MEMORANDUM DECISION

IN THE
Court of Appeals of Indiana

Robert L. Dillinger,
Appellant-Defendant

v.

State of Indiana,
Appellee-Plaintiff

April 10, 2024

Court of Appeals Case No.
23A-CR-1559

Appeal from the Marion Superior Court

The Honorable Cynthia L. Oetjen, Judge

Trial Court Cause No.
49D30-2101-MR-300

Memorandum Decision by Judge Tavitas
Judges Mathias and Weissmann concur.

Tavitas, Judge.

Case Summary

[1] Robert Dillinger appeals his conviction for murder, a felony. Dillinger argues that: (1) the trial court abused its discretion by admitting certain statements from his interview with law enforcement, which he claims were inadmissible under the Fifth Amendment to the United States Constitution; and (2) insufficient evidence supports a finding that Dillinger acted knowingly or intentionally in committing the murder. We are not persuaded by these arguments. Accordingly, we affirm.

Issues

[2] Dillinger raises two issues on appeal, which we restate as:

I. Whether the trial court abused its discretion by admitting certain statements from Dillinger's interview with law enforcement, which Dillinger claims were inadmissible under the Fifth Amendment.

II. Whether sufficient evidence supports a finding that Dillinger acted knowingly or intentionally in committing the murder.

Facts

[3] In the evening of January 2, 2021, Dillinger was visiting his uncle, Russell Peed, at Peed's house in Indianapolis. The two saw each other "quite a bit" during the Covid pandemic. Tr. Vol. II p. 126. On this occasion, Dillinger

drove his white Dodge minivan to the house. He and Peed spoke in Peed's office downstairs. Peed's wife, Theresa Moore, came downstairs, and when Dillinger went to the restroom, she asked Peed, "Should [Dillinger] be in here?" *Id*. at 133. Peed told her, "It's fine. He's very calm and collected." *Id*.

[4] Moore went upstairs and, after approximately five minutes, she heard "two loud bangs coming from downstairs." *Id*. at 135. Moore ran back downstairs and saw Dillinger "running past [her], busting out [her] front door," which was locked. *Id*. at 135. Moore heard Dillinger "screaming something about, 'I shot him.'" *Id*. Dillinger broke the lock and several glass panes on the door as he ran out of the house. *Id*. at 139. Dillinger then drove away in his van.

[5] Moore found Peed collapsed in his office chair and saw that he had been shot. She contacted 911 to report that Dillinger shot Peed, and law enforcement were dispatched. Peed died at the scene as a result of two gunshot wounds to his face. The shots were fired at a downward angle from approximately eighteen to twenty-four inches away.

[6] Home security camera footage from Peed's house showed Peed opening the front door to a white man with whom Peed appeared to be familiar. The man was wearing a black ski mask and a black Gordon Food Services jacket. The footage shows the man in the jacket forcing open the door from the inside and quickly leaving the house approximately one hour later. Additionally, home security camera footage from one of Peed's neighbor's house showed that a

white Dodge minivan was parked in front of Peed's house around the time of the shooting and was gone by the time police arrived.

[7] At approximately midnight on the night of the shooting, Dillinger asked his friends, the Brumleys, to "retrieve" his van because "he thought somebody was following him." Ex. Vol. II p. 71 (State's Ex. 80). Law enforcement later discovered that a black Gordon Food Services jacket matching the one shown in the security footage had been transferred from Dillinger's van to the Brumleys' vehicle. Additionally, law enforcement received a report that an individual found a .40 caliber handgun by a creek "near Brookside."[1] Tr. Vol. II p. 160. Law enforcement determined that the handgun was purchased by Dillinger in November 2020 and that it matched two shell casings recovered from the house.

[8] Two days after the shooting, on January 4, 2021, Dillinger participated in an interview with Detective Gary Smith. Dillinger signed a waiver of rights form indicating that he wished to speak with law enforcement without a lawyer present. Initially, Dillinger stated that his only vehicle was a Ford F-150, but when pressed by Detective Smith, Dillinger admitted that he also drove a white minivan during the days before the shooting. He claimed that the minivan had recently been stolen. He also initially stated that the minivan was a Ford model but later admitted that it was actually a Dodge model.

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[1] This is likely a reference to Brookside Park, which is a few miles west of Peed's house.

