

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

MARK ANTHONY AHO,

Defendant-Appellant.

UNPUBLISHED

March 28, 2000

No. 215678

Midland Circuit Court

LC No. 98-008629-FH

Before: Bandstra, C.J., and Cavanagh and Zahra, JJ.

PER CURIAM.

Following a bench trial, defendant was convicted of third-degree child abuse, MCL 750.136b(4); MSA 28.3311(2)(4). He was sentenced to nine months in jail and three years' probation. Defendant appeals as of right. We affirm.

I

Defendant argues that he was denied the effective assistance of counsel at trial. A defendant who claims that he has been denied the effective assistance of counsel must establish that (1) the performance of his counsel was below an objective standard of reasonableness under prevailing professional norms and (2) a reasonable probability exists that, in the absence of counsel's unprofessional errors, the outcome of the proceedings would have been different. *People v Pickens*, 446 Mich 298, 302-303; 521 NW2d 797 (1994). A defendant must overcome a strong presumption that the assistance of his counsel was sound trial strategy. *People v Stanaway*, 446 Mich 643, 687; 521 NW2d 557 (1994). No separate evidentiary hearing was held below with regard to defendant's claim of ineffective assistance of counsel. Therefore, our review of this issue is limited to the lower court record. See *People v Shively*, 230 Mich App 626, 628, n 1; 584 NW2d 740 (1998).

Defendant contends that counsel was ineffective for (1) failing to call his wife, his marriage counselor, and other, unnamed people as witnesses; (2) failing to introduce a photograph of the bed, a copy of the medical report generated after defendant's son was injured on the bed slats, and evidence of prosecution witness Jerry Oliver's violent behavior; (3) failing to raise various points in his closing argument; and (4) failing to make an offer of proof regarding specific instances of Oliver's

untruthfulness. However, decisions regarding what evidence to present and whether to call or question witnesses are presumed to be matters of trial strategy. This Court will not substitute its judgment for that of counsel regarding matters of trial strategy. *People v Rockey*, 237 Mich App 74, 76; 601 NW2d 887 (1999). The fact that defense counsel's strategy may not have worked does not constitute ineffective assistance of counsel. *People v Plummer*, 229 Mich App 293, 309; 581 NW2d 753 (1998).

Defendant has offered no evidence that the evidence he maintains counsel should have presented would have corroborated his claim of innocence. Consequently, defendant has not sustained his burden of demonstrating that counsel's performance was below an objective standard of reasonableness under prevailing professional norms.¹ Moreover, defendant has not established the existence of a reasonable probability that, in the absence of counsel's alleged deficiencies, the outcome of the proceedings would have been different. See *Pickens, supra*.

II

Defendant next asserts that the trial court erred in refusing to allow defendant to offer testimony regarding Oliver's credibility. The decision whether to admit evidence is within the sound discretion of the trial court and will not be disturbed absent a clear abuse of discretion. *People v Starr*, 457 Mich 490, 494; 577 NW2d 673 (1998).

Pursuant to MRE 607, the credibility of a witness may be attacked by any party, including the party calling the witness. A witness' credibility may be impeached by the testimony of another witness regarding his opinion of the first witness' character for truthfulness or untruthfulness. MRE 405(a); MRE 608(a). However, evidence of specific instances of the first witness' conduct, for the purpose of attacking or supporting the witness' credibility, is admissible only on cross-examination. MRE 405(a); MRE 608(b); see *People v Lukity*, 460 Mich 484, 498; 596 NW2d 607 (1999); *People v Brownridge*, 225 Mich App 291, 297; 570 NW2d 672 (1997), *aff'd in part and rev'd in part* 459 Mich 456; 591 NW2d 26 (1999).

On direct examination, defendant testified that he had known Oliver to lie. However, the trial court sustained the prosecutor's objection to defense counsel's subsequent attempt to elicit testimony from defendant regarding specific examples of Oliver's untruthfulness. We find no abuse of the trial court's discretion. See *Starr, supra*. Evidence of specific instances in which Oliver lied was admissible only on the prosecutor's cross examination of defendant, not on direct examination. See MRE 405(a); MRE 608(b).

III

Finally, defendant maintains that there was insufficient evidence to support the conviction of third-degree child abuse. When ascertaining whether sufficient evidence was presented at trial to support a conviction, a court must view the evidence in a light most favorable to the prosecution and determine whether a rational trier of fact could find that the essential elements of the crime were proven beyond a reasonable doubt. Circumstantial evidence and reasonable inferences arising therefrom may

be sufficient to prove the elements of a crime. *People v Carines*, 460 Mich 750, 757; 597 NW2d 130 (1999).

Third-degree child abuse is the knowing or intentional causing of physical harm to a child. MCL 750.136b(4); MSA 28.331(2)(4). In the present case, the prosecutor presented evidence that the victim, aged eleven months, sustained numerous cuts and bruises while in defendant's care. Oliver testified that defendant held the victim by the shoulder and hit him several times on the face and arms. The medical testimony revealed that the victim's injuries were consistent with being gripped and hit multiple times by an adult, but were not consistent with defendant's claim that the child had run into a table or fallen on a bed frame. Viewing the evidence in a light most favorable to the prosecution, a rational trier of fact could find that the essential elements of third-degree child abuse were proven beyond a reasonable doubt. See *Carines*, *supra*.

Moreover, defendant's entire argument is based on his assertion that Oliver was not credible. Questions of credibility are left to the trier of fact and will not be resolved anew by this Court. *People v Avant*, 235 Mich App 499, 506; 597 NW2d 864 (1999).

Affirmed.

/s/ Richard A. Bandstra

/s/ Mark J. Cavanagh

/s/ Brian K. Zahra

¹ Indeed, given that the record indicates that defendant and his wife were engaged in acrimonious divorce proceedings at the time of trial, a reasonable explanation for defense counsel's failure to call defendant's wife as a witness immediately springs to mind.