IN THE SUPREME COURT OF MISSISSIPPI

NO. 2018-KA-00121-SCT

COREY MOORE a/k/a COREY PATRICK MOORE a/k/a PAT

v.

STATE OF MISSISSIPPI

DATE OF JUDGMENT:	10/18/2017
TRIAL JUDGE:	HON. JEFF WEILL, SR.
TRIAL COURT ATTORNEYS:	CLAYTON LOCKHART JACK BRADLEY McCULLOUCH ESEOSA GWENDLINE AGHO
COURT FROM WHICH APPEALED:	HINDS COUNTY CIRCUIT COURT
ATTORNEY FOR APPELLANT:	THOMAS W. POWELL
ATTORNEY FOR APPELLEE:	OFFICE OF THE ATTORNEY GENERAL BY: JOHN R. HENRY, JR.
DISTRICT ATTORNEY:	ROBERT SHULER SMITH
NATURE OF THE CASE:	CRIMINAL - FELONY
DISPOSITION:	AFFIRMED - 01/09/2020
MOTION FOR REHEARING FILED:	
MANDATE ISSUED:	

BEFORE RANDOLPH, C.J., ISHEE AND GRIFFIS, JJ.

ISHEE, JUSTICE, FOR THE COURT:

¶1. Corey Moore disappeared from his trial after the court refused to grant him a continuance. He was convicted in abstentia and sentenced to twenty-five years as a habitual offender. On appeal, Moore argues that he received ineffective assistance of counsel and that the trial court erred by not ordering a competency hearing, sua sponte, based on Moore's diagnosis of post-traumatic stress disorder (PTSD) and vague, general assertions about

Moore's mental state from lay witnesses. We find that Moore based the ineffective-assistance-of-counsel claims on facts outside the record; thus, those claims are suitable only for postconviction review, not direct appeal. We also find no basis to doubt the trial judge's finding that Moore's absence from the trial was "willful, voluntary, and deliberate." We affirm Moore's conviction and sentence.

FACTS

¶2. On August 23, 2014, an off-duty Jackson police officer, George Jimmerson, noticed a vehicle parked in the driveway of his ex-wife's home. Officer Jimmerson's ex-wife Nita McGee (at the time, Nita Cornelius) was staying with family while recovering from surgery. She confirmed to Officer Jimmerson the car was not supposed to be there. It was later discovered that a door to the house had been kicked in, and Corey Moore was found hiding in a storage room. The vehicle in McGee's driveway was determined to belong to Moore's mother, and personal property from inside the house, including a musical instrument owned by McGee and Jimmerson's daughter said to be worth more than $1000, was found inside it. Moore and McGee knew each other: McGee worked at the Department of Veterans Affairs Medical Center (VA) where Moore had been a patient, she had paid Moore for work at her house, and she had "helped him" in the past. But Moore did not have permission to be in her house or to take her property.

¶3. After numerous continuances attributed to a busy docket, trial was set for June 5, 2017. Moore did not appear. His appointed counsel, Clayton Lockhart, admitted Moore knew the court date. Lockhart then moved for a continuance, saying he wanted time to try

to negotiate a plea deal with the district attorney. The court took the motion under advisement and delayed the trial until the next morning.

¶4. Moore appeared in court the second day. The trial court denied the continuance motion. Moore then asked to address the court; he said he had never met his attorney and had only spoken to him "like three times." According to Moore, they had not discussed the case. Moore said he wanted to hire his own attorney but was still trying to get the money. Moore said the second day of trial was the first time he had seen his attorney. Lockhart admitted they had never met in person, but he said it was "not due to any fault of [his] own." The trial judge then announced that the trial would proceed. After a break, Moore again spoke to the judge, apparently asking for a continuance. Moore said that he was a veteran, that he had been "shot five times," and that he had been diagnosed with PTSD. Moore mentioned medication: "that's what brought me here today." Moore then said he "didn't feel comfortable" with his attorney and with the trial's happening that day; he felt he was being rushed into trial. Moore added that his attorney "[didn't] even know about my medical condition."

