STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED June 28, 2002
v	No. 224956 Wayne Circuit Court
BRIAN LERON HAMILTON, Defendant-Appellant.	LC No. 98-006854

Before: Zahra, P.J., and Cavanagh and White, JJ.

PER CURIAM.

Defendant was convicted by a jury of first-degree felony murder, MCL 750.316, four counts of attempted murder, MCL 750.91, and arson of a dwelling, MCL 750.72. He was sentenced to concurrent terms of life imprisonment for the murder conviction, thirty to fifty years' imprisonment for one of the attempted murder convictions, twenty to thirty years' imprisonment for the remaining three attempted murder convictions, and 160 to 240 months' imprisonment for the arson conviction. He appeals as of right. We vacate defendant's conviction and sentence for arson, but affirm in all other respects.

Defendant's convictions arise from an arson fire in an apartment building. One person died in the fire and several others were injured. Over defendant's objection, the trial court admitted defendant's statement to the police, wherein defendant admitted that he provided the gasoline and acted as a lookout for Jeremy Mosley, who started the fire following a fight with one of the tenants.

Defendant argues that there was insufficient evidence to convict him of the charged crimes. This Court reviews a sufficiency of the evidence claim de novo by viewing the evidence in a light most favorable to the prosecution to determine whether a rational trier of fact could have found that the essential elements of the crimes charged were proven beyond a reasonable doubt. *People v Hampton*, 407 Mich 354, 368; 285 NW2d 284 (1979); *People v Oliver*, 242 Mich App 92, 94-95; 617 NW2d 721 (2000). Defendant acknowledged in his police statement that he provided Mosley access to a gas can, and then acted as lookout for Mosley while Mosley set the fire. He also admitted that he was aware that someone could be hurt if a fire was set. There was eyewitness testimony that there was a man similar in stature to defendant who was with the arsonist outside the apartment building just after the fire was set. Viewed in a light most favorable to the prosecution, the evidence was sufficient to enable a rationale trier of fact to find beyond a reasonable doubt that defendant assisted Mosley in committing the charged crimes,

while either intending the commission of those crimes or with knowledge of Mosley's intent to commit the crimes. Thus, the evidence was sufficient to convict defendant under an aiding and abetting theory. *People v Carines*, 460 Mich 750, 757; 597 NW2d 130 (1999); see MCL 767.39.

Defendant also argues that he was denied the effective assistance of counsel because trial counsel failed to present credible evidence that would have supported defendant's theory that he did not make or adopt the statement attributed to him by the police. At a post-trial *Ginther*[1] hearing, defendant argued that trial counsel should have sought another opinion from a language expert to testify on defendant's behalf.

To establish ineffective assistance of counsel, the burden is on defendant to show that counsel made an error so serious that counsel was not functioning as the counsel guaranteed by the Sixth Amendment and that the deficient performance prejudiced the defense so as to deprive defendant of a fair trial. *People v Mitchell*, 454 Mich 145, 156; 560 NW2d 600 (1997). There is a strong presumption that counsel's conduct was reasonable. *Id.* At the *Ginther* hearing, trial counsel testified that he reviewed defendant's school records, obtained a forensic evaluation, and then had an independent examination done, but the results of both examinations were unfavorable to defendant. Under these circumstances, defendant has not overcome the presumption that counsel's conduct was reasonable. *People v Fike*, 228 Mich App 178, 181; 577 NW2d 903 (1998).

Next, defendant argues that his arson conviction must be vacated because it served as the underlying felony for the felony-murder conviction. We agree that the prohibition against double jeopardy requires the arson conviction to be vacated. Indeed, the prosecutor concedes this issue. Accordingly, we vacate defendant's conviction and sentence for arson. *People v Gimotty*, 216 Mich App 254, 259-260; 549 NW2d 39 (1996).

Finally, defendant argues that his police statement is required to be suppressed because the police did not electronically record the interrogation. As defendant acknowledges, this argument has previously been considered and rejected by this Court. *Fike*, *supra* at 183-186. We decline defendant's invitation to revisit this issue and find no clear error in the trial court's determination that defendant's statement was voluntary. *People v Givans*, 227 Mich App 113, 119; 575 NW2d 84 (1997).

We affirm defendant's convictions and sentences for first-degree felony-murder and attempted murder, but vacate defendant's conviction and sentence for arson.

/s/ Brian K. Zahra
/s/ Mark J. Cavanagh
/s/ Helene N. White

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