on the accuracy of the opinions and the weight to be accorded to them by the trial court, not on the nature of the opinions as mitigating. Clearly, the testimony of Hicks and Velez was of

"critical importance" to defendant's sentence, and Blass' failure to ascertain its continued vitality and present it to the trial court was prejudicial.

¶ 42 The State finally contends that the trial court "erroneously invoked 'fairness' in granting defendant's petition. At the conclusion of the hearing, the trial court stated:

> "I've considered all of the testimony and considered all of the case law, and I've thought carefully about what was done and, probably more importantly what wasn't done, and I've also added into something I think is the most important and that's fairness."

The State argues that, by relying on fairness, the court incorrectly believed that the Act "provided courts with equitable authority to grant relief." We disagree.

¶ 43 First, the applicability of fairness to claims of ineffective assistance of counsel has long been recognized:

> "The ultimate focus of a claim of ineffective assistance of counsel must be upon the fundamental fairness of the proceedings challenged. *Strickland*, 466 U.S. at 696. The court must scrutinize and remain vigilant in determining whether the proceedings are unreliable because of a breakdown in the adversarial process. *Strickland*, 466 U.S. at 696." *Morgan*, 187 Ill. 2d at 557.

See also *People v. Pineda*, 373 Ill. App. 3d 113, 117 (2007) ("The prejudice component of *Strickland* entails more than an 'outcome-determinative test;' rather, the defendant must show that deficient performance of counsel rendered the result of the trial unreliable or the proceeding fundamentally unfair.") Further, the trial court made abundantly clear that it "considered all of the testimony and considered all of the case law" and based its decision "on everything that I've seen." This was no mere default to equitable "fairness." This was a proper consideration of

fairness of the proceeding in light of all the testimony given and the caselaw of this state. We find no error here.

¶ 44 III. CONCLUSION

¶ 45 For these reasons, we affirm the judgment of the Circuit Court of Du Page County and remand the cause for a new sentencing hearing.

¶ 46 Affirmed and remanded.