

MEMORANDUM DECISION

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IN THE COURT OF APPEALS OF INDIANA

Joshua Risinger,
Appellant-Defendant

v.

State of Indiana,
Appellee-Plaintiff.

March 22, 2022

Court of Appeals Case No.
21A-CR-1196

Appeal from the Washington
Circuit Court

The Honorable Larry Medlock,
Judge

Trial Court Cause No.
88C01-1703-MR-185

Pyle, Judge.

Statement of the Case

- [1] Joshua Risinger (“Risinger”) appeals his conviction by jury of murder.¹ He argues that the trial court abused its discretion in denying his motion for a continuance. Concluding that the trial court did not abuse its discretion, we affirm the trial court’s judgment.
- [2] We affirm.

Issue

Whether the trial court abused its discretion when it denied Risinger’s motion for a continuance.

Facts

- [3] In March 2017, Risinger invited an elderly homeless man named Jeffery Givan (“Givan”) to move into his mobile home in Salem, Indiana. Givan had previously suffered from multiple strokes, which had impaired Givan’s cognitive function.
- [4] Also during March 2017, Risinger worked with Tyler Davidson (“Davidson”) at a local tattoo parlor. On March 14, 2017, Davidson agreed to drive Risinger home after work. During the trip to Risinger’s mobile home, Risinger told Davidson that the homeless man living with him had been acting strangely. Risinger asked Davidson if Risinger should burn down his mobile home or kill

¹ IND. CODE § 35-42-1-1.

the homeless man. Davidson responded that Risinger should do neither.

When Davidson and Risinger arrived at Risinger's mobile home, Risinger got out of the car, approached his mobile home, and looked in the windows.

[5] Davidson sat in his car in front of Risinger's mobile home for fifteen to twenty minutes while he smoked a cigarette and read and responded to text messages. As he was finishing his cigarette, Davidson heard the sound of breaking glass coming from inside the mobile home. As Davidson approached the mobile home's open front door, Davidson noticed that the interior of the mobile home had been "trashed." (Tr. Vol. 2 at 195). Davidson also noticed an elderly man with long shaggy hair and a long beard lying on a couch in the living room. Risinger told Davidson that everything was okay and that he and Givan were "just hanging out." (Tr. Vol. 2 at 195). Davidson got into his car and immediately drove away.

[6] Shortly thereafter, Risinger's neighbor telephoned 911 and Roddie Humphrey ("Humphrey"), the manager of the mobile home park, to report that Risinger's mobile home was on fire. When firefighters and law enforcement officers arrived on the scene, there were flames shooting out of the mobile home and heavy smoke rising from it. After the fire had been extinguished, firefighters discovered Givan's charred remains in front of the couch in the living room.

[7] When Humphrey arrived on the scene, Humphrey told the law enforcement officers that he had just seen Risinger walking down the highway that led into town. Salem Police Department Officer Alex Bilbrey ("Officer Bilbrey") left

the scene to look for Risinger. Officer Bilbrey found Risinger on the highway and noticed that Risinger was pulling a duffle bag on wheels. When Officer Bilbrey told Risinger that his mobile home was on fire, Risinger responded that that was why he had left the mobile home. Officer Bilbrey also noticed that Risinger was acting strangely and saying things that did not make sense. For example, Risinger, who was quoting Bible verses, told Officer Bilbrey that demons had told him to make a sacrifice because his sister had been sexually assaulted.

[8] Officer Bilbrey took Risinger to the Washington County Detention Center. A search of Risinger's duffle bag revealed legal documents, medical documents, family photographs, keepsake cards, two Bibles, a pack of batteries, a container of pickled bologna, and several bottles of water. A search of Risinger's person revealed an urn with his father's ashes, Givan's birth certificate, and two 2015 handwritten receipts with Givan's name on them. Risinger told Indiana State Police Detective Matt Busick ("Detective Busick") that he had taken the birth certificate and receipts from the homeless man's backpack. When Detective Busick told Risinger that law enforcement officers were trying to identify the victim of the fire, Risinger responded, "well, it's all there." (Tr. Vol. 3 at 101). Detective Busick asked Risinger if he had these items in his possession to help identify the victim of the fire. Risinger smiled and said, "maybe." (Tr. Vol. 3 at 101). Detective Busick interviewed Risinger three times while Risinger was in custody.

