

# MEMORANDUM DECISION

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# IN THE COURT OF APPEALS OF INDIANA

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Robert T. Drake,  
*Appellant-Defendant,*

v.

State of Indiana,  
*Appellee-Plaintiff.*

August 31, 2023

Court of Appeals Case No.  
23A-CR-189

Appeal from the Whitley Circuit  
Court

The Honorable Matthew J.  
Rentschler, Judge

Trial Court Cause No.  
92C01-2203-MR-231

**Memorandum Decision by Judge Brown**  
Judges Crone and Felix concur.

**Brown, Judge.**

[1] Robert T. Drake appeals his conviction for murder and argues that the trial court abused its discretion in denying his request for a mistrial or continuance and that the evidence was insufficient to sustain his conviction. We affirm.

### ***Facts and Procedural History***

[2] In the early morning hours of March 14, 2022, Joseph Guerra observed Curtis Thomas put a hatchet through the windshield of the vehicle of Guerra's girlfriend, Kayla Burget. Between 5:45 and 6:00 a.m., Guerra picked up Burget in her vehicle, and Burget was "extremely pissed off." Transcript Volume II at 169. Guerra and Burget picked up Drake and his girlfriend, Ashlynn McClain. Burget was "mad," "cussing up a storm," and "wanted something done." *Id.* at 171. She asked Drake "if he thought he could deal with it, handle it for her," and said "how she wanted him beat up real bad." *Id.* Drake said: "I got you sis. I'll handle it. I'll take care of it." *Id.* Drake also stated: "[I]t was bulls--- that [her] window got broke[n] when it wasn't, nothing to do with [her] and that it needed to be taken care of and needed to be fixed." *Id.* at 182-183. A plan was developed "[t]o get [Thomas] to come to [them] so that [they] could just rob him and beat him up." *Id.* at 192.

[3] McClain started messaging Thomas via Facebook Messenger about "cuddling and hanging out." *Id.* at 193. Mia Griffin and McClain dropped off Drake at a gas station, picked up Thomas, and then drove back to the gas station and picked up Drake. Drake pulled out his gun, placed it on his right side, and talked about how Thomas broke the windshield. A minute or two after Griffin pulled out of the gas station, she and McClain heard a gunshot. Griffin looked

at Thomas through the rearview mirror and observed that his face was “a little blue” and he appeared to be in pain. Transcript Volume III at 6. Drake then told Griffin to start driving and to “just find an open area.” Transcript Volume II at 207. Griffin drove “out into the country.” *Id.* Drake told Griffin to stop, she pulled over, and Drake exited the car and pulled Thomas out of the vehicle. Drake entered the car and told Griffin “to drive and if [she] told anyone he would kill [her] husband and [her] kids.” Transcript Volume III at 7. That same day, Indiana State Police Trooper Eric Egbert discovered Thomas’s body along a dirt road.

- [4] At some point in March 2022, Drake went to the home of his uncle, Sean Lundberg. Lundberg learned that Drake “was in some kind of trouble, running.” Transcript Volume II at 126. Drake told Lundberg that he “had gotten into some s--- up in Fort Wayne” and “had to pop the m-----f----- in the back seat of a car.” *Id.* at 127. Drake gave Lundberg a .25 caliber handgun, which Lundberg eventually gave to the police.
- [5] Dr. Scott Wagner, a forensic pathologist, recovered a bullet during an autopsy of Thomas. Michelle Fletcher, a forensic firearms examiner, determined that the bullet recovered from Thomas’s body was fired from the gun recovered from Lundberg.
- [6] On March 18, 2022, the State charged Drake with murder. The State filed a Witness and Exhibit List on May 31, 2022, an Amended Witness and Exhibit

List on July 27, 2022, and a Second Amended Witness and Exhibit List on November 23, 2022, and each listed Lundberg and his address.

