

No. 1-10-3538

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IN THE  
APPELLATE COURT OF ILLINOIS  
FIRST JUDICIAL DISTRICT

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THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the
	)	Circuit Court of
Plaintiff-Appellee,	)	Cook County.
	)	
v.	)	No. 07 C 660770
	)	
JAMES SHEDRICH,	)	Honorable
	)	Luciano Panici,
Defendant-Appellant.	)	Judge Presiding.

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ORDER

JUSTICE ROCHFORD delivered the judgment of the court.  
Presiding Justice Hoffman and Justice Karnezis concurred in the judgment.

¶ 1 *Held:* We reversed the first-stage, summary dismissal of defendant's *pro se* postconviction petition and remanded for second-stage proceedings, where defendant's *pro se* petition raised an arguable claim of ineffective assistance of trial counsel.

¶ 2 A jury convicted defendant, James Shedrich, of unlawful possession of a weapon by a felon and being an armed habitual criminal and the trial court sentenced him to nine years' imprisonment.

On direct appeal, we affirmed defendant's convictions. See *People v. Shedrich*, No. 1-07-3536 (2009) (unpublished order under Supreme Court Rule 23). Defendant then filed a *pro se*, postconviction petition, which the postconviction court summarily dismissed at the first stage of the

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proceedings. Defendant here appeals the first-stage dismissal of his postconviction petition, alleging the postconviction court erred in finding his petition was frivolous or patently without merit. We reverse and remand for second-stage proceedings.

¶ 3 Defendant was charged with being an armed, habitual criminal for knowingly or intentionally possessing a firearm after having been convicted of attempted armed robbery and delivery of a controlled substance. He also was charged with unlawful use of a weapon by a felon, possession of cannabis, and with armed violence.

¶ 4 At trial, Harvey police Officer Andre Sneed testified that at approximately 9 p.m. on June 6, 2007, he and other police officers of the Harvey and Cook County Sheriff's police were investigating certain areas in Harvey, Illinois, with significant narcotics trade. Officer Sneed and the other officers, including Detectives Harris and Stallworth, traveled in unmarked vehicles to the 15300 block of Paulina Avenue to investigate two buildings on that block. One of those buildings, 15336 South Paulina Avenue (the house), was the subject of several complaints. When the officers arrived, Officer Sneed saw a burgundy Chevrolet Suburban (Suburban) truck parked in front of the house with one of its doors open and defendant sitting in the front-passenger seat. Officer Sneed had not met defendant before that day. Several people were standing in the area, which was lit by a streetlight and by light from the adjacent buildings.

¶ 5 Defendant looked at Officer Sneed's vehicle and immediately exited the truck. At that moment, Officer Sneed heard something metal hit the pavement. Officer Sneed exited his vehicle and saw a black semiautomatic handgun on the pavement. Defendant ran into the house, and Officer Sneed followed him inside. Hakim Moore, one of the men standing outside the house, also ran

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inside, and Detective Stallworth followed him. Officer Sneed never lost sight of defendant and, during the pursuit, saw defendant discard a black plastic bag into a bedroom closet. Officer Sneed caught and arrested defendant in that bedroom and then found in the closet a black plastic bag containing a green leafy substance in clear plastic bags. Nobody else was in the bedroom, although there were other people elsewhere in the house, and there were no objects like the black plastic bag near it in the closet. Officer Sneed saw that Detective Stallworth had arrested Mr. Moore. Nobody else in the house was searched or arrested, although other officers checked the names of those present against police records.

¶6 When Officer Sneed took defendant outside, Detective Harris handed the officer a blue-steel, semiautomatic pistol, which he identified at trial as the handgun he had seen on the pavement. At the police station, Officer Sneed inventoried the gun and the contents of the black plastic bag. However, he discarded the black plastic bag itself because he had used it to transport the gun to the station and, thus, it became tattered.