[9] An investigation of the fire revealed that it had been caused by an intentional human act and that it had been started in the mobile home’s living room. Givan was identified through dental records, and an autopsy revealed that his cause of death was “carbon monoxide intoxication secondary to the inhalation of soot and smoke from this particular fire.” (Tr. Vol. 3 at 180). Based upon Givan’s cognitive impairments, it is likely that he “had a hard time realizing what was going on” when the mobile home became engulfed in flames. (Tr. Vol. 3 at 185).

[10] Following the investigation and the autopsy, in March 2017, the State charged Risinger with murder, felony murder, and Level 4 felony arson. Two months later, in May 2017, Risinger filed a notice of defense of mental disease or defect, and the trial court appointed a psychiatrist, Dr. George Parker (“Dr. Parker”), and a psychologist, Dr. Heather Henderson-Galligan (“Dr. Henderson-Galligan”) to examine Risinger and evaluate both his “competency to stand trial and competency at the time the offense was committed.” (PA App. Vol. 2 at 66).²

[11] When completing Risinger’s competency and sanity report, Dr. Parker met with Risinger at the county jail and spoke with Risinger’s defense counsel on the telephone. In addition, Dr. Parker reviewed Indiana State Police reports, video recordings of police interviews with Risinger, audio recordings of April

² PA App. refers to the appendix that Risinger filed in his prior appeal. *See Risinger v. State*, 137 N.E.3d 292 (Ind. Ct. App. 2019).

2017 telephone calls that Risinger made to his mother from the jail, and video recordings of police interviews with Risinger's sister and Davidson. In an eleven-page single-spaced detailed report, Dr. Parker noted that Risinger had said that he was "pretty sure [Givan was] the demon" based on "a piece of paper from a Bible that [had been] ripped out." (PA App. Vol. 2 at 99). Dr. Parker further highlighted Risinger's statement that, "I was worried that he was gonna cross my path, so he died in flames[.]" (PA App. Vol. 2 at 99). Dr. Parker concluded that Risinger was competent to stand trial and that, although Risinger suffered from a mental disease, Risinger "retained a basic appreciation of the wrongfulness of his actions . . . at the time of the offense." (PA App. Vol. 2 at 104).

[12] When completing Risinger's competency and sanity report, Dr. Henderson-Galligan also met with Risinger at the county jail. In addition, Dr. Henderson-Galligan reviewed video recordings of Risinger's police interviews and audio recordings of Risinger's telephone conversations with his mother from the jail. Like Dr. Parker, Dr. Henderson-Galligan concluded that Risinger was competent to stand trial. However, unlike Dr. Parker, Dr. Henderson-Galligan concluded that Risinger "was not sane at the time of the events." (PA Vol. 2 at 92).

[13] At Risinger's November 2018 trial, the trial court admitted into evidence the statements that Risinger had made during the three separate police interviews. Also at trial, Risinger pursued an insanity defense, and Dr. Parker and Dr. Henderson-Galligan both testified about the results of their competency and

sanity reports. The jury was presented with verdict forms that set forth four possible verdicts for each offense: (1) not guilty; (2) guilty; (3) guilty but mentally ill; and (4) not responsible by reason of insanity. The jury found Risinger guilty but mentally ill of murder and felony murder and guilty of Level 4 felony arson. The trial court merged the felony murder and arson convictions with the murder conviction and sentenced Risinger to sixty (60) years in the Department of Correction (“the DOC”).

[14] On direct appeal, this Court concluded that the trial court had abused its discretion in admitting two of Risinger’s police statements and reversed his conviction. *See Risinger*, 137 N.E.3d at 295. The trial court scheduled a second jury trial for Monday, March 15, 2021.