[7] On December 13, 2022, the court began a three-day jury trial. During opening statements, Drake's counsel stated in part:

When this case gets boiled down, when you narrow it down to the basic pure facts of this case, the only person, the only person that implicated Robert Drake in this case is Ashlynn McClain. . . . [Mia Griffin] got the opportunity to review Ashlynn McClain's statement. And sure enough she came in and gave a story to the prosecutor almost identical to Ms. McClain's second statement. When it comes down to it again, those are the only two stories you're really going to have that puts Robert Drake anywhere near with [sic] case. [The prosecutor], well obviously you're sitting there what about this gun that [the prosecutor] says Mr. Drake gave his uncle, the one he had in his possession? The one that comes back and matches the bullet found in [Thomas's] chest? Well that's not quite that way. This gun was found in Mr. Lundberg's house, the same house that Ashlynn stayed the night in at that the [sic] same time. Mr. Drake wasn't even there when he was found. He was at another house down in Cass County. Mr. Lundberg found this gun in a bag in a bedroom where Ashlynn McClain was as well. There is no tie to this gun other than Ashlynn McClain's testimony. There's no DNA that ties this to Mr. Drake. There's no fingerprints that ties it to Mr. Drake. You have to rely solely on Ashlynn McClain's testimony.

*Id.* at 92-93.

[8] After some testimony and outside the presence of the jury, Drake's counsel stated that he spoke with the prosecutor about two to three weeks earlier

regarding the case and “some particular civilian witnesses, namely Sean Lundberg,” and he was given the report regarding Lundberg’s interview in March and did not find the interview to be “particularly incriminating.” *Id.* at 115. He referenced the detailed reports regarding Lundberg’s statement and that Lundberg “did talk about a conversation, a short conversation he had with Mr. Drake regarding something that happened that in Fort Wayne and I believe, without looking it up, I believe that he told the police that he got into an altercation with a dude in Fort Wayne.” *Id.* at 116. He stated that he spoke with the prosecutor on Thursday, December 8, 2022, and learned that Lundberg had been arrested in Hamilton County and was transported to Whitley County. He stated that the prosecutor informed him on Friday, December 9, 2022, that Lundberg “was detoxing, was in bad shape, that they weren’t able to talk to him, we’re going to try to talk to him maybe either Sunday night or Monday.” *Id.* He then stated:

I think we talked Monday morning when I was here, um, [the prosecutor] asked if I wanted to go over and talk with him, Monday afternoon. I told him I couldn’t . . . . I was completely booked that afternoon and all day on Monday. I did not hear anything more from [the prosecutor] with regard to Mr. Lundberg. We proceeded this morning, I made my opening statement based upon what I believed the evidence to be, based on the discovery and the depositions that I had taken. We took our break just about fifteen minutes ago, maybe more than that now, on my way to the bathroom I happened to see Deputy Spencer, Chief Deputy Spencer and another officer with an inmate in the little conference room off of Superior Court. I was told that was Mr. Lundberg. I ran down and went to the bathroom and decided to come in [to] at least introduce myself to

Mr. Lundberg and just ask him a couple of brief questions just confirming what I believe the evidence to be. I said regarding [Drake's] statements to you, you said he told you he got into an altercation with a guy in Fort Wayne, is that right? "Well he told me he popped a guy in, in the back seat of a car in Fort Wayne." Um, so I was a little taken aback by that statement and immediately left Mr. Lundberg, um, and then subsequently learned that [the prosecutor] or law enforcement or his agents, whoever, interviewed Mr. Lundberg yesterday and learned that same information. Um, I was not advised of that. . . . I made my opening statement based on what I believed the evidence to be. I specifically focused my defense on the two ladies involved in this case, Mia Griffin and Ashlynn McClain's statements. I have now laid Mr. Drake open because there's new evidence that was made available and was, the prosecuting attorney was aware of that was not disclosed to me. It was exculpatory, it was inculpatory, but I did not have that information when I made my opening statement and I have now created a vacuum in our defense that I cannot rebuild even with the chance to interview Mr. Lundberg or even depose him now. I mean I can certainly get some more details, but it doesn't change the fact that I have set up our defense based on information that [the prosecutor] knew I didn't have, that he did have. So based on that Judge, I would move for a mistrial in this case and ask for the matter to be reset.