¶5. The circuit judge then asked Lockhart, Moore's appointed attorney, to respond. Lockhart said,

> Once again, Your Honor, he is correct that this is our first time meeting. This is not my first time talking to this individual and trying to request a meeting. He's always had a reason for not meeting me; including him being at the VA for a few months last year after being diagnosed with PTSD. He even had a letter from his caseworker at that time saying that. Mr. Moore, as I said to the Court before, has called me a couple of times. We have talked on the phone more than once. Mr. Moore has told me a couple of times that he was hiring his own attorney and that he wanted to fire me, and he's never done anything

> to try to do that. So I just don't know what else I'm supposed to do here, Your Honor. I've tried. He's right, we don't know each other, we haven't actually had a sit down and discuss the case. But again, I don't believe that's due to anything that I've done wrong.

¶6. The trial judge accepted Lockhart's account and decided to proceed with the trial that day after a five-minute break:

> It's apparent Mr. Lockhart has attempted to discuss the case with Mr. Moore, who has related to Mr. Lockhart that he intended at some point to hire an attorney—which he never did. So we're here today. Mr. Moore's been aware the case has been set for trial for quite some time, and we're going to proceed with the trial.

¶7. Moore left the courthouse during the break and never returned. Lockhart reported that he had tried to call Moore but that Moore's phone went to voicemail. The court proceeded with voir dire and then recessed for the day. Lockhart tried to get in touch with Moore again after the first day of trial, but when he tried Moore's phone, it "went to voicemail after ringing a few times." Lockhart left Moore a message saying the trial would proceed the next day and that he should appear.

¶8. The next morning, Moore again did not appear. The night before, a local attorney, Robyn Teague, had contacted Lockhart and told him Moore had tried to retain her services. Teague appeared in court the second day of the trial, not as Moore's attorney, but to explain what had happened. She reported that Moore had started paying a retainer but had never finished. Teague said Moore's mother had told her Moore had "mental issues," that he had been treated for a "psychiatric condition" at the VA hospital, and that he had been "in and out of the psychiatric ward" in jail. Teague clarified that Moore had told her specifically that he suffered from PTSD but that she had never seen any documentation regarding Moore's

diagnosis or treatment. Teague had talked to Moore the day before, and, apparently, the morning of the second day of trial. She had told him to go to court. Teague was also afraid of Moore and feared he was dangerous. She said,

> I've asked law enforcement if he was violent or if they, you know, knew him to be violent. And they didn't confirm that he was. But from the last 24-hours communication with him—I'm not a medical professional—but common sense tells me that he's not stable at all. And I think he's dangerous. And he's not in his right mind; I do know that.

Teague did not elaborate further, but she added that she did not believe she was representing Moore and was not prepared to do so. She added that Moore was aware the court would try his case even if he was not present.

¶9. The trial court then specifically asked Lockhart, Moore's appointed public defender, why he had not filed a motion for a mental examination. Lockhart said Moore had been diagnosed with PTSD about eighteen months before, but he had "never detected anything over the phone where [Moore] had any kind of mental issues." In their last conversation before those immediately preceding the trial, Moore had thanked Lockhart for his services but had told him he was going to retain other counsel; Lockhart had emphasized that the attorney would have to formally enter an appearance before he could withdraw from the case. Moore "always seemed competent over the telephone."

¶10. The trial judge found,

> I announced we were about to bring the jury in to try his case. [Moore] had absolutely no doubt, that he knew that his trial was five minutes away. We took a comfort break, a short one; when we returned, he was gone. He left some personal effects on the table. And on report of his counsel he had left the courthouse. He hadn't been back since. His absence is clearly willful, voluntary, and deliberate. And I'm finding that he's aware of his trial.

¶11. At trial, Lockhart presented a coherent theory of the defense, that Moore and the victim had been dating and that Moore was in her home with her permission. Moore's attorney brought out that the victim was separated from her husband, that Moore had been invited to her house to help her move furniture, and that he had her cell phone number and had called and texted her. The victim, who worked at the VA hospital where Moore had been a patient, apparently had been questioned about the propriety of her contact with Moore, although there was no suggestion of an intimate relationship with Moore. The defense was ultimately unsuccessful, but we observe it is the same theory Moore later asserted personally at the sentencing hearing—"I didn't do it. Me and the lady was dating. She got mad."