[15] On February 2, 2021, the State provided Risinger with supplemental discovery that included ninety-four hours of audiotapes of telephone calls that Risinger had made to his mother from the county jail before his first trial. At the time that the State provided Risinger with the audiotapes, the State specifically told Risinger that, if the State used any of the telephone calls at trial, those telephone calls would be from March 2017. Risinger had made twenty-eight telephone calls to his mother in March 2017, and those calls totaled 6.24 hours in recorded time.

[16] On March 12, 2021, the Friday before the trial was scheduled to begin on Monday, the State told Risinger that it planned to offer into evidence at trial two of the telephone calls that Risinger had made to his mother in March 2017.

Risinger had made the first telephone call on March 26, 2017. In this brief telephone call, Risinger had told his mother that he would write her soon and tell her the details of “the story.” (Tr. Vol. 3 at 67).

[17] Risinger had made the second telephone call to his mother the following day, March 27, 2017. In this telephone call, which lasted approximately thirty minutes, Risinger told his mother a story about siblings Jacob and Cherie. During the call, Risinger periodically used the word “I” when referring to Jacob and, at times, referred to Cherie as his sister. Risinger’s story was filled with references to the Bible, satanism, people of different nationalities, and magic. Risinger told his mother that Jacob had met an old man, who was magical and who had a “five point star on his back that said all time expulsion.” (Tr. Vol. 3 at 91). According to Risinger’s story, Jacob had taken the old man to his house to stay but later “couldn’t get rid of the guy because he was meant to be there to, to consume Jacob and to make Jacob one of them.” (Tr. Vol. 3 at 94). Risinger further told his mother that Jacob’s hands were guided “[b]y someone else and, and it was the good and, and then this Bible with the ripped page was the exact page that Jacob needed to read[.] And it says if he was not ready, cast her, cast it in flames.” (Tr. Vol. 3 at 94).

[18] After learning that the State planned to offer audio recordings of these two telephone calls into evidence, Risinger immediately filed a motion to continue the trial that was scheduled to begin the following Monday. The trial court held a hearing that same day, and Risinger argued that the telephone calls “call[ed] into question [his] mental state.” (Tr. Vol. 2 at 2). According to

Risinger, the telephone calls were “something that [the] psychologist, [the] psychiatrist need[ed] to reevaluate Mr. Risinger’s mental health.” (Tr. Vol. 2 at 2). The State responded that the psychologist and the psychiatrist had previously interviewed Risinger, watched videotapes of him, listened to audio recordings of his telephone calls, and read police reports. According to the State, there was no reason to believe that these two additional telephone calls would “cause any kind of different opinions to come out of the psychiatrist[.]” (Tr. Vol. 2 at 6).

[19] The following day, March 13, 2021, the trial court issued a two-page order denying Risinger’s motion to continue. The order provides, in relevant part, as follows:

5. The Court acknowledges that the statements of Joshua Risinger are of a bizarre, nonsensical and delusional nature. However, the statements are not unlike many of the statements he has made that the Court has been exposed to in prior litigation[.]

* * *

8. The issue of Joshua Risinger’s mental health is not a freshly revealed matter. Prior counsel felt so strongly about his mental disease or defect that they filed a Notice of Insanity Defense. Current defense counsel has had the opportunity to examine psychological reports, has had access to audio and video recordings, transcripts, prior counsel’s case file and the opportunity to interact with their own client.

9. For whatever strategic reason the defense chose not to pursue the issue of Joshua Risinger’s mental health and the

Court does not see that this thirty-minute interaction with his mother would significantly change the opinion of the mental health professionals involved. The statements available to Dr. Parker which he clearly identified are not unlike the thirty-minute [telephone] conversation[.]

(App. Vol. 2 at 50, 51).

[20] When Risinger’s second trial began as scheduled on March 15, 2021, Risinger renewed his motion for a continuance. In addition, Risinger objected when the State offered into evidence the audio recordings of the two telephone calls between Risinger and his mother.

[21] The jury convicted Risinger of murder, felony murder, and Level 4 felony arson. The trial court merged the felony murder and arson convictions with the murder conviction and again sentenced Risinger to sixty (60) years in the DOC.