¶7 Detective Henry Harris testified that on June 6, 2007, he and other officers went to the house, with Officer Sneed and Detective Stallworth in the lead vehicle. There were several people standing in front of the house, and there was a burgundy Suburban parked in front. Detective Harris saw Officer Sneed and Detective Stallworth pursue two men (defendant and Mr. Moore) into the house. A few seconds later, Detective Harris walked toward the Suburban and saw a handgun on the pavement near the vehicle. Nobody else was standing near the Suburban. Detective Harris picked up the gun, kept it in his belt, and gave it to Officer Sneed when he came out of the house with defendant under arrest. No other guns were found at the scene and nobody but defendant and Mr.

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Moore was arrested, although the names of those present were checked for outstanding warrants.

¶ 8 Forensic chemist Pamela Wilson testified she received from the Harvey police a green plant material, in a sealed plastic bag, bearing Officer Sneed's signature. She weighed and tested the substance, finding it to be 133.8 grams of cannabis.

¶ 9 The parties stipulated defendant had two prior felony convictions.

¶ 10 Defendant, his girlfriend Diona Johnson, her sister Quinshanta Johnson, and Vincent Mattison, who lived in the house, testified for the defense and gave a generally consistent account. On the evening of June 6, 2007, there were several people at the house celebrating defendant's birthday. Defendant did not run inside but was eating in the living room when the police entered. Eugene Jackson suddenly ran inside, pursued by Detective Stallworth. Several officers followed Detective Stallworth. One of those officers came out of the bedroom of Mr. Mattison's brother, Chicory Williams, with a black plastic bag that Mr. Mattison saw contained a green leafy substance. Mr. Moore was arrested, and Mr. Williams and Diona Johnson were detained and handcuffed, but later released. When defendant argued with the police regarding Diona Johnson's detention, Officer Sneed struck him and arrested him. After the arrests, various officers searched the house.

¶ 11 Defendant denied possessing a gun or cannabis on the evening of June 6, 2007.

¶ 12 In rebuttal, Officer Sneed testified he and Detective Stallworth were the only officers to enter the house, denied that he or any other officer struck defendant, and stated that no woman was detained, handcuffed, or arrested on the evening of June 6, 2007. Sheriff's police investigator Brian McNamara similarly testified he saw only Officer Sneed and Detective Stallworth enter the house and saw no woman handcuffed or arrested there.

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¶ 13 During jury deliberations, the jury sent the judge a note stating, "[w]hy wasn't the gun checked for fingerprints? And is this standard procedure?" The court told the jury, "[y]ou already have all of the evidence and instructions that you will be given. Please continue to deliberate." The jury subsequently informed the court it could not reach a verdict. After receiving a *Prim* instruction, the jury acquitted defendant of possession of cannabis and armed violence. The jury convicted defendant of unlawful possession of a weapon by a felon and being an armed habitual criminal. The trial court sentenced defendant to nine years' imprisonment.

¶ 14 On direct appeal, defendant's appellate attorney, who also represented him at trial, argued the evidence was insufficient to prove his guilt beyond a reasonable doubt because the State failed to establish he knowingly possessed a firearm. We affirmed. *Shedrich*, No. 1-07-3536 (2009) (unpublished order under Supreme Court Rule 23). On September 30, 2009, our supreme court denied defendant's petition for leave to appeal. *People v. Shedrich*, 233 Ill. 2d 591 (2009).

¶ 15 On August 13, 2010, defendant filed a *pro se* petition for postconviction relief. Defendant's petition alleged: (1) his trial counsel committed ineffective assistance by failing to contact, interview, and subpoena three eyewitnesses who would have given exculpatory testimony in his defense, Chicory Williams<sup>1</sup>, Eugene Jackson, and Danita Davis; (2) the State failed to prove he possessed a firearm for purposes of the armed habitual criminal statute; (3) the State used perjured testimony to obtain his convictions; (4) the trial court abused its discretion by overruling defense counsel's objection to a leading question from the prosecutor to Officer Sneed, which assumed facts not in

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<sup>1</sup>The record contains numerous variations of the spelling of Mr. Williams's first name. We use the spelling Mr. Williams himself used when he signed an affidavit in support of defendant's postconviction petition.