¶12. At the sentencing hearing, Moore apologized "for running out." He said he had used alcohol and drugs to self-medicate since he returned from the Gulf War in 1991. Moore said he was innocent of the burglary charges and that he was not a criminal, just an addict. At the sentencing hearing Moore denied Lockhart was his attorney. Moore stopped talking about the merits of his defense after being cautioned by the judge. He closed by saying that he was not violent and that he was then in treatment for substance abuse and had been clean "since the 7th of August," about two months after the trial and two months before sentencing.

DISCUSSION

¶13. Moore presents five issues on appeal: (1) whether Moore received ineffective assistance of counsel at trial, (2) whether the circuit court committed plain error by allowing ineffective assistance of counsel, (3) whether the circuit court erred by trying Moore in absentia, (4) whether the circuit court erred by failing to conduct a competency hearing, and

(5) whether the verdict is supported by the weight of the evidence. Because issues one and two are the same, we have combined them.

1. Ineffective Assistance of Counsel

¶14. A defendant in a criminal case has a constitutional right to effective assistance of counsel. ***Strickland v. Washington***, 466 U.S. 668, 687, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984). But "[t]here is a strong presumption that counsel's performance falls within the range of reasonable professional assistance . . . ." ***Id.*** at 689. To succeed on a claim of ineffective assistance of counsel, the defendant must prove (1) that his attorney's performance was deficient and (2) that the deficient performance deprived the defendant of a fair trial. ***Dartez v. State***, 177 So. 3d 422, 423 (Miss. 2015). "The benchmark for judging any claim of ineffectiveness of counsel must be whether counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result." ***Branch v. State***, 961 So. 2d 659, 666 (Miss. 2007) (internal quotation marks omitted) (quoting ***Strickland***, 466 U.S. at 686).

¶15. Moore claims the public defender who represented him at trial, Lockhart, was ineffective in the following respects: (1) failure to meet in person before trial, (2) failure to present evidence Moore and the victim were meeting in an unprofessional manner, (3) failure to object to the State's not introducing the stolen items into evidence, (4) failure to move for a directed verdict due to the State's failure to introduce the stolen items into evidence, (5) failure to object to Moore's being tried in absentia, and (6) failure to ask for a continuance.

Moore also claims he had an attorney-client relationship with Teague and that she totally failed to represent him as promised.

¶16. As to Moore's third and fourth claims regarding Lockhart's representation, no rule of law requires the items taken in a burglary to be entered into evidence. "The elements of burglary are (1) 'breaking and entering the dwelling house or inner door of such dwelling house of another'; and (2) 'with intent to commit some crime therein.'" ***Quinn v. State***, 191 So. 3d 1227, 1233 (Miss. 2016) (quoting Miss. Code Ann. § 97-17-23(1) (Rev. 2014)). The State alleged that Moore broke into the house with the intent to steal, but actually stealing items is not an element of burglary. *See* ***Quinn***, 191 So. 3d at 1233. Moreover, the items were described particularly through direct testimony by two witnesses who personally saw them in the vehicle—musical instruments, paintings, bedding, clothes, an air mattress, and an air pump. A photograph showing the interior of the vehicle was entered into evidence, and Officer Jimmerson specifically identified his daughter's antique clarinet in the photograph. We find no error in counsel's failure to raise these arguments during the trial.

¶17. Moore also claims Lockhart was ineffective for failing to request a continuance, but the record reflects that he did ask for a continuance. Lockhart also allowed Moore to address the trial court and make what was in effect a pro se motion for continuance.