[22] Risinger now appeals.

Decision

[23] Risinger argues that the trial court abused its discretion when it denied his motion for a continuance. Risinger specifically argues that “[a]dditional time would have allowed counsel to investigate the recordings with previous experts on the case and perhaps allowed the defense to proceed with the defense of insanity.” (Risinger’s Br. 11).

[24] At the outset, we note that, although Risinger objected when the State offered into evidence the two audio recordings of his March 2017 telephone calls to his mother, Risinger does not argue that the trial court abused its discretion in

admitting the audio recordings into evidence. Rather, Risinger's sole argument is that the trial court abused its discretion when it denied his motion for a continuance. Accordingly, this is the sole issue that we address.

[25] The denial of a non-statutory request for a continuance is committed to the trial court's discretion and will be reversed only for an abuse of that discretion. *Tharpe v. State*, 955 N.E.2d 836, 843 (Ind. Ct. App. 2011), *trans. denied*. An abuse of discretion occurs when the ruling is against the logic and effect of the facts and circumstances before the court. *Id.* We further note that continuances to allow more time for trial preparation are generally disfavored in criminal cases. *Id.* The appellant must overcome a strong presumption that the trial court properly exercised its discretion. *Evans v. State*, 855 N.E.2d 378, 386 (Ind. Ct. App. 2006), *trans. denied*. Additionally, the appellant must make a specific showing of how he was prejudiced as a result of the trial court's denial of his motion. *Id.* at 386-87.

[26] Here, our review of the record of the proceedings in Risinger's first trial reveals that his mental health issues were well-documented in 2017. Indeed, Risinger unsuccessfully pursued an insanity defense in his first trial. Further, because Dr. Henderson-Galligan had previously concluded that Risinger was not sane at the time of the offense, her review of the audio recordings of the two telephone calls was unnecessary. To the extent that Risinger hoped that the telephone calls might influence Dr. Parker's conclusion, we note that Dr. Parker reviewed a plethora of materials in 2017 before concluding that Risinger appreciated the wrongfulness of his actions at the time of the offense. These

materials included statements that Risinger had made that were substantially similar to the statements that he made to his mother in the March 2017 telephone calls. Based on these similarities, we agree with the trial court that it is unlikely that Risinger's thirty-minute telephone call with his mother on March 27, 2017, would have significantly changed Dr. Parker's conclusion that Risinger had retained a basic appreciation of the wrongfulness of his actions at the time of the offense. We further note that Risinger has failed to allege or show that he was prejudiced as a result of the trial court's denial of his motion. Rather, he only speculates that a continuance might have allowed him to proceed with an insanity defense. The trial court did not abuse its discretion in denying Risinger's motion for a continuance.³

[27] Affirmed.

May, J., and Brown, J., concur.

³ Risinger also makes a brief conclusory argument that he was “deprived [of] due process when the trial court denied his motion for a continuance[]” because he was denied “an opportunity to make a defense.” (Risinger's Br. 12, 13). The gravamen of this argument appears to be that he was somehow denied the opportunity to raise an insanity defense. However, as previously discussed, Risinger's mental health issues were well-documented in 2017. Further, as the trial court noted in its order denying Risinger's motion to continue, Risinger's counsel in the second trial had the opportunity to examine Risinger's psychological reports and had access to audio and video recordings, transcripts, and prior counsel's case file. Risinger was not denied the opportunity to raise an insanity defense. Lastly, we note that Risinger also makes a brief conclusory argument that the State violated *Brady v. Maryland*, 373 U.S. 83 (1963). However, a *Brady* violation does not arise if the defendant, using reasonable diligence, could have obtained the information. *Denney v. State*, 695 N.E.2d 90, 95 (Ind. 1998). The State does not have a duty to disclose evidence that the defendant knew or should have known existed. *Id.* Here, we agree with the State that “there was no *Brady* violation because the 2017 jail phone calls were evidence that [Risinger] either knew about or should have known about and had been disclosed to Risinger before the trial” had begun. (State's Br. 18).