

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

ROBERT J. SZEMYAK,

Defendant-Appellant.

UNPUBLISHED

May 10, 1996

No. 173634

LC No. 92-121147-FH

Before: Taylor, P.J., and MacKenzie and M.J. Talbot*, JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of breaking and entering an occupied dwelling, MCL 750.110; MSA 28.305. He subsequently pleaded guilty to being an habitual offender, fourth offense, MCL 769.12; MSA 28.1084. Defendant was sentenced to six to twenty years' imprisonment and now appeals by application for delayed appeal granted. We affirm.

Defendant contends that he was denied the effective assistance of counsel at trial. Effective assistance of counsel is presumed, and the defendant bears a heavy burden of proving otherwise. To establish ineffective assistance of counsel, a defendant must show that counsel's performance was below an objective standard of reasonableness under prevailing professional norms and there is a reasonable probability that, but for counsel's error, the result of the proceedings would have been different. *Strickland v Washington*, 466 US 668; 104 S Ct 2052; 80 L Ed 2d 674 (1984); *People v Pickens*, 446 Mich 298, 302-303; 521 NW2d 797 (1994).

Defendant first argues that he was denied effective assistance of counsel because his attorney, on cross-examination of two prosecution witnesses, elicited unfavorable testimony concerning defendant's past abusive conduct. The argument is without merit. The exchanges cited by defendant were matters of trial strategy that this Court will not second-guess. *People v Murph*, 185 Mich App 476, 479; 463 NW2d 156 (1990). The fact that the strategy may not have worked does not constitute ineffective assistance of counsel. *Id.*

* Circuit judge, sitting on the Court of Appeals by assignment.

Defendant next asserts that he was denied effective assistance of counsel because his attorney failed to file a timely notice of alibi and failed to follow up on a possible alibi defense. The trial court concluded at defendant's *Ginther* hearing [*People v Ginther*, 390 Mich 436; 212 NW2d 922 (1973)] that counsel's conduct in this regard was not deficient, and we agree. Counsel was not made aware of an alibi defense until the first day of trial. As soon as he learned of the alibi witnesses, he immediately sought from the prosecution a waiver of notice or a stipulation to postpone trial so that defendant could file a notice of alibi. When the prosecution refused, counsel immediately brought a motion for leave to file a notice of alibi, which was denied. Counsel's conduct was not so lacking as to constitute ineffective assistance of counsel. See *People v Hubbard*, 156 Mich App 712, 715; 402 NW2d 79 (1986).

In a related claim, defendant contends that the trial court abused its discretion in denying defendant's motion for leave to file a notice of alibi. We disagree. Whether the trial court has abused its discretion in disallowing the testimony of an alibi witness varies with the facts of each case, and involves a weighing of the competing interests involved. *People v Travis*, 443 Mich 668, 681; 505 NW2d 563 (1993). In this case, the record shows that before trial, counsel sent defendant a letter requesting that he and defendant meet to discuss the case, but defendant never contacted him. Instead, defendant failed to notify his attorney of the alibi defense until the day of trial. We agree with the trial court's conclusion that defendant's request for leave to bring an alibi defense appears to be a tactic to delay trial. Under these circumstances, we find no abuse of discretion in the court's decision.

Affirmed.

/s/ Clifford W. Taylor
/s/ Barbara B. MacKenzie
/s/ Michael J. Talbot