¶18. As to the claims Lockhart failed to meet in person with Moore, to introduce certain evidence at trial, and to object to Moore's being tried in absentia, these claims all depend on facts not fully developed in the record. "It is unusual for this [c]ourt to consider a claim of ineffective assistance of counsel when the claim is made on direct appeal," because "there

is usually insufficient evidence within the record to evaluate the claim." ***Wilcher v. State***, 863 So. 2d 776, 825 (Miss. 2003) (alteration in original) (quoting ***Aguilar v. State***, 847 So. 2d 871, 878 (Miss. Ct. App. 2002)). We address ineffective-assistance claims on direct appeal only when "the record affirmatively shows ineffectiveness of constitutional dimensions, or . . . the parties stipulate that the record is adequate and the Court determines that findings of fact by a trial judge able to consider the demeanor of witnesses, etc. are not needed." ***Read v. State***, 430 So. 2d 832, 841 (Miss. 1983). The same is true regarding Moore's claims about his purported attorney, Teague. Moore claims in his brief on appeal to have hired her, but, at trial, she denied an attorney-client relationship with Moore.

¶19. The facts surrounding Moore's claims are not fully apparent from the record. We deny relief on these issues without prejudice to Moore's right in the future to file a motion for postconviction relief. *See* ***McGrath v. State***, 271 So. 3d 437, 444 (Miss. 2019).

2. Competency Hearing

¶20. Moore contends on appeal that the trial court, sua sponte, should have ordered a hearing to determine whether Moore was competent to stand trial. The trial occurred before the effective date of the Mississippi Rules of Criminal Procedure, so the issue is governed by the former Uniform Rule of Circuit and County Court Practice 9.06, which provided, in relevant part, that the trial court must order a mental evaluation and conduct a competency hearing if it has "reasonable ground to believe that the defendant is incompetent to stand trial." ***King v. State***, 269 So. 3d 98, 101 (Miss. 2018) (quoting URCCC 9.06).[1]

[1] Moore was tried in June 2017. On July 1, 2017, Rule 9.06 was superseded by Rule 12 of the Mississippi Rules of Criminal Procedure. *See* MRCrP 12.

¶21. "A criminal defendant is presumed competent." ***Evans v. State***, 226 So. 3d 1, 14 (Miss. 2017) (quoting ***Silvia v. State***, 175 So. 3d 533, 540 (Miss. Ct. App. 2015) (Carlton, J., dissenting)). "The burden of proof rests on the defendant to prove that he is mentally incompetent to stand trial." ***Id.*** (citing ***Richardson v. State***, 767 So. 2d 195, 203 (Miss. 2000)). A competent defendant is one

> (1) who is able to perceive and understand the nature of the proceedings; (2) who is able to rationally communicate with his attorney about the case; (3) who is able to recall relevant facts; (4) who is able to testify in his own defense if appropriate; and (5) whose ability to satisfy the foregoing criteria is commensurate with the severity of the case.

Hollie v. State, 174 So. 3d 824, 830 (Miss. 2015) (quoting ***Hearn v. State***, 3 So. 3d 722, 728 (Miss. 2008)), *overruled on other grounds by* ***Pitchford v. State***, 240 So. 3d 1061 (Miss. 2017).

¶22. "On review, the pertinent question is whether 'the trial judge received information which, objectively considered, should reasonably have raised a doubt about the defendant's competence and alerted [the judge] to the possibility that the defendant could neither understand the proceedings, appreciate their significance, nor rationally aid his attorney in his defense.'" ***Harden v. State***, 59 So. 3d 594, 601 (Miss. 2011) (quoting ***Goff v. State***, 14 So. 3d 625, 644 (Miss. 2009)). "'What constitutes "reasonable ground" . . . rests largely within the discretion of the trial judge.'" ***Id.*** (quoting ***Goff***, 14 So. 3d at 644).

¶23. The record does show that Moore was diagnosed with and treated for PTSD, and, when speaking to the trial court, he referenced taking medication. Teague, the attorney Moore tried to hire, related secondhand accounts about Moore's condition and treatment,

then added that, apparently based on her conversation with Moore the day of his trial, he might be dangerous and was "not in his right mind."

