MEMORANDUM DECISION

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IN THE COURT OF APPEALS OF INDIANA

Timothy Jelks,
Appellant-Defendant,

v.

State of Indiana,
Appellee-Plaintiff.

May 11, 2023

Court of Appeals Case No. 22A-CR-2689

Appeal from the Marion Superior Court

The Honorable Shatrese Flowers, Judge

Trial Court Cause No. 49D28-2003-F3-11952

Memorandum Decision by Judge Riley.
Chief Judge Altice and Judge Pyle concur.

Riley, Judge.

STATEMENT OF THE CASE

[1] Appellant-Defendant, Timothy Jelks (Jelks), appeals his sentence for conspiracy to commit murder not resulting in death, a Level 2 felony, Ind. Code § 35-41-5-2(a)(1).

[2] We affirm.

ISSUES

[3] Jelks presents this court with two issues, which we restate as:

(1) Whether the trial court abused its discretion in denying Jelks' motion to continue his sentencing hearing; and
(2) Whether his advisory sentence is inappropriate given the nature of the offense and his character.

FACTS AND PROCEDURAL HISTORY

[4] On March 18, 2020, seventeen-year-old Jelks agreed with Deangelo Tillman (Tillman) and Ranasia Green (Green) to murder C.H. Green lured C.H. into meeting with her at Northwest Way Park, telling C.H. that her brother would pick up C.H. and give him a ride to the park. In reality, Jelks drove to pick up C.H. from C.H.'s house, with Tillman hiding in the trunk of the car. Once at Northwest Way Park, Tillman exited the trunk, took C.H. behind an outdoor restroom, and shot C.H. four times. After the offense, Jelks and Tillman returned to Jelks' mother's home where they were both living. The next day, Jelks learned that C.H. had not died. Jelks asked his mother to call the police,

and later that day Jelks provided a statement to law enforcement that implicated Tillman, Green, and himself in the offense.

[5] On March 23, 2020, the State filed an Information which it amended once, charging Jelks with Level 2 felony conspiracy to commit murder not resulting in death, Level 3 felony aggravated battery, and Level 3 felony kidnapping. On March 27, 2020, Jelks was released on pre-trial home detention. On September 25, 2020, the parties filed an executed plea agreement pursuant to which Jelks would admit to conspiracy to commit murder not resulting in death as a Level 2 felony and the State would dismiss the other two charges. The State also agreed to recommend that Jelks receive an advisory sentence of seventeen and one-half years, with an overall cap of fourteen years on executed time and a cap of ten years on any time executed in the Department of Corrections (DOC). On October 13, 2020, the parties appeared for Jelks' guilty plea hearing, and Jelks' counsel confirmed with the trial court that the parties had agreed to postpone sentencing until after Tillman's trial. Jelks established a factual basis for his plea, and the trial court accepted Jelks' guilty plea. The trial court observed that it would not order a presentence investigation report (PSI) to be prepared at that time due to the fact that the parties intended to wait until Tillman's trial was concluded. The matter was then continued multiple times until September 8, 2022, when Jelks filed a motion to set a sentencing hearing in light of the resolution of Tillman's case. On September 8, 2022, the trial court set Jelks' sentencing hearing for October 14, 2022, and ordered a PSI to be prepared.

[6] On October 12, 2022, Jelks' PSI was filed and contained the following information. Jelks reported that, after his arrest on the present charge, he continued to attend high school, earned good grades, participated in a barbering program, and graduated in 2021. Jelks had begun working full-time at a catering company in July 2022 and had worked part-time at a pizza restaurant for four years. Jelks' PSI investigator placed Jelks in a low-risk category to reoffend. In his victim's impact statement included in the PSI, C.H. indicated that he had been shot in the head, neck, left hand, and right arm by four bullets. C.H. underwent brain surgery, flatlined in the operating room, and was hospitalized for eight days. Bullets remained lodged in C.H.'s head and neck, and as a result of the injuries to his left hand and his right arm, C.H. did not have the full use of his hands for almost a year after being shot.