[9] Dillinger initially denied being at Peed's house on January 2 and claimed that the two had not seen each other for several weeks. He claimed that, before the interview, he "got a phone call about what was going on" but could not identify the person who called him. State's Ex. 71 at 17:00. Dillinger stated that he was most recently employed at Gordon Food Services, and Detective Smith showed Dillinger the surveillance footage of the man wearing the black Gordon Food Services jacket entering and leaving the house around the time Peed was shot. Dillinger denied that the man was him.

[10] The following exchange took place soon after:

> **Dillinger**: I might have to get an attorney or something.
>
> **Det. Smith**: Very well, this questioning is over then, alright. 'Cause that's one of your rights, and I don't want to violate that. What I will let you know is you are under arrest for murder.
>
> **Dillinger**: Really?
>
> **Det. Smith**: Yes sir.
>
> **Dillinger**: I didn't, no, I didn't hear the—

Id. at 34:57. Dillinger then paused, muttered a few words, and nodded and said, "Alright, what do you want to talk about because I mean, okay, I was there, but that wasn't, somebody else came in. Somebody else did it, and that was not me." *Id*. at 35:12. Detective Smith then sought to clarify whether Dillinger wished to continue the interview after Dillinger "asked for an attorney." *Id*. at 35:33. Dillinger did not provide any more statements regarding the investigation. The interview concluded, and Dillinger was

arrested. That same day, January 4, 2021, the State charged Dillinger with murder, a felony.

[11] During a May 22, 2023 suppression hearing, Dillinger moved to suppress his statements from the interview regarding his presence at the house during the shooting. Dillinger first argued that he invoked his right to speak with an attorney. He further argued that Detective Smith elicited Dillinger's subsequent statements in violation of Dillinger's Fifth Amendment *Miranda*[2] rights because Detective Smith informed Dillinger that he was under arrest and then "sat there, posture unchanged, allowing Mr. Dillinger to talk[.] [T]here was at least a five-second gap where Detective Smith is just staring at [Dillinger] waiting for Mr. Dillinger to say what he's gonna say." Tr. Vol. II p. 11. The State, meanwhile, argued that Dillinger did not unequivocally invoke his right to an attorney and that his subsequent statements were voluntary. The trial court took the matter under advisement.

[12] A jury trial was held in May 2023, at which Dillinger did not testify. The trial court determined, over Dillinger's objection, that Dillinger's statements from the interview were admissible. The jury found Dillinger guilty of murder, and the trial court sentenced him to fifty-five years in the Department of Correction. Dillinger now appeals.

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[2] *Miranda v. Arizona*, 384 U.S. 436 (1966).

Discussion and Decision

I. Dillinger's statements from the interview regarding his presence at the house during the shooting were admissible[3]

[13] Dillinger first challenges the admission of his statements from the interview regarding his presence at the house during the shooting. "The general admission of evidence at trial is a matter we leave to the discretion of the trial court." *Clark v. State,* 994 N.E.2d 252, 259-60 (Ind. 2013). "We review these determinations for abuse of that discretion and reverse only when admission is clearly against the logic and effect of the facts and circumstances and the error affects a party's substantial rights." *Id.* at 260. "'However, when a constitutional violation is alleged, the proper standard of appellate review is de novo.'" *Crabtree v. State*, 152 N.E.3d 687, 696 (Ind. Ct. App. 2020) (quoting *Ackerman v. State,* 51 N.E.3d 171, 177 (Ind. 2016)), *trans. denied*.

[14] Discussing the Fifth Amendment's protections against self-incrimination, our Supreme Court has explained:

> The Fifth Amendment grants to individuals, among other rights, the right to be free from self-incrimination. U.S. Const. amend. V ("No person . . . shall be compelled in any criminal case to be a witness against himself . . . ."). This provision applies to the states by virtue of the Fourteenth Amendment. *Malloy v. Hogan,* 378 U.S. 1, 6, 84 S. Ct. 1489, 1492 (1964). In *Miranda v. Arizona,* the United States Supreme Court outlined an additional prophylactic requirement, inherent in the privilege against self-

[3] Dillinger raises no challenge under the Indiana Constitution.