¶24. Lockhart stated several times on the record that he had no reason to doubt Moore's competency, and he never requested a mental evaluation. The attorney conceded he only had limited contact with Moore, but he said Moore always offered "some kind of *reason*" for not meeting in person. (Emphasis added.) Moore had said he intended to hire another attorney. And while Moore was repeatedly said to have been diagnosed and treated for PTSD, there was never any suggestion it impacted his ability to "'understand the proceedings, appreciate their significance, [and] rationally aid his attorney in his defense.'" ***Harden***, 59 So. 3d at 601 (quoting ***Goff***, 14 So. 3d at 644). The mere diagnosis of a mental illness or defect, without more, does not "reasonably . . . raise[] a doubt about the defendant's competence . . . ." ***Id.*** (quoting ***Goff***, 14 So. 3d at 644). Although not in effect at the time of Moore's trial, Rule 12 of the Mississippi Rules of Criminal Procedure is instructive in providing that "[t]he presence of a mental illness, defect, or disability alone is not grounds for finding a defendant incompetent to stand trial." MRCrP 12. This Court has found that no competency hearing was required in cases in which the defendant was diagnosed with schizophrenia, ***Conner v. State***, 632 So. 2d 1239, 1248 (Miss. 1993), *overruled on other grounds by* ***Weatherspoon v. State***, 732 So. 2d 158 (Miss. 1999), bipolar disorder, ***Hearn***, 3 So. 3d at 729, and mental retardation, ***Harden***, 59 So. 3d at 601.

¶25. Moreover, Moore appeared in court and spoke with the trial judge. So far as the record reveals, Moore was rational and coherent; the trial judge observed his behavior. And

at the sentencing hearing, Moore himself attributed his conduct to drug and alcohol abuse rather than mental illness or incapacity per se. He further articulated a coherent theory of defense and was cogent enough to interject and to argue with the judge about whether he was actually inside the house when he was caught.[2] And despite their limited contact before trial, Lockhart, Moore's attorney, knew Moore's theory of the defense and brought out facts at trial to support it.

¶26. We also observe that the dissent's contention that Moore missed the trial because he was hospitalized receiving treatment for PTSD is based on a single ambiguous sentence from Teague's account.[3] Moore himself has never claimed to have been hospitalized during the trial, nor has his counsel made that claim in arguments at trial or on appeal. Instead, Moore attributed his conduct to drugs and alcohol, and Moore said he went into substance-abuse treatment "on the 7th of August." That was about two months *after* the trial, which was held the first week of June.

¶27. The trial judge had the benefit of speaking with Moore directly and observing him in person, and the trial court's conclusions about Moore's competency should not be disturbed. ***Harden***, 59 So. 3d at 601. The trial judge "sees the evidence first hand; he observes the

---

[2] Moore was found in a storage room attached to the house but accessed through the carport or garage; he argued this was not "in" the house.

[3] Teague told the trial court that Moore had been "in and out of jail in the psychiatric ward." The judge asked Teague how she knew this, and Teague said it was something Moore's mother had told her—"at times she's said [Moore's] in the hospital." Teague then added that "[J]ust yesterday or this morning, I've asked what was he in the hospital for, and he told me he was on the psychiatry ward at the VA."

demeanor and behavior of the defendant." ***Conner***, 632 So. 2d at 1248. On this point, ***Harden*** is instructive. It was undisputed that Harden suffered from mental deficiencies, including mild mental retardation. ***Harden***, 59 So. 3d at 601-02. Unlike in today's case, Harden's attorney asked for a mental examination and a competency hearing, and both were refused. ***Id.*** At an abortive plea hearing, Harden "had difficulty responding to questioning by the trial court" and "stated that he did not understand the contents of the plea petition," even after conferring again with counsel. ***Id.*** at 602. Nonetheless, the trial court refused to hold a competency hearing, and Harden was ultimately convicted. This Court affirmed based on the trial judge's having personally observed the defendant—"Although this Court lacks the benefit of having observed Harden, given the broad discretion afforded to trial courts in determining whether to order a mental evaluation and competency hearing, we cannot say the ruling was outside the trial court's discretion." ***Id.*** at 603. This Court further observed that—like in the instant case—the trial judge had expressed a "willingness to consider other evidence pertaining to [the defendant's] competency . . . ." ***Id.***

¶28. We reach the same conclusion in today's case and find no error in the trial court's decision not to hold a competency hearing.