*Id.* at 116-117. The prosecutor replied in part:

Yesterday, late afternoon, I made contact with Ms. Griffin to prepare her for trial, Mr. Lundberg, who is a State's witness, I met with him to prepare for trial. We discussed his testimony and that is when I in fact learned that he was going to make the statement that he made. That was approximately 4:30, 4:30 yesterday afternoon. He has been a resident of the Whitley County Jail since the time he arrived. He has been available to be interviewed. . . . We were set for trial today, I, because the

information is not exculpatory and because it was witness preparation, I did not feel any burning need to tell that. . . . And if . . . Mr. Lundberg had said, um, [Drake] had nothing to do with it, I would have had bring that to [defense counsel's] attention immediately.

*Id.* at 118-119.

[9] After some discussion, the court stated:

Well in my mind, the difference between “I got into an altercation with a dude in Fort Wayne”, in reference to the facts that we’ve all heard in the allegations here, to “he told me he popped a guy in the back seat of a car”, is a difference merely of a degree. He’s not changing his story. He’s being more descriptive, he’s perhaps putting additional words in the mouth of your client, [defense counsel] I would agree with that, but to me it’s, you would, you would have had to explain around that statement, whether it was the minor one or the major one. The fact that he was saying the major one now in my mind does not change the, the inconsistency of those statements with what you have put forth in your opening statement. So I’m going to deny the request for a mistrial.

*Id.* at 121.

[10] Defense counsel moved to exclude “his testimony as to pertaining to those two items,” and the court denied the request. *Id.* Defense counsel stated: “And then I request the evening and not have him called until tomorrow, to give me the evening to talk to him.” *Id.* After some discussion, the court indicated that it would give defense counsel “the next half-hour to speak with Mr. Lundberg

and gain whatever information you can in preparation for his examination.” *Id.* at 122.

[11] After a recess, defense counsel stated that he spoke with Lundberg privately and Lundberg stated in part that he gave the gun to “two welder buddies of his to destroy it.” *Id.* at 123. Defense counsel stated:

I would like the opportunity to go find these guys. Verify what Mr. Lundberg has said. Mr. Lundberg says he doesn’t know how the gun eventually got into the bag which it did, I think that’s important. I think that finding these two guys and taking their statements to somehow either corroborate or discredit Mr. Lundberg because we now have a vastly inconsistent statement with what he originally told the police back on March 18 is crucial to our defense. So again I would renew my Motion for a Mistrial or at least ask for a continuance of a few days to track down these witnesses, these potential witnesses and interview them.

*Id.* The court denied the motion for a mistrial and stated “witnesses change their statement or make more elaborate or sometimes inconsistent statements at trials that they have previously made,” and “[t]he time for discovering that was, is not in the midst of trial.” *Id.* at 124.

[12] The State then presented Lundberg’s testimony. Lundberg acknowledged that he was incarcerated. He testified that Drake went to his home in March 2022 and “was in some kind of trouble, running.” *Id.* at 126. According to Lundberg’s testimony, he had a conversation with Drake, Drake “and his girl were running,” Drake “had gotten into some s--- up in Fort Wayne.” *Id.* at 127.



Drake told him “he had to pop the m-----f----- in the back seat of a car.” *Id.* Lundberg testified that Drake had a .25 caliber handgun, and he asked him “why he still had it.” *Id.* at 128. Drake gave Lundberg the handgun, and Lundberg asked his “guys that work for [him] if they would just dispose of it.” *Id.* at 129.

[13] On cross-examination, Lundberg indicated he realized he could be charged with aiding a murder and being an accessory after the fact. He testified he met with police on March 16th and did not tell them this story. When asked if he earlier told the police that Drake told him he was in an altercation with a man in Fort Wayne “over a girl named Iris,” Lundberg answered: “I didn’t know her name, but yes, it’s the statement I gave.” *Id.* at 131. He admitted he never told the police anything about Drake handing him a gun or handing the gun to his two friends. He indicated that his friends did not destroy the gun and it was left in his garage. He indicated that the gun was on a work bench and ended up in a grey bag, but he did not remember how it ended up in the bag. Defense counsel asked: “Is it fair to say that the first time you told anyone this statement that you’re giving here today which you agree is different than what you told the police, was yesterday . . . when you met with the prosecuting attorney?” *Id.* at 141. Lundberg answered: “Well I wouldn’t say it’s different, it’s just more detailed.” *Id.*

[14] The State then presented the testimony of multiple witnesses including Guerra, Burget, McClain, Griffin, Dr. Wagner, and Fletcher. The jury found Drake guilty as charged. The court sentenced Drake to sixty-five years.

