2014 IL App (2d) 130143-U
No. 2-13-0143
Order filed July 2, 2014

IN THE

APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS, Plaintiff-Appellee, v. MARION PARHAM, Defendant-Appellant.	))))))))))	Appeal from the Circuit Court of Lake County. No. 10-CF-271 Honorable James K. Booras, Judge, Presiding.

PRESIDING JUSTICE BURKE delivered the judgment of the court.
Justices McLaren and Jorgensen concurred in the judgment.

ORDER

¶ 1 *Held*: Trial court committed no abuse of discretion (and consequently no plain error) either in allowing defendant to proceed *pro se* or in failing to appoint standby counsel. However, the cause must be remanded for the proper imposition of mandatory fees; affirmed in part, vacated in part, and remanded with directions.

¶ 2 Following a jury trial, defendant, Marion Parham, was convicted of burglary and was sentenced to 10 years' imprisonment. On appeal, he contends that the trial court committed plain error when it allowed him to proceed *pro se* and, alternatively, that the trial court committed plain error in failing to appoint standby counsel. He also contends that the trial court improperly

imposed mandatory fines at sentencing. We affirm in part, vacate in part, and remand the cause with directions

¶ 3 I. BACKGROUND

¶ 4 A one-count indictment was filed on November 24, 2010, charging defendant with burglary (720 ILCS 5/19-1(a) (West 2010)), arising from the unauthorized entry of Lauren Barnes's vehicle.

¶ 5 Barnes had parked and locked her car in a church parking lot located in Zion, Illinois. When she returned to the car around 9:30 p.m., she found the front passenger window broken, with broken glass shards strewn throughout the interior of the car as well as on the ground next to the window. The car stereo or radio, which had been intact when Barnes had locked the car, was in shambles. It had been pulled out from the console area in the center portion of the car. Barnes found blood spatters on the front area of the car stereo. A throw pillow, which had been in the front seat, had been moved to the back seat.

¶ 6 When the police arrived, neither the police nor Barnes had noticed that there was blood on the pillow. But when Barnes vacuumed her car, she turned the pillow over and found what she believed was blood. Without touching the blood, Barnes threw the pillow to the rear of the car and called the police back to the scene.

¶ 7 Officer Eric Hill of the Zion police department retrieved samples of the blood for analysis. After further investigation, a DNA saliva standard or swab was taken from defendant. Michelle Thomas of the Northeastern Illinois Regional Crime Laboratory analyzed the blood from the DNA swab taken from the pillow against defendant's saliva swab and found that it established a match.

¶ 8 Attorney Kevin Rosner filed an appearance on defendant's behalf, and the public defender was granted leave to withdraw. Prior to trial, Rosner filed a motion for a confirmatory analysis of defendant's DNA. In the motion, counsel noted that defendant was being charged with five pending cases involving DNA evidence, and although there was a Combined DNA Index System (CODIS) match to defendant, the CODIS result was not an evidentiary sample. The State explained that it sought a buccal swab from defendant to obtain the confirmatory analysis. The trial court ordered defendant to submit to a buccal swab. On June 30, 2011, defendant acknowledged receipt of the confirmatory analysis and filed a motion for a fitness evaluation. The court granted the motion "for the purpose of him being able to understand the proceedings" and for general fitness and a mental assessment.

¶ 9 During the pendency of the fitness evaluation, Rosner moved to withdraw as defense counsel. At the hearing on the motion, Rosner indicated that defendant requested him to withdraw, and defendant agreed that he did not wish Rosner to represent him. Defendant stated that his family was attempting to hire another attorney. The court cautioned that a new attorney may not do what defendant wanted him to do. Defendant responded, "Basically, my case is so basic, it ain't funny." The court then granted Rosner leave to withdraw and appointed the public defender in his stead.

¶ 10 In October 2011, the parties stipulated to the fitness evaluation. The August evaluation indicated that defendant's thought processes appeared paranoid and delusional and that his intellectual functioning was limited. The report also revealed that defendant's multiple mental health evaluations established sub-average intellectual functioning and personality issues. Although defendant possessed some knowledge of the nature of the court process, he lacked a rational understanding of the nature and purpose of the proceedings against him. The report

concluded that defendant was unfit to assist in his defense and stand trial. Based on the report, the court's observations, and the parties' stipulation, the court found defendant unfit to stand trial and remanded him to the Department of Human Services.