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evidence and led to Officer Sneed giving perjured testimony; and (5) his appellate counsel committed ineffective assistance by failing to raise the issues of the prosecutor's leading question and of the trial court's alleged abuse of discretion in overruling defense counsel's objection thereto.

¶ 16 Defendant attached notarized affidavits from Chicory Williams, Eugene Jackson, and Danita Davis to his *pro se* postconviction petition. Mr. Williams attested that at approximately 9 p.m. on June 6, 2007, he was in front of 15336 S. Paulina Avenue in Harvey, Illinois, when an unmarked police vehicle pulled up. Mr. Williams saw several officers exit their vehicles and chase Eugene Jackson inside the house. Defendant was not outside at that time. The people who were outside were made to lie down on the ground. At about 9:30 p.m., the police exited the house, with defendant in handcuffs, and placed him in the back of an unmarked police vehicle. Mr. Williams was taken inside the house and questioned about the cannabis that officers found inside a closet. He and Mr. Moore then were arrested. Police took Mr. Williams, Mr. Moore, and defendant to the police station, but they later released Mr. Williams. Three months later, Mr. Williams learned defendant was facing trial. He contacted defendant's attorney, Kenneth Flaxman, and left multiple instructions to call him as a witness. Mr. Flaxman never responded.

¶ 17 Mr. Jackson attested he also was standing in front of 15336 S. Paulina Avenue when police pulled up at about 9 p.m. on June 6, 2007. When Mr. Jackson saw the police, he ran into the house; the police pursued him. Upon running into the house, Mr. Jackson saw defendant in the living room by the kitchen. Police apprehended Mr. Jackson and told him to get down on the floor along with several other persons. The police were unsure of the identity of the person who they chased into the house. Mr. Jackson would have told them he was the person who ran into the house, but he was

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afraid of going to jail. In September 2007, Mr. Jackson contacted defendant's attorney, Mr. Flaxman, about being a witness on defendant's behalf, but Mr. Flaxman never responded.

¶ 18 Ms. Davis attested that when she arrived in front of 15336 S. Paulina Avenue at approximately 9:30 p.m. on June 6, 2007, she observed an undercover police officer wearing "a bulletproof vest that said police on the front." The officer entered a maroon Suburban truck to search. There were several other police vehicles present. Ms. Davis saw the officer exit the truck with a black handgun. At that point, defendant was already in handcuffs in the back of an unmarked police vehicle. Defendant "was not in the immediate area of the gun when it was discovered by the officer." Later, defendant, Mr. Moore, and Mr. Williams were taken away by the police. Several months later, Ms. Davis learned defendant was going to trial. She called Mr. Flaxman's office to let him know she was ready to testify, but she never heard back from him or received a subpoena. Ms. Davis attested, "[i]f given the chance," she would "testify to what [she] witnessed."

¶ 19 The postconviction court denied defendant's *pro se* postconviction petition, stating, "defendant's petition \*\*\* basically alleges that because there were additional witnesses whose testimony was only cumulative in nature, and nothing other than what's been already presented before the court—it alleges ineffective assistance of counsel. This court believes that under the standard required under the ineffective assistance of counsel, that the [defendant] has not met the grounds, and therefore, the petition \*\*\* is denied."

¶ 20 There was no written order. This appeal follows.

¶ 21 A postconviction proceeding "is not an appeal of a defendant's underlying judgment. Rather, it is a collateral attack on the judgment." *People v. Evans*, 186 Ill. 2d 83, 89 (1999). Such a

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proceeding "allow[s] inquiry into constitutional issues relating to the conviction or sentence that were not, and could not have been, determined on direct appeal." *People v. Barrow*, 195 Ill. 2d 506, 519 (2001).