3. Trial in Absentia

¶29. The "decision to try a felony defendant in absentia [is] within the discretion of the trial court. But this discretion necessarily must be limited by the fact that a felony defendant has a constitutional right to be present at trial." ***Wales v. State***, 73 So. 3d 1113, 1120 (Miss. 2011) (citing U.S. Const. amend. VI; Miss. Const. art 3, § 26). "A waiver of a constitutional

right is ordinarily valid only if there is 'an intentional relinquishment of a known right or privilege.'" ***Bostic v. State***, 531 So. 2d 1210, 1213 (Miss. 1988) (quoting ***Johnson v. Zerbst***, 304 U.S. 458, 464, 58 S. Ct. 1019, 82 L. Ed. 1461 (1938)). Specifically, the right to be present at trial "may be waived based on a defendant's 'willful, voluntary, and deliberate absence from trial.'" ***Blanchard v. State***, 55 So. 3d 1074, 1077-78 (Miss. 2011) (quoting ***Jay v. State***, 25 So. 3d 257, 264 (Miss. 2010)).

¶30. The circuit court found that Moore's absence was "clearly willful, voluntary, and deliberate" and that Moore had voluntarily waived his right to be present. *See* Miss. Code Ann. § 99-17-9 (Rev. 2015). Moore had complained about his attorney and had asked for a continuance; his request was denied. Then, after a short recess, Moore walked out of the courthouse and apparently went to another attorney he was trying to hire. Moore's court-appointed attorney advised him he would be tried anyway, as did the attorney he tried to hire. Moore did not return.

¶31. Moore cites ***Jay v. State***, 25 So. 3d 257, 263-64 (Miss. 2010), as an analogous case, but it is not. Jay was diagnosed with a traumatic brain injury. ***Id.*** at 258. In light of this diagnosis, Jay's attorney filed a motion for a continuance and attached a letter from a physician as evidence of Jay's condition. ***Id.*** at 259. The trial court then ordered a psychiatric examination, but before the court was given the report, Jay's case was called for trial. ***Id.*** Jay was in the courtroom before his case was called, but once the case was called, he was not there. The ***Jay*** Court reversed the conviction because the trial court did not conduct a competency hearing after ordering a psychiatric evaluation; the Court observed that

"[t]his issue turns on Jay's mental competency hearing." ***Id.*** at 264. As noted above, no psychiatric evaluation was ordered in this case, and no reasonable basis existed to question whether Moore was competent to stand trial. So he was not entitled to a mental examination or a competency hearing.

¶32. Moore also contends he did not receive written notice concerning the trial date, but the authority he cites, Mississippi Code Section 99-17-9 (Rev. 2015), offers no support. It provides,

> In criminal cases the presence of the prisoner may be waived (a) if the defendant is in custody and consenting thereto, or (b) is on recognizance or bail, has been arrested and escaped, or has been notified in writing by the proper officer of the pendency of the indictment against him, and resisted or fled, or refused to be taken, or is in any way in default for nonappearance, the trial may progress at the discretion of the court, and judgment made final and sentence awarded as though such defendant were personally present in court.

Miss. Code Ann. § 99-17-9 (Rev. 2015). Section 99-17-9 expressly permits trial in absentia when "the defendant . . . is on recognizance or bail . . . and is in any way in default for nonappearance . . . ." *Id.* This statute does not require written notice of the trial date to be mailed to the defendant, as Moore claims it does. Moreover, we observe that Moore had actual knowledge of the trial dates and actually appeared in court before ultimately walking out after his request for a continuance was denied.

¶33. We find no merit to Moore's claims that his mental condition caused him to miss the trial involuntarily. Nor can we find any reason to doubt the trial judge's findings that Moore was absent from the trial voluntarily. We find no merit to this issue.