¶ 11 Following the recommendation of a December fitness report, the parties returned to court in December 2011. The parties stipulated to the report, which opined that defendant was restored to fitness, was able to understand the charges against him, and was able to assist in his defense. The evaluation stated that defendant suffered from no psychotic or behavior issues or delusional thinking. Furthermore, defendant was not medicated. Although his cognitive processing was sluggish and he had limited insight as to how his behavior led to his arrest, defendant demonstrated a sound grasp of basic legal terms and court procedures and was aware of the severity of the charges, sentencing range, and adversarial nature of trial. The court found defendant restored to fitness.

¶ 12 On February 10, 2012, the court granted David Weinstein leave to file his appearance on behalf of defendant and granted the public defender leave to withdraw as counsel. When the cause arose for pretrial two months later, Weinstein orally moved to withdraw as counsel. He told the court that he and defendant were not accomplishing anything. Defendant asserted that counsel had not come to speak with him and was "not respecting what I want." The court again explained that, sometimes, a lawyer cannot get what he wants. When defendant indicated that he wanted Weinstein as his counsel, Weinstein requested a little more time to make a decision.

¶ 13 Subsequently, Weinstein filed a written motion to withdraw as counsel and informed the court that, although he had spent a good deal of time with defendant and his mother, they were "going backwards" and that he had "no relationship whatsoever" with defendant. Weinstein further indicated that defendant had sent him "letters which [were] borderline threatening" and

he raised concerns as to defendant's fitness. Defendant denied sending such letters, but counsel described their relationship as "open hostility." To the contrary, defendant stated that he had no issues with Weinstein, denied there were any differences with counsel, and indicated that he was ready to go to trial. The court granted Weinstein's motion, acknowledging the hostility between defendant and counsel. The court then told defendant to find another attorney so that he could go to trial.

¶ 14 On May 10, 2012, defendant stated that he wished to proceed *pro se*. The judge admonished defendant that he would hold defendant to the standard of an attorney and would not provide him assistance or standby counsel. When asked by the judge if he knew how to conduct evidence, defendant responded, "I do not feel I'm capable enough to do all this case myself." Verifying that defendant had been evaluated for fitness, the court acknowledged the difference between being fit to stand trial and being fit to represent oneself. Defendant agreed that he could select a jury, make an opening statement, and make proper objections. When the court inquired into why he did not want an assistant public defender, defendant replied that his case was not being resolved and denied that he was causing that. The court ordered defendant reevaluated for fitness. The judge agreed with defendant that he had a right to proceed *pro se* but first wanted to make certain he was fit to stand trial.

¶ 15 The May evaluation reported that defendant showed no signs of psychotic disorder, and his thought process appeared logical, goal-directed, and more flexible than his previous evaluation. Defendant's intellectual function, however, appeared limited. During the evaluation, defendant described the roles and responsibilities of the court participants, showed awareness of court-related issues, possessed the ability to assist in his defense, and indicated that his case was simple and "is about DNA evidence." He was dissatisfied with his attorneys because they failed

or refused to file a motion to dismiss and spent too much of his family's money. Because defendant felt that he did nothing illegal, he found advice to plead guilty antithetical to this belief. Defendant stated the advantages and disadvantages of proceeding *pro se*. Based on his previous evaluations, defendant showed sub-average intellectual functioning and personality issues; he frequently was diagnosed with dysthymic disorder, and personality disorder with passive-aggressive and schizoid features. In recommending a finding of fitness to enter a plea or stand trial, the psychologist commented that defendant "appears to be able to pursue what he considers to be in his best legal interest. At this time[,] he believes his best legal interest to be *pro se* defense in a bench trial." The parties agreed with the recommendation, and the court found defendant fit to stand trial.

¶ 16 At the May 17, 2012, hearing, defendant argued his motion to dismiss the indictment. After arguing that the State should not have used a standard sample of his DNA, that the sample had a broken seal, and the red substance was paint rather than blood, the court denied the motion.

¶ 17 On May 22, the State filed a motion to admit defendant's prior felony convictions to impeach him. The State also filed another motion to admit a prior burglary to establish defendant's intent and opportunity. At the hearing on the State's second motion, defendant argued that the other crimes were not an issue in the case. The court allowed the State to present other crimes in the case-in-chief to show intent.