[7] On October 13, 2022, Jelks filed a motion to continue his October 14, 2022, sentencing hearing because his PSI report had been filed the previous day and he needed time to review it, his counsel anticipated preparing a sentencing memorandum which would require a "mitigation interview" which "have been conducted prematurely without the [PSI] report[,]" and because his counsel was unavailable. (Appellant's App. Vol. III, p. 49). On October 13, 2022, the trial court denied Jelks' motion to continue. Also on October 13, 2022, Jelks filed his Consolidated Motion to Reconsider Continuance and Request for Bifurcated Sentencing Hearing in which Jelks reiterated the grounds for a continuance he had presented in his previous motion and requested that the hearing be bifurcated, as Tillman's sentencing was also set for October 14,

2022, and "both co-defendants will be sentenced at the same time." (Appellant's App. Vol. III, p. 53).

[8] On October 14, 2022, the trial court convened Jelks' and Tillman's sentencing hearings. A substitute attorney from the firm representing Jelks appeared for the hearing. Jelks' counsel renewed Jelks' motion to continue so that "we have a chance to respond to the PSI." (Tr. p. 18). Tillman also moved to continue the hearing so that he could be present for the birth of his child. The State objected to both motions. The trial court denied Jelks' motion, observing that Jelks' PSI was short and that they could review it while Tillman's sentencing hearing was conducted. Tillman ultimately withdrew his motion to continue, and the trial court sentenced Tillman first.

[9] The trial court then convened Jelks's sentencing hearing. Jelks' counsel affirmed to the trial court that he had reviewed the PSI with Jelks for approximately one hour and that Jelks only had one correction, to add his job at the pizza restaurant.[1] C.H. testified at Jelks' sentencing hearing that he knew Jelks from high school and that he would not have been at Northwest Way Park on the day of the offense if Jelks had not driven him there. Because of his physical injuries, C.H., who had been successful in ROTC during high school, was forced to abandon his dream of enlisting in the military. C.H. stated that

[1] Although Jelks' employment at the pizza restaurant was not noted in the PSI's initial "Education, Employment, and Health" section, it had been included later in the PSI in the "Personal Background" section. (Appellant's App. Vol. III, pp. 41, 45).

he had barely graduated high school and missed his first semester of college because of his injuries. C.H. had been in counseling since his discharge from the hospital but was still experiencing sleeplessness and extreme paranoia as a result of the offense. C.H. told the trial court that the experience of the offense was "something that's going to be with [him] for the rest of [his] life." (Tr. p. 33). Jelks testified under oath that he had no personal dislike or animus against C.H. but that he had participated in the offense because Tillman had told him "come with me, like you need to come or like threats." (Tr. p. 46). On cross-examination, Jelks acknowledged that he knew that Tillman intended to kill C.H. on the day of the offense.

[10] The trial court found Jelks' guilty plea, his lack of criminal record, and his low risk to re-offend as mitigating circumstances. The trial court found the nature and circumstances of the offense as an aggravating circumstance, in that the offense was premeditated and C.H. had been left for dead. As an additional aggravator, the trial court found that the harm to C.H. was significant. The trial court found the aggravators and mitigators were balanced and that the advisory sentence provided for in Jelks' plea agreement was "extremely fair due to the facts and circumstances of this case[.]" (Tr. p. 70). The trial court sentenced Jelks to seventeen and one-half years, with five and one-half years suspended to probation. The trial court ordered Jelks to execute ten years in the DOC, followed by two years of Community Corrections and two years of standard probation.

[11] Jelks now appeals. Additional facts will be provided as necessary.

DISCUSSION AND DECISION

I. *Continuance*

[12] Jelks argues that the trial court erred when it denied his motions to continue his sentencing hearing. "The decision whether to grant a continuance when the motion is not based on statutory grounds is within the discretion of the trial court." *Jones v. State*, 957 N.E.2d 1033, 1042 (Ind. Ct. App. 2011). We will not reverse unless the trial court abused its discretion, and a defendant seeking reversal faces a "strong presumption" that the court acted within its discretion. *Id*.