4. Weight of the Evidence

¶34. This Court has held that when considering a challenge to the weight of the evidence, we will view "'the evidence in the "light most favorable to the verdict"' and '"will only disturb a verdict when it is so contrary to the overwhelming weight of the evidence that to allow it to stand would sanction an unconscionable injustice."'" ***E.G. Johnson v. State***, 234 So. 3d 1248, 1250 (Miss. 2017) (quoting ***Martin v. State***, 214 So. 3d 217, 222 (Miss. 2017)).

¶35. As noted above, "[t]he elements of burglary are (1) 'breaking and entering the dwelling house or inner door of such dwelling house of another'; and (2) 'with intent to commit some crime therein.'" ***Quinn v. State***, 191 So. 3d 1227, 1233 (Miss. 2016) (quoting Miss. Code Ann. § 97-17-23(1) (Rev. 2014)). The State alleged that Moore broke into the house with the intent to steal items within.

¶36. The door to the victim's house had been kicked in and valuable property belonging to the victim and her daughter was found in a vehicle owned by Moore's mother and parked in the driveway. Moore was found hiding in a storage room attached to the victim's house. Little evidence supported the defense theory that Moore was there with permission. After reviewing the record, we find Moore's conviction was not against the overwhelming weight of the evidence.

CONCLUSION

¶37. We find no merit to Moore's arguments on appeal, and we affirm Moore's conviction and sentence.

¶38. **AFFIRMED.**

RANDOLPH, C.J., COLEMAN, MAXWELL, BEAM, CHAMBERLIN AND GRIFFIS, JJ., CONCUR. KITCHENS, P.J., DISSENTS WITH SEPARATE WRITTEN OPINION JOINED BY KING, P.J.

KITCHENS, PRESIDING JUSTICE, DISSENTING:

¶39. Because the trial judge had reasonable ground to believe that Moore was mentally incompetent to stand trial and should have ordered a mental competency evaluation, I respectfully dissent. A criminal defendant has a federal and a state constitutional due process right not to be tried while mentally incompetent. ***Pate v. Robinson***, 383 U.S. 375, 385, 86 S. Ct. 836, 15 L. Ed. 2d 815 (1966); ***Williams v. State***, 205 Miss. 515, 524, 39 So. 2d 3, 4 (1949) (citing Miss. Const. art. 3, § 26). A defendant is mentally competent to stand trial if the defendant "has sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding . . . and . . . has a rational as well as factual understanding of the proceedings against him." ***Dusky v. United States***, 362 U.S. 402, 402, 80 S. Ct. 788, 788-89, 4 L. Ed. 2d 824, 825 (1960).

¶40. The court rule in effect at the time of Moore's trial required the trial judge to order a mental competency evaluation *sua sponte* upon "reasonable ground to believe that the defendant is incompetent to stand trial." URCCC 9.06. We have held that a mental competency evaluation is required when "the trial judge received information which, objectively considered, should reasonably have raised a doubt about the defendant's competence and alerted [the judge] to the possibility that the defendant could neither understand the proceedings, appreciate their significance, nor rationally aid his attorney in his defense." ***Harden v. State***, 59 So. 3d 594, 601 (Miss. 2011) (internal quotation marks

omitted) (quoting ***Goff v. State***, 14 So. 3d 625, 644 (Miss. 2009)). Although the trial court has discretion to determine what constitutes reasonable ground, that discretion does have a limit, and this record demonstrates that the failure to order a mental competency evaluation for Moore was an abuse of discretion. ***Harden***, 59 So. 3d at 601.

¶41. Moore did not attend court for the June 5, 2017, trial setting, but he did appear the next day. Moore informed the judge that, before that day, he never had met his court-appointed counsel, Clayton Lockhart, and never had discussed the case with him. Moore told the court that he had been diagnosed with post-traumatic stress disorder (PTSD). Lockhart confirmed that this was the first time he had met Moore and that, when he had spoken with Moore on the phone previously, Moore had expressed a desire to fire him and to hire a different attorney. Lockhart confirmed that "we haven't actually had a sit down and discuss [sic] the case."