¶ 18 On June 8, the State advised that defendant refused the offered plea and raised concerns over the admonishments given before defendant proceeded *pro se*. The State expressed concern over defendant's statement that he did not feel capable of doing the case himself. The court believed that defendant's statement meant "that if he wanted a stand-by counsel, which I said no, he was not going to get [it]." Additionally, the court explained that it had exercised its discretion

in not allowing standby counsel, as defendant appeared "very seasoned and sophisticated in the—not the legal field, but probably in the system." Nevertheless, the court inquired further into the previous statement. Defendant responded that his case was not difficult or complicated for him to take care of the matter himself and he felt capable of proceeding.

¶ 19 Prior to the start of trial, the State asked the court to address a third *pro se* motion filed by defendant seeking to dismiss the charges. On June 18, the court denied the motion, finding it neither to be a motion to dismiss the indictment nor a motion to dismiss for discovery violations. Thereafter, the cause proceeded to trial.

¶ 20 During *voir dire*, defendant excused two jurors. Afterwards, defendant wondered if he could hire an attorney. Defendant asked if the State was going to use his background and was it too late for him to hire an attorney. Defendant stated that, if the State could bring up his background, he would not want to testify. The State asserted that defendant had been unequivocal in wanting to represent himself and noted the antagonistic relationships with his previous counsel. The State believed that defendant was playing a "stall game." Defendant countered that the State delayed his case, and he asserted that it was his right to decide his counsel. The trial court first noted that the impeachment motion had been made pretrial and then ordered the trial to proceed. The following exchange then ensued:

> "THE COURT: You can't be hot and cold with an attorney; today I want an attorney, the next day I want to fire an attorney. You were very emphatic when I addressed you. 'Yes, I want to represent myself.' 'Yes, I'm capable of doing that.' 'Yes, I am. I want to do that.' I told you I wouldn't have a standby counsel for you, and you said it's okay. So now to—

DEFENDANT: I did speak on this. I mean, I don't have no problem with what I'm going to say, Your Honor. But I did ask you that I did need assisting counsel, you know, that's on my side. And you had denied that.

THE COURT: Absolutely.

DEFENDANT: But that's my right, though.

THE COURT: No, it's not your right. Your right.

DEFENDANT: I mean as far as—

THE COURT: *** is to have an attorney to represent you, not to have an attorney here that's sitting behind you. No, that's not your right. Your right is to appear *pro se*. And you chose to appear *pro se*. And I honored that right."

The matter then proceeded to opening statements, during which defendant informed the jury that the case was "strictly about DNA," that the evidence was fabricated and not DNA, and that the blood was really nail polish or paint.

¶ 21 Following the trial, the jury found defendant guilty of burglary by unauthorized entry and the trial court entered judgment on the verdict. Defendant inquired if he could hire an attorney to appeal his case, and the court told him that he could hire an attorney for sentencing and for his appeal. Attorney Bob Ritacca filed his appearance on behalf of defendant on July 3, 2012. He requested leave to file a motion for a new trial because defendant had "wrongfully decided to proceed by himself."

¶ 22 In his motion for a new trial, defendant maintained that he had a long history of mental health issues that prevented him from properly representing himself and that he should have had an attorney to assist him in his defense. At the hearing on the motion, defendant argued that he was not "fully advised as to the complexity" of proceeding *pro se*, especially when the

complexity of the case involved DNA analysis and scientists. Defendant further averred that he had defenses that should have been prepared. The State responded that both the prosecution and the court expressed concerns about defendant proceeding *pro se*, but he unequivocally stated that was how he wished to proceed. When defense counsel asserted that there was a fitness issue, the court indicated that he had defendant evaluated and re-evaluated and he was found fit. The judge stated: "If he were unfit, definitely I would have considered appointing counsel and having counsel handle the case, not the defendant." The court allowed defendant time to revise the posttrial motion.

¶ 23 At the following hearing, defense counsel argued that defendant, "being without any type of support, *** put himself in a bad position. *** [The State] went into a fight with [defendant's hands] tied behind his back and without the sophistication or the knowledge to properly defend himself." Counsel then requested an Illinois Supreme Court Rule 402 (eff. July 1, 2012) conference for the remaining cases pending against defendant.