## *Discussion*

I.

[15] Drake argues that “the State’s suppression of evidence required mistrial or a new trial.” Appellant’s Brief at 12 (capitalization omitted). He contends defense counsel “moved for a mistrial or at least a significant continuance to investigate the claims, as well as attempt to find the corroborating witnesses Lundberg suddenly recalled.” *Id.* at 13. He asserts that the State violated the rule in *Brady v. Maryland*, 373 U.S. 83, 83 S. Ct. 1194 (1965). Specifically, he asserts Lundberg had made much more benign statements to investigators prior to the prosecutor’s indication at trial that the State intended to offer testimony from Lundberg that Drake admitted to the murder and asked him to dispose of the pistol. He acknowledges it could be argued that “the evidence suppressed was, in fact, damaging to the defense, as it amounted to testimony alleging a confession,” but contends that “what defense believes was suppressed amounts to impeachment evidence, as this witness has presented prior, inconsistent statements on these same facts.” *Id.* at 14-15.

[16] Under *Brady*, the State has an affirmative duty to disclose material evidence favorable to the defendant. *State v. Hollin*, 970 N.E.2d 147, 153 (Ind. 2012). “To prevail on a *Brady* claim, a defendant must establish: (1) that the prosecution suppressed evidence; (2) that the evidence was favorable to the defense; and (3) that the evidence was material to an issue at trial.” *Id.* (quoting *Minnick v. State*, 698 N.E.2d 745, 755 (Ind. 1998) (citing *Brady*, 373 U.S. at 87, 83 S. Ct. 1194), *reh’g denied*, *cert. denied*, 528 U.S. 1006, 120 S. Ct. 501 (1999)).

Evidence is material when there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different. *Id.* The State will not be found to have suppressed material information if that information was available to a defendant through the exercise of reasonable diligence. *Stephenson v. State*, 864 N.E.2d 1022, 1057 (Ind. 2007), *reh'g denied, cert. denied*, 552 U.S. 1314, 128 S. Ct. 1871 (2008). The Indiana Supreme Court has observed that, “[i]f the favorable evidence becomes known to the defendant before or during the course of a trial, *Brady* is not implicated.” *Williams v. State*, 714 N.E.2d 644, 649 (Ind. 1999) (citing *Braswell v. State*, 550 N.E.2d 1280, 1283 (Ind. 1990) (“[I]n the instant case, the discovery of the recorded statement occurred before the trial concluded. Thus appellant’s reliance on *Brady* is misplaced.”)), *cert. denied*, 528 U.S. 1170, 120 S. Ct. 1195 (2000).

[17] To the extent Drake challenges the trial court’s denial of his request for a continuance, rulings on non-statutory motions for continuance are within the trial court’s discretion and will be reversed only for an abuse of that discretion and resultant prejudice. *Robinson v. State*, 91 N.E.3d 574, 577 (Ind. 2018). An abuse occurs only where the trial court’s decision is clearly against the logic and effect of the facts and circumstances. *Id.* “There is a strong presumption that the trial court properly exercised its discretion.” *Id.* (quoting *Warner v. State*, 773 N.E.2d 239, 247 (Ind. 2002)). “We will not conclude that the trial court abused its discretion unless the defendant can demonstrate prejudice as a result of the trial court’s denial of the motion for continuance.” *Stafford v. State*, 890

N.E.2d 744, 750 (Ind. Ct. App. 2008). Continuances to allow more time for preparation are not favored and are granted only by showing good cause and in the furtherance of justice. *Id.* (citing *Timm v. State*, 644 N.E.2d 1235, 1237 (Ind. 1994)). Further, motions to allow more time for preparation “require a specific showing as to how the additional time would have aided counsel.” *Zanussi v. State*, 2 N.E.3d 731, 734 (Ind. Ct. App. 2013).