¶42. During a break, Moore left the courthouse, precipitating his trial *in absentia*. The day after Moore left, Attorney Robyn Teague appeared in court to provide information about her interactions with Moore after his disappearance. As background, Teague informed the court that Moore first had contacted her in 2015 about representing him in the case being tried. She said that Moore was being treated for a psychiatric condition at the Department of Veterans Affairs Medical Center (VA) and that she had spoken with his mother about his mental health problems. Teague reported that, the day before, Moore had called to tell her that he was in the psychiatric ward at the VA. Based on her communications with Moore over the previous twenty-four hours, Teague opined that Moore was "not stable at all," "not in his

right mind," and "dangerous." Additionally, Teague's opinion was that Moore believed, erroneously, that she was representing him on the burglary charge. Teague had recommended to Moore that he attend his trial.

¶43. Teague's information prompted the trial judge to ask Lockhart why he had not filed a motion for a mental evaluation. Lockhart responded that the entirety of his communication with Moore had taken place over the telephone. Lockhart was aware that Moore had been treated for PTSD at the VA, but he "never detected anything over the phone where he had any kind of mental issues." Lockhart said he had not spoken on the phone with Moore "since February of last year,"[4] when Moore had said that he wanted to hire other counsel. After hearing from Lockhart, the trial judge said nothing more on the subject and proceeded with the trial.

¶44. I would find that the information before the trial court, objectively considered, reasonably should have raised a doubt about Moore's mental competency to stand trial. Moore had been diagnosed with PTSD. Although this Court held in ***Harden*** that a diagnosed psychiatric condition, standing alone, is not sufficient to create reasonable ground to order a mental evaluation, Moore's behavior provided evidence that his mental condition affected his competency to stand trial. ***Harden***, 59 So. 3d at 601. Teague informed the court that, the day Moore absented himself from trial, he called her and said he was in the psychiatric ward at the VA. She said Moore was unstable and not in his right mind and that Moore thought Teague, who did not represent him, was his attorney. This information strongly suggests that

[4] The record does reflect that a day earlier, Lockhart had informed the court that he had spoken with Moore on the previous weekend to tell him the date and time of trial.

Moore was in no mental condition to have consulted with his attorney with a rational degree of understanding and that he lacked a rational understanding of the proceedings.

¶45. The trial judge acknowledged harboring some doubt about Moore's mental competency by asking Lockhart why he had not filed a motion for a mental evaluation. The trial court accepted Lockhart's explanation that Moore had seemed mentally competent over the phone. But Lockhart's information was of extremely limited usefulness in assessing Moore's mental competency because (1) Lockhart never had met with Moore in person; (2) even over the phone, Lockhart never had discussed the case with Moore; and (3) other than one recent phone call to inform Moore of the date and time of his trial, Lockhart's last phone conversation with Moore had occurred in "February last year," more than one year before the trial. In contrast, Teague, who had known Moore for two years, reported her communication with Moore from the previous twenty-four hours, which had left her with the impression that Moore was not stable, not in his right mind, and dangerous. Therefore, although the majority credits Lockhart's assurances that Moore seemed competent on the phone, Teague's much more recent and impactful interaction with Moore was the kind of information that, objectively considered, should have alerted the trial judge to the need for a mental competency evaluation.[5]

¶46. Finally, I note that the majority finds great significance in the trial judge's observation of Moore during the proceedings. But Moore was largely absent from the proceedings—he

[5] Although I focus on the evidence before the trial court at the time of the competency discussion, Teague's information that Moore was in the VA's psychiatric ward was bolstered by the victim's trial testimony that one of the ways she knew Moore was that he was a mental health patient at the VA, where she was a nurse practitioner.

walked out of a pretrial hearing, missed the entire trial, and returned only for the brief sentencing hearing. Therefore, unlike in ***Harden***, the trial judge lacked a meaningful opportunity to assess Moore's mental competency based on personal observation of his demeanor and behavior.

¶47. Because reasonable ground existed to believe Moore was incompetent to stand trial, the trial court abused its discretion by failing to order a mental competency evaluation. I would reverse and remand for a mental competency evaluation, followed by a competency hearing to determine Moore's competency to stand trial. URCCC 9.06.

KING, P.J., JOINS THIS OPINION.