¶22 Section 122-2 of the Post-Conviction Hearing Act (the Act) (725 ILCS 5/122-2 (West 2010)) requires that a postconviction petition "clearly set forth the respects in which petitioner's constitutional rights were violated." However, a *pro se* petition should be given a liberal construction. *People v. Hodges*, 234 Ill. 2d 1, 21 (2009). "Where defendants are acting *pro se*, courts should review their petitions 'with a lenient eye, allowing borderline cases to proceed.'" *Id.* (quoting *Williams v. Kullman*, 722 F. 2d 1048, 1050 (2d Cir. 1983)).

¶23 In a noncapital case, the Act creates a three-stage procedure of postconviction relief. In the first stage, the trial court independently reviews the petition and determines whether it is "frivolous" or "patently without merit." 725 ILCS 5/122-2.1 (a)(2) (West 2010); *Hodges*, 234 Ill. 2d at 10. All well-pleaded facts are taken as true at this point in the proceedings. *People v. Jones*, 399 Ill. App. 3d 341, 357 (2010). If the postconviction petition is not so summarily dismissed as being frivolous or patently without merit, it advances to the second stage where the State may file a motion to dismiss the petition, and the trial court must determine whether the petition and any accompanying documents make a substantial showing of a constitutional violation. *Hodges*, 234 Ill. 2d at 10-11. If the petition fails to make a substantial showing of a constitutional violation, it is dismissed; if such a showing is made, the postconviction petition advances to the third stage, where the trial court conducts an evidentiary hearing. 725 ILCS 5/122-6 (West 2010).

¶24 At the first stage of postconviction proceedings, defendant need only present a limited

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amount of detail in his petition. *Hodges*, 234 Ill. 2d at 9. Because most postconviction petitions at the first stage of proceedings are drafted by defendants who have little legal knowledge or training, the supreme court has held, "the threshold for survival [is] low," (*id.*) and that only a "gist" of a constitutional claim is needed. See *People v. Boclair*, 202 Ill. 2d 89, 99 (2002). Our supreme court recently explained what the term "gist" of a constitutional claim means:

"[O]ur use of the term 'gist' describes what the defendant must allege at the first stage; it is not the legal standard used by the circuit court to evaluate the petition, under section 122-2.1 of the Act, which deals with summary dismissals. Under that section, the 'gist' of the constitutional claim alleged by the defendant is to be viewed within the framework of the 'frivolous or \*\*\* patently without merit' test. \*\*\* Thus, under the Act, a petition which is sufficient to avoid a summary dismissal is simply one which is *not* frivolous or patently without merit." (Emphasis in original.) *Hodges*, 234 Ill. 2d at 11.

¶ 25 The Act does not define "frivolous" or "patently without merit." Our supreme court has provided the following definition:

"[A] *pro se* petition seeking postconviction relief under the Act for a denial of constitutional rights may be summarily dismissed as frivolous or patently without merit only if the petition has no arguable basis either in law or in fact.

\* \* \*

A petition which lacks an arguable basis either in law or in fact is one which is based on an indisputably meritless legal theory or a fanciful factual allegation. An example of an indisputably meritless legal theory is one which is completely contradicted by

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the record. \*\*\* Fanciful factual allegations include those which are fantastic or delusional." *Id.* at 11-12, 16-17.

¶ 26 In assessing whether a postconviction petition is frivolous or patently without merit, the court also considers whether the petition "attached thereto affidavits, records, or other evidence supporting its allegations or [stated] why the same are not attached." 725 ILCS 5/122-2 (West 2010). "The purpose of the 'affidavits, records, or other evidence' requirement is to establish that a petition's allegations are capable of objective or independent corroboration." *Hodges*, 234 Ill. 2d at 10.

¶ 27 On appeal from a first-stage, summary dismissal, our review is *de novo*. *Jones*, 399 Ill. App. 3d at 359.

¶ 28 Defendant first contends the postconviction court erred in summarily dismissing his *pro se* petition as being frivolous or patently without merit, where its claim of ineffective assistance of counsel had an arguable basis in both fact and law. To prevail on a claim of ineffective assistance, defendant must show "counsel's representation fell below an objective standard of reasonableness" (*Strickland v. Washington*, 466 U. S. 668, 688 (1984)), and second, that he was prejudiced such that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Id.* at 694.