¶ 24 Following the conference, the trial court summarized the terms discussed. The court stated that it had recommended 10 years' imprisonment and the State would *nolle pros* the remaining cases pending against defendant. The court further indicated that defendant could be Class X eligible with an extensive criminal history. Defendant indicated that he was willing to enter the agreed sentence of 10 years, and he withdrew all pending motions. The court then imposed the agreed sentence, and on November 6, 2012, assessed and ordered defendant to pay $431 in fines, fees, and costs, and the State *nolle prossed* the remaining four pending cases.

¶ 25 On March 21, 2013, we granted defendant leave to file a late notice of appeal.

¶ 26 II. ANALYSIS

¶ 27 Defendant contends that the trial court abused its discretion by allowing him to proceed *pro se* and alternatively, in failing to appoint standby counsel. As set forth above, initially, defendant's posttrial motion asserted that his long history of mental health issues did not allow him to properly defend himself and that he should have had an attorney to help him in his defense. However, when the parties reached an agreed sentence, defendant withdrew this motion and the issue on appeal was not litigated in the posttrial motion. Accordingly, defendant forfeited the issue he now raises on appeal.[1] See *People v. Enoch*, 122 Ill. 2d 176, 186 (1988) (where a defendant fails to raise an issue in a posttrial motion, he forfeits his contention on appeal). Defendant therefore argues for plain-error review. We need not address his plain-error arguments, however, because even addressing the issues on the merits, we find no abuse of discretion. *People v. Sargent*, 239 Ill. 2d 166, 189 (2010) (a prerequisite or an initial step toward applying plain error is the existence of an error).

¶ 28 A. *Pro Se* Representation

¶ 29 A defendant has a right to self-representation in criminal trials under both the United States and Illinois Constitutions. See U.S. Const., amend. VI; Ill. Const. 1970, art. I, § 8; *Faretta v. California*, 422 U.S. 806, 832 (1975); *People v. Burton*, 184 Ill. 2d 1, 21 (1998). The right is " 'not absolute and may be forfeited if the defendant engages in serious and obstructionist misconduct, or if he cannot make a knowing and intelligent waiver of counsel.' " *People v. Rasho*, 398 Ill. App. 3d 1035, 1041 (2010) (citing *People v. Rohlfs*, 368 Ill. App. 3d 540, 545 (2006). A trial judge does not measure a defendant's competency to elect self-representation based on the level of the defendant's competency as a lawyer. *People v. Simpson*, 172 Ill. 2d

[1]The State does not argue that part of the agreement entered into concerning defendant's sentence was the withdrawal of the motion.

117, 137-38 (1996). A defendant's ability to represent himself, such as his technical decisions and legal knowledge, has no bearing on his competency to choose self-representation. See *Godinez v. Moran*, 509 U.S. 389, 400 (1993); *Faretta*, 422 U.S. at 836.

¶ 30 Concurrently, the due process clause of the fourteenth amendment prohibits the prosecution of a defendant who is not fit to stand trial. *People v. Mitchell*, 189 Ill. 2d 312, 226 (2000). In Illinois, a defendant is presumed to be fit unless, due to a mental or physical condition, he is unable to understand the nature or purpose of the proceedings against him or to assist in his defense. 725 ILCS 5/104-10 (West 2010). The significant inquiry is whether the defendant understood the proceedings and could cooperate with counsel in his defense, not whether the defendant has a mental illness. *People v. Easley*, 192 Ill. 2d 307, 323 (2000).

¶ 31 A criminal defendant has a constitutional right to represent himself if he makes an unequivocal request to do so. *People v. Rohlfs*, 368 Ill. App. 3d 540, 544 (2006). The trial court's decision on a defendant's election to represent himself will be reversed only if the court abused its discretion. *Id*. 368 Ill.App.3d at 545. The trial court also has broad discretion to appoint counsel for advisory or other limited purposes. *People v. Redd*, 173 Ill. 2d 1, 38 (1996).

¶ 32 In support of his first argument, defendant relies on *Indiana v. Edwards*, 554 U.S. 164 (2008), arguing that it stands for the proposition that, where a defendant is fit to stand trial, a trial court may deny his request to represent himself when he lacks the mental capacity to conduct his trial defense.

