

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

DETRIC SIMPSON,

Defendant-Appellant.

UNPUBLISHED

July 24, 1998

No. 198510

Recorder's Court

LC No. 96-001362

Before: Holbrook, Jr., P.J., and White and J.W. Fitzgerald*, JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of two counts of first-degree felony murder, MCL 750.316(1)(b); MSA 28.548(1)(b), one count of first-degree premeditated murder MCL 750.316(1)(a); MSA 28.548(1)(a), one count of second-degree murder, MCL 750.317; MSA 28.549, and one count of assault with intent to murder, MCL 750.83; MSA 28.278. It was alleged that defendant had thrown two gas filled Molotov cocktails into the home of Catherine Lewis, thereby igniting a fire that claimed the lives of Lewis's daughter, Valjean, and Lewis's son-in-law, Everett Donaldson. Defendant was sentenced to natural life for one of the first-degree premeditated murder convictions and for each of the first-degree felony murder convictions, and thirty to sixty years' imprisonment for the assault with intent to murder conviction. We affirm in part, vacate in part and remand in part.

I

Defendant's first issue on appeal is that he was denied effective assistance of counsel. To prevail on a claim of ineffective assistance, defendant "must show that counsel's performance was below an objective standard of reasonableness under prevailing norms" and "that there is a reasonable probability that, but for counsel's error, the result of the proceeding would have been different." *People v Stanaway*, 446 Mich 643, 687-688; 521 NW2d 557 (1994). "Accordingly, any

* Former Supreme Court justice, sitting on the Court of Appeals by assignment.

deficiencies in counsel's performance must be prejudicial to defendant in order to constitute ineffective assistance" *Strickland v Washington*, 466 US 668, 692; 104 S Ct 2052; 80 L Ed 2d 674 (1984). Further, the defendant is required "to 'overcome the presumption that, under the circumstances, the challenged action 'might be considered sound trial strategy.'"" *People v Mitchell*, 454 Mich 145, 156; 560 NW2d 600 (1997) (quoting *Strickland, supra* at 689, quoting *Michael v Louisiana*, 350 US 91, 101; 76 S Ct 158; 100 L Ed 2d 83 [1955]).

We conclude that defendant has failed to establish in any of the instances cited that defense counsel's performance was ineffective. Defendant first asserts that counsel's ineffective assistance is evidenced by counsel's failure to produce at trial an alleged alibi witness. At the *Ginther*¹ hearing, defense counsel testified that because the witness was identified to him as a family friend, he relied on defendant's sister to help him locate and secure the witness for trial. We believe that it is reasonable for defense counsel to have relied on defendant's sister to help him in this manner. Indeed, we note that at sentencing defendant produced an affidavit from the witness on which the sister's name appears as an attesting witness. If the sister was in close enough contact with the witness to sign this affidavit, then it is reasonable to conclude that the sister could help secure the presence of the witness at trial.² Second, defendant contends that defense counsel's ineffective assistance is evidenced by counsel's handling of a witness who died one week after the fire. Specifically, defendant asserts that counsel's failure to discover before trial that the witness was deceased and counsel's failure to introduce the deceased witness's statements to police prejudiced defendant, because the deceased witness' testimony would have impeached the testimony of the prosecution's eyewitness. We disagree. According to the police report at issue, the deceased witness told the investigating officer that he was approached after the fire by the eyewitness who asked him "what happened." At trial, however, the eyewitness admitted to posing this question to the deceased witness. As a result, this statement by the deceased witness would have added nothing to the proceedings.³ For the same reason, we see nothing prejudicial in defense counsel's failure to discover earlier in the proceedings that the witness was deceased. Finally, we decline to address defendant's assertion that counsel's failure to object to a statement made by the prosecutor during his closing argument evidences counsel's ineffective assistance. Because defendant failed to make a supporting argument in his brief on appeal for this assertion, this question is not properly before this Court. MCR 7.212(C)(7).

II

Defendant's second issue is that his convictions for first-degree felony murder and first-degree premeditated murder arising out of the death of Valjean Donaldson, and his convictions for first-degree felony murder and second-degree murder arising out of the death of Everett Donaldson violate his protection against double jeopardy. We agree. Accordingly, defendant's judgment of sentence must be modified to indicate that in the murder of Valjean Donaldson, defendant was convicted of one count of "first-degree murder supported by two [separate] theories: premeditated murder and felony murder." *People v Bigelow*, ___ Mich App ___, ___; ___ NW2d ___ (Docket No. 188900, issued 04/10/98). Additionally, "because felony murder requires proof of an element not required for a conviction of second-degree murder," *People v Passeno*, 195 Mich App 91, 96; 489 NW2d 152 (1992), overruled on other grounds, *Bigelow, supra* at ___, defendant's first-degree felony murder

conviction for the killing of Everett Donaldson is affirmed and his conviction for second-degree murder for the same death is vacated. *Id.*

III

Defendant's third argument involves a two-pronged attack on the evidence. Defendant asserts that: (1) there was insufficient evidence to support his conviction of first-degree premeditated and felony murder; and (2) the verdict was against the great weight of the evidence. Given our vacating the second-degree murder conviction for the killing of Everett Donaldson, and given that defendant has not challenged the evidentiary basis for his assault with intent to murder conviction, our review of this issue is limited to defendant's convictions for first-degree felony murder and premeditated murder in the killing of Valjean Donaldson and first-degree felony murder in the killing of Everett Donaldson.