[18] The State first listed Lundberg as a witness on May 31, 2022, more than six months before the trial in December 2022. At the trial, defense counsel referenced detailed reports regarding Lundberg’s statement that Lundberg had a conversation with Drake regarding something that happened in Fort Wayne and that Drake had “an altercation with a dude in Fort Wayne.” Transcript Volume II at 116. Further, the evidence became known to Drake during the course of the trial. Thus, we conclude reversal is not required based on *Brady*. We also cannot say that the trial court abused its discretion in denying Drake’s motion for a continuance.

## II.

[19] The next issue is whether the evidence is sufficient to sustain Drake’s conviction. Drake argues that “[t]estimony at trial varied substantially from prior stories told multiple times before.” Appellant’s Brief at 9. He also asserts that there were no fingerprints or DNA on the gun or any shell casing found in the vehicle or at the scene.

[20] Ind. Code § 35-42-1-1 provides that “[a] person who . . . knowingly or intentionally kills another human being . . . commits murder, a felony.” “A person engages in conduct ‘intentionally’ if, when he engages in the conduct, it is his conscious objective to do so.” Ind. Code § 35-41-2-2(a). “A person engages in conduct ‘knowingly’ if, when he engages in the conduct, he is aware of a high probability that he is doing so.” Ind. Code § 35-41-2-2(b).

[21] When reviewing claims of insufficiency of the evidence, we do not reweigh the evidence or judge the credibility of witnesses. *Jordan v. State*, 656 N.E.2d 816, 817 (Ind. 1995), *reh’g denied*. Rather, we look to the evidence and the reasonable inferences therefrom that support the verdict. *Id.* We will affirm the conviction if there exists evidence of probative value from which a reasonable trier of fact could find the defendant guilty beyond a reasonable doubt. *Id.*

[22] As for Drake’s argument that testimony at trial varied from prior versions, we note that these inconsistencies were before the jury. On cross-examination, Lundberg asserted that his testimony was “just more detailed.” Transcript Volume II at 141. Defense counsel questioned Guerra regarding a previous interview with police. On direct examination, McClain acknowledged that she was testifying under a grant of immunity, had been charged with aiding in murder, had given three prior statements, and was changing her story to tell the truth. On cross-examination, McClain acknowledged that she did not tell defense counsel about the plan during a deposition in October and had previously told police that Thomas exited the car and walked into a ditch. She also indicated that she changed her story because she was scared. On direct

examination, Griffin testified that she drove the vehicle, heard Drake arguing with Thomas in the backseat, heard a shot, and Drake told her to drive to a country road and later stated that he would kill her husband and children if she told anyone. On cross-examination, defense counsel asked: “You didn’t give that statement before at the time you were arrested, right?” Transcript Volume III at 10. Griffin answered: “I didn’t.” *Id.*

[23] The record further reveals that McClain testified Drake was directly behind her, she observed Drake pull out the gun, there was a disagreement between Thomas and Drake, and she heard the gunshot. She also testified that Drake gave the gun he used to shoot Thomas to Lundberg. Lundberg testified that he had a conversation with Drake, Drake “and his girl were running,” Drake “had gotten into some s--- up in Fort Wayne,” Drake told him “he had to pop the m---f----- in the back seat of a car,” and Drake gave a .25 caliber handgun to him. Transcript Volume II at 127. Dr. Wagner testified that a .25 caliber pistol was consistent with what he found during the autopsy. Fletcher, the forensic firearms examiner, indicated that the bullet recovered from Thomas’s body was fired from the gun recovered from Lundberg.

[24] Based upon the record, we conclude that evidence of probative value was presented from which a reasonable jury could find beyond a reasonable doubt that Drake was guilty of murder.

[25] For the foregoing reasons, we affirm Drake’s conviction for murder.

[26] Affirmed.

Crone, J., and Felix, J., concur.