¶ 33 *Edwards* concerned a criminal defendant whom a state court found mentally competent to stand trial if represented by counsel but not mentally competent to represent himself *pro se* at trial. The Supreme Court considered whether, under these circumstances, the Constitution forbade a state from insisting that the defendant proceed to trial with counsel, thereby denying

the defendant the right to represent himself. The Court found that it was constitutional for a state to deny the defendant the right to represent himself if the defendant was not mentally competent to do so. *Edwards*, 554 U.S. at 167.

¶ 34 In reaching this determination, the court noted its "foundational 'self-representation' case" of *Faretta*, which held that the sixth and fourteenth amendments include a constitutional right to proceed without counsel when a criminal defendant voluntarily and intelligently elects to do so. *Edwards*, 554 U.S. at 169. However, the Court made it clear that *Faretta* did not answer the question presented in *Edwards* because *Faretta* did not concern a defendant with mental competency issues. The Court reiterated that the question in *Edwards* concerned whether there was a mental-illness-related limitation on the scope of the right of self-representation. *Edwards*, 554 U.S. at 171.

¶ 35 In finding that it was constitutional to limit this right, the Court reasoned that an individual may well be able to satisfy the mental competence standard to stand trial when represented by counsel, yet may be unable to carry out the basic tasks needed to present his own defense without the help of counsel. *Id*. at 174-75. The Court further observed that "mental illnesses can impair the defendant's ability to play the significantly expanded role required for self-representation even if he can play the lesser role of represented defendant. [Citation.]" *Id.* at 176. The Court also noted that, "a right of self-representation at trial will not 'affirm the dignity' of a defendant who lacks the mental capacity to conduct his defense without the assistance of counsel. [Citation.]" *Id.* at 176. Thus, where a defendant may be competent to stand trial but may suffer a severe mental illness that makes him incompetent to conduct trial proceedings himself, the judge may insist upon representation for the defendant so that the proceedings provide him with a fair trial. *Id*. at 176-78.

¶ 36 While *Edwards* recognized a mental-illness-related limitation, it did not set a standard by which to determine whether a defendant is competent to conduct trial proceedings by himself. It merely left the individual determination within the sound discretion of the trial judge to take a realistic account of a defendant's particular capacities. See *Id.* at 177-79. In this case, defendant unequivocally requested to proceed *pro se.* Although prior to trial, defendant did make some comment about wanting assistance of counsel, the trial court determined that defendant was referring to standby counsel. After the jury had been selected, defendant asked if he could hire an attorney. Based on the timing of the request, the trial court did not abuse its discretion in refusing to delay the trial for that purpose.

¶ 37 We find the facts here are similar to those in *People v. Allen*, 401 Ill. App. 3d 840 (2010), where the defendant claimed on appeal that he was not mentally competent to represent himself at trial. In that case, once the defendant was found fit to stand trial, the trial court allowed him to proceed *pro se* based on his repeated requests to allow his public defender to withdraw. *Id.* at 852. The *Allen* court noted that the trial court had observed that the defendant was intelligent and capable of conducting his own defense. The record showed that the defendant performed all of the duties that an attorney would do, including making an opening statement and closing argument, cross-examining witnesses, entering exhibits into evidence, objecting to witnesses' testimony, and submitting jury instructions, and thus was able to carry out the basic tasks needed to present his own defense without the help of counsel. *Id.*

¶ 38 Moreover, the *Allen* court noted that the defendant's argument on the issue invited the court to substitute its judgment for that of the trial court regarding whether the defendant was mentally competent to proceed *pro se. Id.* Even though the defendant had previously been found unfit and was diagnosed with a psychotic delusional disorder, the court concluded the

record established the defendant was mentally competent to represent himself at trial. Additionally, although the record showed obvious deficiencies in the defendant's self-representation, these deficiencies were a result of the defendant not being an attorney, not the result of mental incompetence. *Id.*

¶ 39 Here, defendant's comments to the court and the manner in which he conducted his defense show that he was competent to carry out the basic tasks needed to present his own defense. Defendant performed all the duties that counsel would do. He actively filed and argued motions on his behalf and participated in excusing jurors during *voir dire*. He made an opening statement, noting that the case was "strictly about DNA." He conducted meaningful cross-examination of the witnesses. He successfully objected when the State began to introduce the other crimes evidence. And, defendant presented a closing argument. Like in *Allen*, defendant made some questionable choices in pursuing his line of defense which the evidence did not support. However, this did not show his mental incompetence to represent himself, especially in light of the overwhelming evidence implicating him in the offense.