> incrimination, that an individual must be informed of his right to have counsel present during custodial interrogation. *Miranda v. Arizona,* 384 U.S. 436, 469, 86 S. Ct. 1602, 1625 (1966) ("[T]he right to have counsel present at the interrogation is indispensable to the protection of the Fifth Amendment privilege under the system we delineate today."). When an individual in custody invokes his Fifth Amendment right to counsel, all interrogation must cease until an attorney is present, and the individual must be afforded the opportunity to speak with the attorney and have an attorney present at any further questioning. *Id.* at 474, 86 S. Ct. at 1628.

Hartman v. State, 988 N.E.2d 785, 788 (Ind. 2013).

[15] The admission of statements made while in custody after the invocation of one's right to an attorney, however, is not dispositive of a *Miranda* violation.

> [I]f the individual initiates "further communication, exchanges, or conversations" with law enforcement, then the individual may be further interrogated without counsel present. *Edwards v. Arizona,* 451 U.S. 477, 484-85, 101 S. Ct. 1880, 1885 (1981). . . . Under *Miranda,* "interrogation" refers to "either express questioning or its functional equivalent." *Rhode Island v. Innis,* 446 U.S. 291, 300-01, 100 S. Ct. 1682, 1689 (1980). The Court has defined the functional equivalent of express questioning as "any words or actions on the part of the police (other than those normally attendant to arrest and custody) that the police should know are reasonably likely to elicit an incriminating response from the suspect." *Id.* at 301, 100 S. Ct. 1689-90 (footnote omitted). Such reasonable likelihood of eliciting an incriminating response must be determined from the suspect's perspective, rather than the intent of the police, because *Miranda* protections are intended as a layer of protection for the suspect against coercive police practices, "without regard to

> objective proof of the underlying intent of the police." *Id.* at 301, 100 S. Ct. at 1690.

Id.; *accord White v. State*, 772 N.E.2d 408, 412 (Ind. 2002) ("Volunteered statements do not amount to interrogation."). On the other hand, "'[o]nce a suspect indicates that he is not capable of undergoing [custodial] questioning without advice of counsel, any subsequent waiver that has come at the authorities' behest, and not at the suspect's own instigation, is itself the product of the inherently compelling pressures and not the purely voluntary choice of the suspect.'" *Carr v. State*, 934 N.E.2d 1096, 1107 (Ind. 2010) (quoting *Maryland v. Shatzer*, 559 U.S. 98, 104-05 (2010) (internal quotation marks omitted)).

[16] Here, the parties do not dispute that Dillinger was in custody. Rather, the parties dispute whether Dillinger unequivocally invoked his right to counsel and whether his subsequent statements were voluntary or the product of interrogation. We conclude that Dillinger did not unequivocally invoke his right to counsel, and even if he did, his subsequent statements were voluntary and not the product of interrogation.[4]

[4] As a threshold matter, the State argues that Dillinger waived his Fifth Amendment challenge because, during the suppression hearing, defense counsel stated that he was not "asking" the trial court to review his challenge to the interview statement "under the invocation of [Dillinger's] Fifth Amendment Right" because "[t]he Sixth Amendment Right has a much higher duty (indiscernible) law enforcement." Tr. Vol. II p. 15. Defense counsel went on, however, to state that "in [Detective Smith's] mind, he knew [Dillinger] **invoked** . . . and [Detective Smith] sits there and stares at him and then the statement is made." *Id.* (emphasis added). Defense counsel and the State both cited Fifth Amendment caselaw in support of their arguments. And

A. Invocation of Right to Counsel

[17] First, Dillinger did not unequivocally invoke his right to counsel. As our Supreme Court explained in *Carr*:

> An accused's request for counsel . . . must be unambiguous and unequivocal. *Berghuis v. Thompkins,* 560 U.S. 370, 381, 130 S. Ct. 2250, 2259 (2010). The cessation of police questioning is not required "if a suspect makes a reference to an attorney that is ambiguous or equivocal in that a reasonable officer in light of the circumstances would have understood only that the suspect **might** be invoking the right to counsel." *Davis v. United States,* 512 U.S. 452, 459, 114 S. Ct. 2350, 2355 (1994).

Id. at 1102 (emphasis in original).

[18] Here, Dillinger stated that he "**might** have to get an attorney or something," which is equivocal. State's Ex. 71 at 34:57 (emphasis added). Dillinger never definitively stated that he wished to speak with an attorney. *See Collins v. State*, 873 N.E.2d 149, 156 (Ind. Ct. App. 2007) (holding that defendant did not unequivocally invoke his right to an attorney when he stated that he "probably" needed an attorney during interview with detective).