[13] Jelks contends that the continuance denial was an abuse of the trial court's discretion because he needed more time to review his PSI with his counsel and so that his counsel could prepare a sentencing memorandum. In addressing these claims, we first note that there is no set deadline for when a PSI must be filed prior to sentencing. Rather, pursuant to Indiana Code section 35-38-1-12(b), the trial court must furnish the PSI "sufficiently in advance of sentencing so that the defendant will be afforded a fair opportunity to controvert the material included." Our supreme court has observed that it is preferable that a trial court ensure that a PSI is made available more than one day before a sentencing hearing. *Goudy v. State*, 689 N.E.2d 686, 699 (Ind. 1997). Nevertheless, when a defendant appeals the denial of a continuance based on a late-filed PSI, "it is incumbent upon [the] defendant to show how he was prejudiced by a short time period within which to review a pre-sentence report." *Id.* (concluding that Goudy, who faced sentencing for murder and attempted

murder and who received his PSI the day before sentencing, suffered no prejudice where he made no claim that the report contained factual errors that required additional time to rebut).

[14] Here, Jelks has failed to show that he was prejudiced by the denial of his motion for more time to review his PSI and to submit a sentencing memorandum. Jelks pleaded guilty almost two years before he filed a motion to have his sentencing hearing set. After his sentencing date was set, Jelks had over a month to prepare for his sentencing hearing. Jelks had no criminal history, and the vast majority of the information contained in his PSI came from Jelks himself. Jelks was on home detention prior to his sentencing and, thus, was presumably available to assist in the preparation of a sentencing memorandum even without a PSI. While the preparation of the PSI was delayed until the resolution of Tillman's charges, there is nothing in the record indicating that Jelks' plea agreement was contingent on providing testimony in that matter, and Jelks' PSI only notes that Tillman was scheduled to be sentenced on the same day as Jelks. Jelks had an opportunity to review his PSI with his counsel prior to sentencing, and he did not identify any real inaccuracies or anything that surprised him in the PSI.

[15] On appeal, Jelks claims that he was prejudiced by not having more time to review his PSI and the opportunity to present a sentencing memorandum, but does not explain this bald assertion or detail what information or authority he would have developed in a sentencing memorandum that was not presented to the trial court at the hearing. In addition, his claim that he was prejudiced "due

to the apparent bias of the trial court in its willingness to allow Tillman a continuance, but not Jelks" is not supported by the record. (Appellant's Br. p. 8). While the trial court gathered information from the witnesses and the parties relevant to Tillman's continuance request, it never indicated that it was willing to grant that request. We find no prejudice in the trial court's denial of more time to review the PSI and to prepare a sentencing memorandum. *See Goudy*, 689 N.E.2d at 699; *Evans v. State*, 855 N.E.2d 378, 387 (Ind. Ct. App. 2006) (finding no prejudice to attempted murder defendant in denial of continuance despite the fact that he received his PSI one day before sentencing, where Evans had three weeks to prepare for sentencing, most of the PSI information came from him, he reviewed the PSI and indicated he was ready to proceed, and he did not indicate anything in the PSI surprised him), *trans. denied*.

[16] Jelks also claims that it was an abuse of the trial court's discretion to deny him a continuance so that his regular counsel, as opposed to a substitute from the same firm, could be present for his sentencing hearing. Although this argument is not well-developed, we will address it briefly. In his written motions seeking a continuance, Jelks stated that his regular counsel was unavailable on October 14, 2022, due to

> trials, CLE, depositions, or vacation expected to proceed on October 3-7, 12-14, 24-27, 31, November 1-3, 7, 9-11, 15-16, 24-25, 30, December 2, 7-8, 23-25, 31, January 1, 5, 10, February 1, 13, 27, March 9, May 8.

(Appellant's App. Vol. III, p. 50). Given the form of the motion, it was not possible for the trial court to discern the actual reason for the absence of Jelks' regular counsel from the October 14, 2022, sentencing hearing. In addition, as we have already noted, it has long been the law in Indiana that there is no reversible abuse of discretion in the denial of a continuance motion, even one related to choice of counsel, where the defendant does not show that he was prejudiced by the denial. *Parr v. State*, 504 N.E.2d 1014, 1016-17 (Ind. 1987) (finding no abuse of discretion in the trial court denial of a continuance so that Parr could retain private counsel). Here, Jelks' claim that he was prejudiced because he "did not have adequate time for substitution counsel to get up to speed" is not supported by the record. (Appellant's Br. p. 8). In renewing Jelks' continuance motion at the sentencing hearing, Jelks' substitute counsel never claimed that he was inadequately prepared and, in fact, affirmed to the trial court that he was prepared to proceed. In addition, Jelks' reliance on *Ungar v. Sarafite,* 376 U.S. 575, 588-91, 84 S.Ct. 841, 849-50, 11 L.Ed.2d 921 (1964), is misplaced, as that case involved a complete denial of counsel after Ungar was denied a continuance to obtain counsel for a criminal contempt proceeding. Jelks was represented by counsel at his sentencing hearing. Accordingly, we find no abuse of the trial court's discretion in denying Jelks' motion to continue his sentencing hearing so that his regular counsel could be present.