¶ 40 Defendant cites his history of mental illness and low intellectual functioning. In contrast, the May 2012 fitness evaluation showed defendant exhibited no sign of a psychotic disorder, was logical, and understood the court process. The trial court also found defendant to be seasoned and sophisticated in the judicial system. Based on the totality of the record, we cannot say that the trial court abused its discretion in granting defendant's request to proceed *pro se*.

¶ 41 B. Standby Counsel

¶ 42 We next address defendant's alternative argument regarding whether the trial court abused its discretion by not appointing standby counsel. The appointment of standby counsel does not offend a defendant's constitutional right to self-representation under the United States

or Illinois Constitutions. *People v. Gibson*, 136 Ill. 2d 262, 375 (1990). However, a *pro se* defendant does not have a right to standby counsel because the right of self-representation does not carry a corresponding right to legal assistance. *People v. Simpson*, 204 Ill. 2d 536, 562 (2001); *People v. Ellison*, 2013 IL App (1st) 101261, ¶ 42. The defendant does not have the right to a hybrid trial—alternating between representing himself and being represented by counsel. *People v. Smith*, 249 Ill. App. 3d 460, 470 (1993).

¶ 43 Relevant information a trial court should use in deciding whether to appoint standby counsel includes (1) the nature and gravity of the charge; (2) the expected factual and legal complexity of the proceedings; and (3) the abilities and experience of the defendant. *Gibson*, 136 Ill. 2d at 380. A trial court's decision whether to appoint standby counsel is reviewed for an abuse of discretion. *People v. Taggart*, 233 Ill. App. 3d 530, 557 (1992). The *Ellison* case points out that no court has been reversed on this issue. *Ellison*, 2013 IL App (1st) 101261, ¶ 42. We would reverse if the trial court did not exercise its discretion, but here it clearly did.

¶ 44 Defendant relies on *Gibson*, which we find distinguishable for a number of reasons. The *Gibson* case did not involve a trial court exercising its discretion in not appointing standby counsel. Additionally, in *Gibson*, the defendant was facing a capital offense, a great deal of forensic and expert testimony, and he had little experience with the criminal justice system. Clearly, facts much different than the present case.

¶ 45 When applying the three *Gibson* factors here, it is hard to say that the trial court abused its discretion by not appointing standby counsel. The present case did not involve a capital offense, the trial court found defendant was sophisticated with the court system, and the trial court specifically stated it was exercising its discretion. While the case involved DNA evidence,

and defendant clearly knew that the case involved DNA evidence when he decided to proceed *pro se*, the case was not otherwise legally or factually complex.

¶ 46 C. Fines

¶ 47 Defendant last contends that the assessment charged to him under the Violent Crime Victims Assistance Fund (VCVAF) must be reduced from $100 to $4, as the legislation increasing this fine to $100 did not take effect until after the date of the crime charged. Compare 725 ILCS 240/10 (West 2008) with 725 ILCS 240/10 (West 2012). The State concedes the error and further points out that the $10 State Police Service fine (730 ILCS 5/5-9-1.17 (West 2010)), which relates to the expungement of juvenile records, was not in effect at the time of this offense and must also be vacated.

¶ 48 The State further notes that the trial court did not impose the mandatory "Lump Sum" surcharge, which is $10 for every $40 in fines imposed. 730 ILCS 5/5-9-1(c) (West 2008). The State also questions what statute authorized the imposition of the $10.25 "Clerk Operadmin Fund" assessment. The State recommends that we remand the cause for the proper calculation and imposition of the mandatory fines.

¶ 49 Defendant notes that, in addition to the State Police Service fine, the State's Attorney fee and the Administration Fund violate *ex post facto* principles, as all took effect after the charged offense. Defendant agrees that the cause must be remanded for clarification of all the fines imposed by the trial court.

¶ 50 III. CONCLUSION

¶ 51 For the reasons stated, we affirm defendant's conviction of burglary, vacate the fines, fees, and costs previously imposed, and remand the cause for the proper imposition of all fines, fees, and costs.

¶ 52 Affirmed in part, vacated in part, and remanded with directions.