

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

ADAM DANN,

Defendant-Appellant.

UNPUBLISHED

March 30, 1999

No. 205790

Shiawassee Circuit Court

LC No. 96-007673 FH

Before: Cavanagh, P.J., and MacKenzie and McDonald, JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of first-degree child abuse, MCL 750.136b(2); MSA 28.331(2). The trial court sentenced defendant to four to fifteen years' imprisonment. Defendant appeals as of right. We affirm.

In his sole issue on appeal, defendant argues that the trial court erroneously denied his motion for new trial that was based on the ineffective assistance of counsel. Whether to grant a new trial is in the trial court's discretion, and its decision will not be reversed absent a clear abuse of discretion. *People v Plummer*, 229 Mich App 293, 306; 581 NW2d 753 (1998). To establish ineffective assistance of counsel, a defendant must show that counsel's performance fell below an objective standard of reasonableness under prevailing professional norms and that there is a reasonable probability, but for counsel's error, the result of the proceedings would have been different. *People v Stanaway*, 446 Mich 643, 687-688; 521 NW2d 557 (1994). Effective assistance of counsel is presumed, and the defendant bears a heavy burden of proving otherwise. *Id.* at 687.

In the present case, defendant argues that counsel failed to adequately challenge the prosecution's medical evidence, failed to call relevant witnesses, and failed to respond to the introduction of a hearsay statement at trial. Decisions as to what evidence to present and whether to call or question witnesses are presumed to be matters of trial strategy for which this Court will not substitute its judgment. *People v Mitchell*, 454 Mich 145, 163; 560 NW2d 600 (1997). The failure to call witnesses or present other evidence can constitute ineffective assistance of counsel only when it deprives the defendant of a substantial defense. *People v Daniel*, 207 Mich App 47, 58; 523 NW2d 830 (1994). A substantial defense is one which might have made a difference in the outcome of the

trial. *Id.* at 58. The fact that a strategy may not have worked does not render its use ineffective assistance of counsel. *People v Stewart (On Remand)*, 219 Mich App 38, 42; 555 NW2d 715 (1996).

Here, counsel objected to medical testimony offered by the prosecution and extensively cross-examined witnesses that testified to the victim's medical condition. We find, therefore, that the jury was apprised of the medical uncertainty involved in predicting the time at which the victim's injuries occurred and counsel's failure to introduce additional evidence in support did not deprive defendant of a substantial defense. Also, there is no evidence that Chase Cooney has personal knowledge of any relevant facts and, thus, we find that counsel's decision not to call him as a witness did not prejudice defendant. Further, we find that counsel's decision not to request a curative instruction in response to hearsay elicited at trial was a strategic decision that is not a viable ground for asserting a claim of ineffective assistance of counsel. See *People v Coddington*, 188 Mich App 584, 608; 470 NW2d 478 (1991); *People v Alexander*, 118 Mich App 112, 115; 324 NW2d 550 (1982).

Defendant also asserts that counsel's failure to call Mark Everett as a witness constituted ineffective assistance. Without record evidence supporting a claim, there is no basis for the claim on appeal. *People v Ginther*, 390 Mich 436, 443-444; 212 NW2d 922 (1973); *People v Williams*, 223 Mich App 409, 414; 566 NW2d 649 (1997). We find that there is no evidence in the lower court proceedings of Everett's observations and, thus, defendant's claim with respect to Everett is not preserved for this Court's review.

Accordingly, we believe counsel's performance was not objectively unreasonable and the trial court did not abuse its discretion in denying defendant's motion for new trial.

Affirmed.

/s/ Mark J. Cavanagh
/s/ Barbara B. MacKenzie
/s/ Gary R. McDonald