II. *Sentence*

[17] Jelks requests that we review his sentence, which he argues is overly harsh. "Even when a trial court imposes a sentence within its discretion, the Indiana Constitution authorizes independent appellate review and revision of this sentencing decision." *Hoak v. State*, 113 N.E.3d 1209, 1209 (Ind. 2019). Thus, we may revise a sentence if, after due consideration of the trial court's decision, we find that the sentence is inappropriate in light of the nature of the offense and the character of the offender. *Id*. The principal role of such review is to attempt to leaven the outliers. *Cardwell v. State*, 895 N.E.2d 1219, 1225 (Ind. 2008). The defendant bears the burden to persuade the reviewing court that the sentence imposed is inappropriate. *Robinson v. State*, 91 N.E.3d 574, 577 (Ind. 2018).

A. *Nature of the Offense*

[18] When assessing the nature of an offense, the advisory sentence is the starting point that the legislature selected as an appropriate sentence for the particular crime committed. *Childress v. State*, 848 N.E.2d 1073, 1081 (Ind. 2006); *Madden v. State*, 162 N.E.3d 549, 564 (Ind. Ct. App. 2021). Jelks pleaded guilty to Level 2 felony conspiracy to commit murder not resulting in death. A Level 2 felony carries a sentencing range of between ten and thirty years, with an advisory sentence of seventeen and one-half years. I.C. § 35-50-2-4.5. The trial court sentenced Jelks in accordance with his plea agreement to an advisory sentence of seventeen and one-half years, with five and one-half years suspended to probation. The trial court ordered Jelks to execute ten years in the DOC,

followed by two years of Community Corrections and two years of standard probation.

[19] The nature of the offense weighs heavily against a revision of Jelks' advisory sentence. Jelks was a direct and active participant in a plan to murder a high school classmate against whom Jelks admittedly had no personal animosity. Jelks knew what was going to happen when he drove Tillman to C.H.'s house to pick up C.H. that day. Although Jelks maintains on appeal that Tillman threatened him into participating in the offense, there is scant evidence of this in the record before us. C.H. was shot four times and left to die behind a public restroom. C.H. had a long and difficult physical recovery, and he will never fully psychologically recover from what happened to him. As a direct result of the offense, C.H. has been forced to relinquish his dream of serving in the United States military. This was a heinous offense which does not merit a revision of Jelks' sentence below the advisory sentence he received.

B. *Character of the Offender*

[20] Neither do we find that Jelks' character merits a reduction in his sentence. In assessing this factor for purposes of a sentencing review, we look to a defendant's life and conduct as illustrative of his character. *Morris v. State*, 114 N.E.3d 531, 539 (Ind. Ct. App. 2018), *trans. denied*. We are aware that Jelks was only seventeen years old when he committed the offense, he had no other criminal record, he was on home detention during the pendency of this matter without incident, and that there was other positive character evidence in the record. These circumstances would normally weigh in favor of a revision, but

here, the trial court already took Jelks' age, his guilty plea, and his low risk to re-offend into account in imposing an advisory sentence which did not even include the maximum executed time permitted under Jelks' plea agreement. *See Hall v. State*, 177 N.E.3d 1183, 1198 (Ind. 2021) (declining to revise Hall's sentence even though she had no criminal history and displayed other positive character traits, due to the trial court's previous consideration of those factors and the nature and circumstances of the crime). Balanced against the heinous nature of the offense, we find, as did the trial court, that the advisory sentence imposed here is "extremely fair[,]" even in light of Jelks' character. (Tr. p. 70). Accordingly, we decline to revise Jelks' sentence.

CONCLUSION

[21] Based on the foregoing, we hold that the trial court did not abuse its discretion when it declined to continue Jelks' sentencing hearing and that Jelks' sentence is not inappropriate given the nature of his offense and his character.

[22] Affirmed.

[23] Altice, C. J. and Pyle, J. concur