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defense counsel later objected to the admission of the interview statement at trial based upon the "limited objection" during the suppression hearing. *Id*. at 235. Though defense counsel appears to have mislabeled his argument as based upon the Sixth Amendment, defense counsel sufficiently articulated a Fifth Amendment challenge so as to avoid waiver.

B. Voluntary Statements

[19] Furthermore, even if Dillinger had unequivocally invoked his right to an attorney, his Fifth Amendment challenge would fail because Dillinger's subsequent statements were voluntary and not the product of interrogation. Dillinger argues that Detective Smith elicited Dillinger's statement that he was present at the house during the shooting and that the statement was not voluntary because, after Dillinger stated that he might need to speak with an attorney, Detective Smith "impermissibly prolonged the interrogation by telling Dillinger he was under arrest for murder and then paus[ing] for nine seconds while staring at Dillinger." Appellant's Br. p. 13. Dillinger also cites *Carr*, 934 N.E.2d 1096, for the position that Detective Smith failed to honor Dillinger's Fifth Amendment rights by inviting Dillinger to continue to speak after Dillinger invoked his right to an attorney.

[20] First, we disagree with Dillinger's characterization of the interview. After Detective Smith informed Dillinger that he was under arrest, Dillinger immediately responded, "Really?" State's Ex. 71 at 34:57. Detective Smith replied in the affirmative, and Dillinger said, "I didn't, no, I didn't hear the—." *Id*. Over the next four or five seconds, Dillinger sat back in his chair and muttered a few words under his breath. He then nodded his head and said, "Alright, what do you want to talk about?" *Id*. at 35:12. Dillinger then told Detective Smith that he had been at the house but "somebody" else came in and shot Peed. *Id*. at 35:20. Detective Smith did not simply stare at Dillinger

for nine seconds as Dillinger contends.[5] *See Wright v. State*, 916 N.E.2d 269, 274, 278 (Ind. Ct. App. 2009) (holding that law enforcement did not engage in interrogation or its "functional equivalent" when defendant invoked his right to an attorney during interview, officers informed him that he was "under arrest for triple homicide," and defendant then "indicated that he wished to speak further"), *trans. denied*.

[21] We are also not persuaded by Dillinger's reliance on *Carr*, 934 N.E.2d 1096, which we find distinguishable. In *Carr*, our Supreme Court held that Carr's incriminating statements from an interview regarding his role in a murder were erroneously admitted at trial because Carr invoked his right to counsel several times but the detective demonstrated a pattern of "prolong[ing] the conversation and thus instigat[ing] the subsequent dialogue." *Id*. at 1107.

[22] Here, however, after Dillinger stated that he might need to speak with an attorney, Detective Smith merely stated that the interview was over and that Dillinger was under arrest for murder, which is clearly a permissible statement. *See, e.g.*, *Hartman*, 988 N.E.2d at 788 (interrogation does not include words or actions "normally attendant to arrest and custody"). Unlike in *Carr*, Detective Smith did not make any further statements that invited Dillinger to continue to speak. Rather, Detective Smith merely confirmed that Dillinger was under arrest when Dillinger asked, "Really?" State's Ex. 71 at 34:57. Dillinger

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[5] The video of the interview shows at most two or three seconds during which neither Dillinger nor Detective Smith were talking.

immediately continued to speak, and, several seconds later, provided the challenged statements. Dillinger made those statements, not due to any interrogation by law enforcement, but rather out of a voluntary effort to convince Detective Smith not to place him under arrest. Accordingly, the statements were voluntary, and the admission of the challenged statements did not violate Dillinger's Fifth Amendment rights.

C. Harmless error

[23] Lastly, even if the challenged statements were inadmissible under the Fifth Amendment, any error in the admission thereof would be harmless. "Errors in the admission or exclusion of evidence are to be disregarded as harmless error unless they affect the substantial rights of the party." *Crabtree*, 152 N.E.3d at 703. "To determine whether an error in the introduction of evidence affected the appellant's substantial rights, we assess the probable impact of that evidence upon the jury." *Id*. (citation omitted). When the admission of evidence rises to a federal constitutional error, "the State bears the burden of establishing that the federal constitutional error was harmless beyond a reasonable doubt." *Myers v. State*, 27 N.E.3d 1069, 1074 (Ind. 2015).

