

Eugene Cardwell (“Cardwell”) appeals, following a jury trial, his convictions for attempted murder¹ as a Class A felony and possession of a deadly weapon by an incarcerated person² as a Class B felony. Cardwell raises the following restated issue for our review: whether he received the effective assistance of trial counsel.

We affirm.

FACTS AND PROCEDURAL HISTORY

In September 2007, Cardwell and Eddie Buchanan (“Buchanan”) were incarcerated at the Indiana State Prison. On the morning of September 22, while both were in the recreation area, Cardwell approached Buchanan from behind and stabbed him with a large shank. The two had engaged in a verbal argument the night before the stabbing. Prison officers responded immediately, subdued Cardwell, and transported Buchanan to the hospital, where he recovered from the stab wound.

The State charged Cardwell with attempted murder and possession of a deadly weapon by an incarcerated person. At trial, the State presented video evidence of the attack as captured by the prison security camera system. Several of the officers who responded to the incident provided testimony cumulative to the video evidence. The jury found Cardwell guilty as charged. Cardwell now appeals.

DISCUSSION AND DECISION

Cardwell argues on direct appeal that his counsel was ineffective in three respects: 1) failure to prepare and present a viable defense; 2) failure to cross-examine witnesses;

¹ See Ind. Code § 35-41-5-1.

² See Ind. Code § 35-44-3-9.5.

and 3) failure to object to any of the State's evidence and to Final Instruction No.7.³ Cardwell concedes that each alleged error alone does not constitute ineffective assistance of counsel and argues instead that the cumulative effect of the errors is sufficient to prove his trial counsel's performance was ineffective. *See Grinstead v. State*, 845 N.E.2d 1027, 1036 (Ind. 2006) (cumulative effect of a number of errors can render counsel's performance ineffective).

There is a presumption that counsel rendered effective assistance and made all significant decisions in the exercise of reasonable professional judgment. *Walker v. State*, 779 N.E.2d 1158, 1161 (Ind. Ct. App. 2002). A defendant must offer strong and convincing evidence to overcome the presumption of effectiveness. *Saylor v. State*, 765 N.E.2d 535, 549 (Ind. 2002). We give considerable deference to counsel's discretion in choosing strategy and tactics. *Id.* A defendant must show more than isolated poor strategy, bad tactics, mistake, carelessness, or inexperience. *Law v. State*, 797 N.E.2d 1157, 1162 (Ind. Ct. App. 2003).

Claims of ineffective assistance of trial counsel are reviewed under the two-part test announced in *Strickland v. Washington*, 466 U.S. 668 (1984). A claimant must first demonstrate that counsel's performance fell below an objective standard of reasonableness based on prevailing professional norms. *Slusher v. State*, 823 N.E.2d

³ We note that our Supreme Court has repeatedly stated that although claims of ineffective assistance of trial counsel may be brought on direct appeal, the preferred method of presenting such claims is on post-conviction review. *See McIntire v. State*, 717 N.E.2d 96, 101 (Ind. 1999); *Woods v. State*, 701 N.E.2d 1208, 1219 (Ind. 1998), *cert. denied*, 528 U.S. 861 (1999). Post-conviction relief proceedings are preferred because presenting such claims often requires the development of new facts not present in the trial record. *McIntire*, 717 N.E.2d at 101. However, if the defendant does choose to present the issue of the ineffective assistance of trial counsel on direct appeal, the issue will be foreclosed from later collateral review. *Id.* at 102; *Woods*, 701 N.E.2d at 1220.

1219, 1221 (Ind. App. Ct. 2005). Second, the defendant must show that the lack of reasonable performance resulted in prejudice. *Id.* Prejudice occurs when the defendant demonstrates that “there is a reasonable probability that, but for counsel’s unprofessional errors, the result of the proceeding would have been different.” *Smith v. State*, 689 N.E.2d 1238, 1244 (Ind. 1997). We need not evaluate counsel’s performance if the defendant fails to show evidence of prejudice due to counsel’s performance. *Law*, 797 N.E.2d at 1162.

I. Failure to Present a Viable Defense

Cardwell first contends that trial counsel failed to investigate and present a claim of self-defense. Because Cardwell raises this issue on direct appeal, the record contains no evidence as to what investigations trial counsel did or did not conduct. Given the lack of opening or closing statements in the record, there is no evidence of what type of defense trial counsel argued to the jury. Both alleged failures, since not visible at all on the face of the trial record, require “additional record development to assess either the competence of the attorney or the prejudice resulting from the claimed error.” *Slusher v. State*, 823 N.E.2d 1219, 1222 (Ind. Ct. App. 2005). Absent such a record, Cardwell has failed to demonstrate his trial counsel’s ineffectiveness.

Cardwell further contends that trial counsel was ineffective because trial counsel: (1) did not call Cardwell in his own defense; (2) called witnesses with no information in support of the defense; and (3) did not call potentially helpful witnesses. The errors claimed are of the type that our Supreme Court has classified as a “hybrid contention,” consisting of “an act or omission on the record that is perhaps within the range of

acceptable tactical choices counsel might have made, but in the particular instance is claimed to be made due ... to some other egregious failure rising to the level of deficient attorney performance.” *Woods v State*, 701 N.E.2d 1208, 1212 (Ind. 1998). “The reasoning of trial counsel is sometimes apparent from the trial record. However, in assessing hybrid contentions, it is often necessary for an additional record to be developed to show the reason for an act or omission that appears in the trial record.” *Id.* at 1212-13.

In this case, there is no record by which we can evaluate the reasons for counsel’s alleged error, and the likelihood that the error, if any, affected the result. Since these claims are hybrid contentions, the presumption that counsel performed competently prohibits us from finding counsel’s performance deficient. This court has no ability to engage in fact-finding or take new evidence to make such a determination. *See Brewster v. State*, 697 N.E.2d 95, 96 (Ind. Ct. App. 1998) (not proper function of appellate court to receive and weigh evidence).

II. Failure to Cross Examine

Cardwell next contends that his counsel was ineffective for failing to cross-examine six of the State’s ten witnesses. The nature and extent of cross-examination is a matter of strategy left to trial counsel. *Waldon v. State*, 684 N.E.2d 206, 208 (Ind. Ct. App. 1997). Because the reasoning behind trial counsel’s decision not to cross-examine is not apparent on the record, an alleged error for failure to cross-examine is one of the hybrid contentions discussed above. Again, because this issue is raised on direct appeal, the lack of additional evidence prevents a finding of ineffective counsel.

III. Failure to Object

Cardwell lastly raises trial counsel's failure to object to: (1) the admission of the weapons; (2) the admission of the videotapes; (3) the presence of the exhibits in the jury room; and (4) a modification to Final Instruction No.7 as establishing ineffective assistance of counsel. However, Cardwell does not explain how these alleged errors by trial counsel, individually or collectively, prejudiced his defense. In fact, as to the final instruction, Cardwell admits that the modification did not result in prejudice. *Appellant's Br.* at 23. "If it is easier to dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice ... that course should be followed." *Strickland*, 466 U.S. at 697; *See Slusher*, 823 N.E.2d at 1221.

Cardwell has failed to overcome the presumption of effectiveness or to demonstrate prejudice as a result of his trial counsel's alleged errors. We therefore conclude that Cardwell received effective assistance of trial counsel.

Affirmed.

RILEY, J., and MATHIAS, J., concur.