

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

DARRYL SANDERS

Defendant-Appellant.

UNPUBLISHED

November 26, 2002

No. 236007

Wayne Circuit Court

LC No. 01-001250-01

Before: Markey, P.J., and Saad and Smolenski, JJ.

MEMORANDUM.

Following a bench trial, defendant was convicted of second degree home invasion, MCL 750.110a(3), and sentenced to 2 to 15 years' imprisonment.¹ Defendant appeals by right. We affirm. This appeal is being heard without oral argument pursuant to MCR 7.214(E).

Defendant argues that he was denied the effective assistance of counsel when counsel failed to present his defense to the trial court. We disagree. To establish ineffective assistance of counsel, a defendant must show: (1) that counsel's performance was below an objective standard of reasonableness under prevailing professional norms; (2) that there is a reasonable probability that, but for counsel's error, the result of the proceedings would have been different. *Bell v Cone*, 535 US __; 122 S Ct 1823, 1850; 152 L Ed 2d 914 (2002); *People v Toma*, 462 Mich 281, 302; 613 NW2d 694 (2000). Effective assistance of counsel is presumed, and the defendant bears a heavy burden of proving otherwise. *People v LeBlanc*, 465 Mich 575, 578; 640 NW2d 246 (2002).

Generally, decisions as to what evidence to present and whether to call or question witnesses are presumed to be matters of trial strategy, *People v Mitchell*, 454 Mich 145, 163; 560 NW2d 600 (1997), and 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 Hyland*, 212 Mich App 701, 710; 538 NW2d 465 (1995). A substantial defense is one which might have made a difference in the outcome of the trial. *Id.*

¹ This sentence was to be served concurrently to a sentence imposed on an unrelated home invasion conviction.

Defendant has presented nothing on the record to indicate that his “alternate” defense -- that his fingerprints were found on the complainant’s door because he had previously purchased marijuana from the complainant -- had any basis in fact. Trial counsel’s defense strategy, to attack the credibility of the fingerprint comparison, was reasonable under the circumstances. That the strategy did not work did not render its use to be ineffective assistance of counsel. *People v Kevorkian*, 248 Mich App 373, 414-415; 639 NW2d 291 (2001). Furthermore, trial counsel did argue that the prosecutor failed to prove that the fingerprints were not on the door before the break-in.

Affirmed.

/s/ Jane E. Markey

/s/ Henry William Saad

/s/ Michael R. Smolenski