¶ 29 Our supreme court has held, "[a]t the first stage of postconviction proceedings under the Act, a petition alleging ineffective assistance may not be summarily dismissed if (i) it is *arguable* that counsel's performance fell below an objective standard of reasonableness and (ii) it is *arguable* that the defendant was prejudiced." (Emphasis added.) *Hodges*, 234 Ill. 2d at 17.

¶ 30

#### I. Factual Basis

¶ 31 The first question is whether defendant's petition lacked an arguable basis in fact, *i.e.*, were the factual allegations "fantastic" or "delusional." *Id.* at 16-17. In the case at bar, defendant's petition set forth sufficient facts to assert an arguable claim of ineffective assistance of counsel so as to survive summary dismissal. Specifically, defendant contended he was deprived of his sixth amendment right to effective assistance of counsel when counsel failed to contact, interview, and subpoena three individuals: Mr. Williams; Mr. Jackson; and Ms. Davis; all of whom attested they could provide exculpatory eyewitness testimony in defendant's defense. We consider defendant's claim with regard to Ms. Davis, as it is dispositive of this appeal.

¶ 32 Defendant contended Ms. Davis would testify, contrary to the testimony of Officer Sneed and Detective Harris, that police discovered the handgun inside a maroon Suburban truck after defendant already had been led in handcuffs to an unmarked police vehicle. Defendant contended Ms. Davis's testimony "would probably change the result in a retrial" because it refutes Officer Sneed and Detective Harris about where the handgun was actually discovered, and because the evidence in the case was otherwise closely balanced. Defendant contended that where, as here, the record is unclear regarding whether trial counsel's decision not to call an exculpatory witness was a matter of trial strategy or ineffectiveness, defendant is entitled to an evidentiary hearing on that issue. Defendant's petition satisfied the Act's requirement that it "clearly set forth the respects in which petitioner's constitutional rights were violated." 725 ILCS 5/122-2 (West 2010).

¶ 33 Defendant's petition also satisfied the corroboration requirements of section 122-2. Defendant attached Ms. Davis's affidavit, in which she asserted that she saw an officer search the maroon Suburban truck, after which he exited the truck with a black handgun. At that point,

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defendant already was in handcuffs in the back of an unmarked police vehicle, and he was not in the immediate area of the gun when the officer discovered it in the Suburban truck. Ms. Davis asserted that she contacted defense counsel's office and informed him of her willingness to testify, but that she had never heard back from him or received a subpoena to come to court on this matter.

¶ 34 There is nothing so obviously fantastic or delusional in Ms. Davis's attestations as to indicate that defendant's petition premised on his counsel's ineffectiveness for failing to investigate and call her as a witness lacked an arguable basis in fact. "Whether defense counsel's failure to investigate amounts to ineffective assistance is determined by the value of the evidence that was not presented at trial and the closeness of the evidence that was presented." *People v. Montgomery*, 327 Ill. App. 3d 180, 185 (2001). Here, there was no fingerprint evidence linking defendant to the gun, no eyewitness who actually saw defendant in possession of the gun, and no confession. Had defense counsel called Ms. Davis as a witness, and had the jury believed her testimony, it could have determined defendant was not in possession of the handgun and, therefore, acquitted him of unlawful possession of a weapon by a felon and of being an armed habitual criminal. This is especially so where the jury obviously believed the evidence in this case was closely balanced, having: (1) questioned the judge as to why the handgun was not checked for fingerprints; (2) initially failed to reach a verdict and later reached a verdict only after a *Prim* instruction was given; and (3) disbelieved at least a portion of Officer Sneed's testimony and acquitted defendant of the charges of possession of cannabis and armed violence.

¶ 35 The State argues, though, that the petition lacked an arguable basis in fact because defense counsel could have determined Ms. Davis was not a credible witness given her status as the

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girlfriend of Mr. Moore, the man who was arrested with defendant and charged based on the same incident. There is no support for such a speculative argument because, on the record before us, counsel had no basis on which to form any judgment about Ms. Davis's credibility, as there was no evidence he ever spoke with her. As discussed above, Ms. Davis attested in her affidavit that she called defense counsel's office and told him she was willing to testify, but she never heard back from him or received a subpoena.