[24] Here, ample evidence aside from the challenged statement supports the jury's verdict. Moore testified that she saw Dillinger speaking with Peed before she went upstairs, that she heard two loud bangs coming from downstairs, and that she then saw Dillinger run past her and "bust[] out" the door, breaking the lock and several glass panes in the process. Tr. Vol. II p. 136; *see Myers*, 27 N.E.3d at 1077 ("[E]vidence of flight may be considered as circumstantial evidence of

consciousness of guilt."). Moore was familiar with Dillinger because Dillinger was Peed's nephew and often visited Peed during the Covid pandemic. Home security camera footage largely corroborated Moore's testimony. Peed's home security camera footage showed Peed opening the door to a man wearing a black jacket, and that man later forcibly opened the door to get out of the house right after the shooting. The black jacket was from Dillinger's most recent employer. Additionally, a neighbor's home security camera footage showed that a white minivan matching the description of Dillinger's minivan was parked in front of the house at the time of the shooting and was gone by the time police arrived.

[25] Law enforcement later recovered a gun that was previously purchased by Dillinger and matched the casings left at the scene. And, during portions of the interview, which Dillinger does not challenge, Dillinger changed his story several times and either provided unconvincing answers to simple questions or failed to answer them at all. Given this set of facts, Dillinger's brief statement regarding his presence at the house during the shooting would not have affected the jury's verdict, and any error in the admission thereof was harmless beyond a reasonable doubt.

II. Sufficient evidence supports a finding that Dillinger knowingly or intentionally committed murder.

[26] Dillinger next challenges the sufficiency of the evidence to support his conviction for murder. We conclude, however, that sufficient evidence supports Dillinger's conviction.

[27] Sufficiency of evidence claims "warrant a deferential standard, in which we neither reweigh the evidence nor judge witness credibility." *Powell v. State*, 151 N.E.3d 256, 262 (Ind. 2020) (citation omitted). "When there are conflicts in the evidence, the jury must resolve them." *Young v. State*, 198 N.E.3d 1172, 1176 (Ind. 2022). We consider only the evidence supporting the judgment and any reasonable inferences drawn from that evidence. *Powell*, 151 N.E.3d at 262 (citation omitted). "We will affirm a conviction if there is substantial evidence of probative value that would lead a reasonable trier of fact to conclude that the defendant was guilty beyond a reasonable doubt." *Id.* at 263. We "'affirm the conviction unless no reasonable fact-finder could find the elements of the crime proven beyond a reasonable doubt. It is therefore not necessary that the evidence overcome every reasonable hypothesis of innocence. The evidence is sufficient if an inference may reasonably be drawn from it to support the verdict.'" *Sutton v. State*, 167 N.E.3d 800, 801 (Ind. Ct. App. 2021) (quoting *Drane v. State*, 867 N.E.2d 144, 146-47 (Ind. 2007)).

[28] Here, the State was required to prove that Dillinger "knowingly or intentionally kill[ed]" Peed, Ind. Code § 35-42-1-1(1), and Dillinger argues that insufficient evidence supports a finding that he acted with the requisite mental state. The terms "knowingly" and "intentionally" are defined by statute: "[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), and "[a] person engages in conduct 'intentionally' if, when he engages in the conduct, it is his conscious objective to do so, *id*. § 2(a). "[T]he trier of fact may infer

intent to kill from the use of a deadly weapon in a manner likely to cause death or great bodily harm." *Kiefer v. State*, 761 N.E.2d 802, 805 (Ind. 2002).

[29] Here, the evidence showed that Dillinger shot Peed twice in the face. The shots were fired at a downward angle from a close distance. Dillinger then ran from the scene. The jury could infer from the evidence that Dillinger acted knowingly or intentionally.[6] Accordingly, sufficient evidence supports Dillinger's conviction for murder.

Conclusion

[30] The trial court did not abuse its discretion by admitting Dillinger's statements from the interview, and any error in the admission thereof would be harmless. Additionally, sufficient evidence supports Dillinger's conviction. Accordingly, we affirm.

[31] Affirmed.

Mathias, J., and Weissmann, J., concur.

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[6] Although Dillinger argues that the State did not present evidence that Dillinger and Peed argued before the shooting, "[t]he State is not required to prove motive." *Sallee v. State*, 51 N.E.3d 130, 134 (Ind. 2016).

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