"When reviewing the sufficiency of the evidence in a criminal case, this Court views the evidence in the light most favorable to the prosecution to determine whether a rational factfinder could have found the essential elements of the crime proved beyond a reasonable doubt." *People v Reeves*, 222 Mich App 32, 34; 564 NW2d 476 (1997). Accord *People v Wolfe*, 440 Mich 508, 515; 489 NW2d 748 (1992), amended on other grounds 441 Mich 1201 (1992). "An objection going to the weight of the evidence can be raised only by a motion for a new trial. On appeal, this Court reviews a denial of such a motion for an abuse of discretion." *People v Bradshaw*, 165 Mich App 562, 565; 419 NW2d 33 (1988) (quoting *People v Strong*, 143 Mich App 442, 450; 372 NW2d 335 [1985]).

"In order to convict a defendant of first-degree [premeditated] murder, the prosecution must prove that the defendant intentionally killed the victim and that the . . . killing was premeditated and deliberate." *People v Anderson*, 209 Mich App 527, 537; 531 NW2d 780 (1995)." The elements of intent, and premeditation and deliberation, may be inferred from the circumstances surrounding the killing. *Id.*; *People v Vicuna*, 141 Mich App 486, 496; 367 NW2d 887 (1985). In order to convict a defendant of first-degree felony murder, the prosecution must prove that the defendant was involved in:

(1) the killing of a human being, (2) with the intent to kill, to do great bodily harm, or to create a very high risk of death or great bodily harm with knowledge that death or great bodily harm was the probable result, (3) while committing, attempting to commit, or assisting in the commission of any of the felonies specifically enumerated in MCL 750.316; MSA 28.548. [*People v Turner*, 213 Mich App 558, 566; 540 NW2d 728 (1995).]

The crime of arson is such an enumerated felony. MCL 750.316; MSA 28.548.

The prosecution's eyewitness testified that on the night of the fire, she came upon Valjean Donaldson and defendant as they were talking on the street in front of the Lewis home. According to the eyewitness, defendant was asking Valjean "where his money [was] at and his dope." As the eyewitness was walking away from the scene, she testified she observed defendant strike Valjean. The eyewitness also testified that she later saw defendant approach the back of the Lewis home carrying a gas can and two bottles. The eyewitness testified she saw defendant fill one of the bottles with gas,

ignite a rag he stuck in the top of the bottle, and throw the lit bottle through a back window of the Lewis home. Within a few minutes the home was on fire. It is undisputed that Valjean and Everett Donaldson were killed in that fire. We conclude that when viewed in a light most favorable to the prosecution, this evidence is sufficient to permit a rational trier of fact to conclude that defendant had committed both first-degree premeditated and felony murder. We acknowledge that the eyewitness' trial testimony often contradicted both her preliminary examination testimony and statements she made to the police. However, such contradictions go to the credibility of the witness, and we defer to the jury's superior ability to assess that credibility. *Wolfe, supra* at 514-515.

As for defendant's assertion that the verdict was against the great weight of the evidence, we note that although defendant did make a motion for a new trial, the basis for his motion was that he had recently obtained an affidavit from the alleged alibi witness, not that the verdict was against the great weight of the evidence. Accordingly, defendant has failed to properly preserve this issue for appeal. *Brown v Swartz Creek Memorial Post 3720—Veterans of Foreign Wars, Inc.*, 214 Mich App 15, 27; 542 NW2d 588 (1995); *People Bradshaw*, 165 Mich App 562, 565-566; 419 NW2d 33 (1988). In any event, we conclude that defendant's challenge, which is based on the credibility of the eyewitness who testified at trial, does not provide sufficient grounds for the grant of a new trial. *People v Lemmon*, 456 Mich 625, 647; 576 NW2d 129 (1998). The challenged witness' testimony was neither "patently incredible" nor "inherently implausible." *Id.*

IV

Finally, we reject defendant's argument that the cumulative effect of the alleged errors requires reversal of defendant's convictions. The only error that defendant has established is that his convictions for first-degree felony murder and first-degree premeditated murder arising out of the death of Valjean Donaldson, and his convictions for first-degree felony murder and second-degree murder arising out of the death of Everett Donaldson violate his protection against double jeopardy. We have already indicated that these errors will be corrected by modifying defendant's judgment of sentence with regard to the death of Valjean Donaldson, and vacating defendant's conviction for second-degree murder for the killing of Everett Donaldson. Therefore, because we have rejected defendant's arguments with regard to all other alleged errors, we conclude that defendant's final argument is necessarily baseless.

Affirmed in part, vacated in part and remanded for correction of the judgment of sentence. We do not retain jurisdiction.

/s/ Donald E. Holbrook, Jr.

/s/ Helene N. White

/s/ John W. Fitzgerald

¹ *People v Ginther* 390 Mich 436; 212 NW2d 922 (1973).

² We note that this witness also failed to honor a subpoena, personally served, to appear at the *Ginther* hearing. We believe this evidences a reluctance on the part of the witness to become involved in the proceedings.

³ Given this conclusion, we find it unnecessary to address the question of whether the deceased witness's statement to police would be admissible under an exception to the hearsay rule.