IN THE COURT OF APPEALS
FIRST APPELLATE DISTRICT OF OHIO
HAMILTON COUNTY, OHIO

STATE OF OHIO,	:	APPEAL NO. C-170572 TRIAL NO. B-1605807
Plaintiff-Appellee,	:	*JUDGMENT ENTRY.*
vs.	:	
TERRANCE HARVEY,	:	
Defendant-Appellant.	:	

We consider this appeal on the accelerated calendar, and this judgment entry is not an opinion of the court. *See* Rep.Op.R. 3.1; App.R. 11.1(E); 1st Dist. Loc.R. 11.1.1.

Defendant-appellant Terrance Harvey appeals his convictions for one count of felonious assault and one count of endangering children for causing a serious brain injury to O.L., and his sentence of eight years. Raising four assignments of error Harvey argues that the evidence was insufficient to support the convictions, the convictions were against the manifest weight of the evidence, trial counsel provided ineffective assistance, and the sentence is contrary to law. For the following reasons, we overrule each assignment of error and affirm the judgment of the trial court.

First, Harvey contends that his convictions were not supported by sufficient evidence and were against the manifest weight of the evidence. The evidence presented by the state showed that the injuries to the child occurred after 11:30 a.m. on October 5, 2016. The previous day, Renee Brown, Harvey's mother, was watching the child until Harvey came to pick him up at approximately 11:30 a.m. The evidence established that

the child was not injured at her house, he had a healthy appetite at her house, and he was feeling fine while in her care. The child's mother testified that she did not see any bruises when she bathed O.L. that evening, and she did not see any bruises on him before she left for work. Later that day, after she took O.L. to the hospital, she saw numerous bruises on his body. Although there is no direct evidence that Harvey abused O.L. because no one saw him do it, the lack of physical evidence is insufficient to justify a reversal. *See State v. Williams*, 2017-Ohio-8898, 101 N.E.3d 547, ¶ 19 (1st Dist.).

Moreover, there is compelling circumstantial evidence that Harvey committed the offenses. Dr. Shapiro testified, within a reasonable degree of medical certainty, that the injuries were not the result of two household falls, and the injuries were caused by a significant use of force. Harvey was the sole person caring for O.L. after the child's mother left for work. The fact that O.L. became seriously injured while left alone with Harvey is circumstantial evidence that he abused the infant. *See State v. Milby*, 12th Dist. Warren No. CA2013-02-014, 2013-Ohio-433, ¶ 39. "Circumstantial evidence and direct evidence inherently possess the same probative value. In some instances certain facts can only be established by circumstantial evidence." *State v. Jenks*, 61 Ohio St.3d 259, 272, 574 N.E.2d 492 (1991).

The trier of fact could have found all the elements proven beyond a reasonable doubt. *See State v. Thompkins*, 78 Ohio St.3d 380, 386, 678 N.E.2d 541 (1997). Reviewing the entire record, we cannot find the jury lost its way and committed such a miscarriage of justice that the convictions must be reversed. *See id.* at 387. Accordingly, we overrule the first and second assignments of error.

Next, Harvey argues that his trial counsel was ineffective for failing to hire an expert in crime scene reconstruction or a medical expert, because the experts could

have disputed the timeline or testified that the injuries were caused by the household falls.

To establish a claim for ineffective assistance of counsel, the appellant has the burden of demonstrating that (1) the performance of defense counsel was seriously flawed and deficient, and (2) there is a reasonable probability that the result of the proceeding would have been different had defense counsel provided proper representation. *See Strickland v. Washington*, 466 U.S. 668, 687, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984).

In general, "the failure to call an expert and instead rely on cross-examination does not constitute ineffective assistance of counsel." *State v. Chambers*, 1st Dist. Hamilton Nos. C-060922 and C-061036, 2008-Ohio-470, ¶ 28, quoting *State v. Nicholas*, 66 Ohio St.3d 431, 436, 613 N.E.2d 225 (1993). The decision to utilize or forgo an expert falls within the realm of trial strategy. *Id.*

Harvey has not demonstrated that he was prejudiced by the omission of the testimony of an expert in crime scene reconstruction or a medical expert, and any testimony that may have been offered is purely speculative. Following our review of the record, we conclude that counsel's performance was not deficient and that Harvey did not receive ineffective assistance. This assignment of error is overruled.

In his fourth assignment of error, Harvey argues that his sentence is contrary to law because the record does not support a maximum sentence. Applying R.C. 2953.08(G)(2), this court will only modify or vacate a sentence if it clearly and convincingly finds that either the record does not support the mandatory sentencing findings or the sentence is otherwise contrary to law. *State v. Martin*, 1st Dist. Hamilton No. C-150054, 2016-Ohio-802, ¶ 35.

Although a court must consider the overriding principles of felony sentencing, including R.C. 2929.12, the court need not make specific findings on the record, and we can presume that a court considered the factors, absent an affirmative demonstration in the record showing otherwise. *State v. Alexander*, 1st Dist. Hamilton Nos. C-110828 and C-110829, 2012-Ohio-3349, ¶ 24.

This record does not affirmatively demonstrate that the court failed to consider the principles and purposes of felony sentencing. At the sentencing hearing, the trial court merged the convictions and sentenced him to an eight-year prison term for the felonious assault. The record reflects that the court considered the risk that Harvey would commit another offense, the need to protect the public, the nature and circumstances of the offenses, his history, character, condition, and the seriousness of the harm to the victim before imposing sentence. We overrule the fourth assignment of error and affirm the judgment of the trial court.

A certified copy of this judgment entry shall constitute the mandate, which shall be sent to the trial court under App.R. 27. Costs shall be taxed under App.R. 24.

MOCK, P.J., ZAYAS and **MYERS, JJ.**

To the clerk:

Enter upon the journal of the court on September 14, 2018

per order of the court _____.

Presiding Judge