¶ 36 The State contends defense counsel investigated Ms. Davis as a potential witness because he obtained a written statement from her over three months prior to trial, determined she was not credible and, therefore, that his decision not to call her was a matter of trial strategy. The State is referencing a one-page, written statement by Ms. Davis attached to defense counsel's answer to discovery, dated June 6, 2007, in which she stated she was visiting her boyfriend, Mr. Moore, at Paulina Avenue and 153rd Street on the night defendant was "locked up." Ms. Davis stated she heard a police officer refuse defendant's repeated requests to go to the hospital because his face was hurting. Although Ms. Davis's statement indicated she was a witness to at least some of the events leading to defendant's arrest on June 6, 2007, there is no indication in the record as to whether defense counsel ever followed up and spoke with Ms. Davis regarding what she had seen on that night. There also is no evidence in the record rebutting Ms. Davis's attestation in her affidavit that, although she was prepared to provide potentially exculpatory testimony regarding the location of the gun and had called counsel's office prior to trial and informed him of her readiness to testify, she never heard back from him or received a subpoena. The State's argument that defense counsel made a strategic decision not to call Ms. Davis as a witness after investigating her is unsupported in the

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record.

¶ 37 The State also argues that the petition lacked an arguable basis in fact because defense counsel could have determined not to call Ms. Davis because her testimony would have been cumulative. We disagree. First, as discussed, there is no evidence in the record that defense counsel ever discussed with Ms. Davis her proposed testimony regarding the officer's discovery of the gun inside the Suburban truck so as to be able to make a determination as to whether or not it would be cumulative. Further, no other witness testified at trial to seeing the officer discover the gun *inside* the Suburban truck after defendant's arrest, as opposed to Officer Sneed's and Detective Harris's testimony indicating that defendant dropped the gun outside the truck as he was fleeing from Officer Sneed. Ms. Davis's testimony would not have been cumulative in relevant part.

¶ 38 In sum, defendant's allegation in his *pro se* postconviction petition of ineffective assistance of counsel premised on the failure to contact, interview, and subpoena Ms. Davis, corroborated by Ms. Davis's supporting affidavit, was un rebutted by the record and had an arguable basis in fact.

¶ 39

## II. Legal Basis

¶ 40 The next question is whether defendant's petition lacked an arguable basis in law, *i.e.*, was it based on an indisputably meritless legal theory completely contradicted by the record. *Hodges*, 234 Ill. 2d at 16. As discussed above, there is nothing in the record indicating that defendant's legal theory that counsel was ineffective for failing to contact, interview, and subpoena Ms. Davis was indisputably meritless, nor is there anything in the record completely contradicting defendant's claim of ineffective assistance. Accordingly, defendant's allegation of ineffective assistance of counsel had an arguable basis in law.

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¶ 41 We emphasize that we are not making a dispositive holding that trial counsel failed to contact or interview Ms. Davis, that his conduct was not based on trial strategy, or that he committed ineffective assistance. We are only holding that, based on the record before us and giving defendant's *pro se* postconviction petition a liberal construction (*id.* at 21), defendant's claim of ineffective assistance had an arguable basis in fact and law sufficient to survive summary dismissal at the first stage of postconviction proceedings.

¶ 42 Because we have concluded that defendant's *pro se* postconviction petition set forth a claim of ineffective assistance of counsel sufficient to survive summary dismissal, the entire petition must be remanded for further proceedings, regardless of the merits of any other claims. *People v. Cathey*, 2012 IL 111746, ¶ 34.

¶ 43 For the foregoing reasons, we reverse the order summarily dismissing defendant's *pro se* postconviction petition, and remand for second-stage proceedings. As a result of our disposition of this case, we need not address the other arguments on appeal.

¶ 44 Reversed and remanded.