

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

LORENZO CORTEZ TOWNSEND,

Defendant-Appellant.

UNPUBLISHED

November 12, 1996

No. 182313

LC No. 94-050843

Before: MacKenzie, P.J., and Jansen and T.R. Thomas*, JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of two counts of first-degree criminal sexual conduct, MCL 750.520b(1)(a); MSA 28.788(2)(1)(a). He subsequently pleaded guilty to being an habitual offender, second offense, MCL 769.10; MSA 28.1082. Defendant was sentenced to forty to sixty years' imprisonment and he now appeals as of right. We affirm.

In three arguments, defendant contends that he received ineffective assistance of counsel at trial. To establish whether a defendant's right to effective assistance of counsel has been so undermined as to justify reversal, the defendant must show that his legal representation fell below an objective standard of reasonableness and that it was so prejudicial as to deprive him of a fair trial. *People v Price*, 214 Mich App 538, 547; 543 NW2d 49 (1995). Effective assistance of counsel is presumed, and the defendant bears the heavy burden of proving otherwise. *People v Stanaway*, 446 Mich 643, 687; 521 NW2d 557 (1994).

Here, defendant first argues that his attorney should have recalled the victim in order to present evidence that she had previously engaged in sexual intercourse. According to defendant, this failure denied him the opportunity to rebut the medical evidence that the victim had been sexually penetrated. We reject defendant's reasoning. The rape-shield statute, MCL 750.520j; MSA 28.788(10), bars, with two narrow exceptions, evidence of *all* sexual activity by the complainant not incident to the alleged rape. *People v Adair*, 452 Mich 473; ___ NW2d ___ (1996), quoting *People v Stull*, 127 Mich App 14, 17; 338 NW2d 403 (1983) (emphasis in the original). Neither of the two narrow

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

exceptions allows general evidence concerning the victim's sexual experience. Accordingly, defendant was not prejudiced by counsel's failure to recall the victim to ask whether she had previously engaged in sexual activity. In the absence of any prejudice to defendant, we find no ineffective assistance of counsel. In any event, we note that counsel successfully established during cross-examination of the victim that she had engaged in sexual intercourse prior to the incidents involved in this case.

Defendant also argues that his counsel's representation was ineffective because his attorney failed to move for a ruling, before defendant refused a plea offer, whether defendant's previous armed robbery conviction was admissible for impeachment purposes. Defendant claims that he would have accepted the plea offer had he known two things: (1) that he would be counseled not to testify because his previous conviction could be used to impeach his credibility, and (2) that he did not possess a cognizable defense. However, nothing in the record reflects that defense counsel failed to explain to defendant all the consequences of rejecting the plea offer and going to trial. Indeed, the record reveals that defendant was fully apprised of his plea option and its consequences, including the sentencing ramifications of his decision. Furthermore, defense counsel fulfilled his duty to defendant by moving for suppression of his armed robbery conviction. See *People v Perkins*, 141 Mich App 186, 191; 366 NW2d 94 (1985). Counsel's representation was not deficient in this regard.

Defendant also argues that his counsel's representation was inadequate because he failed to object to the court's scoring of the sentencing guidelines. This claim has been waived, however. See *People v Walker*, 155 Mich App 247, 248-249; 399 NW2d 489 (1986), aff'd on other grounds 428 Mich 261; 407 NW2d 367 (1987). In any event, a review of the record establishes that there was evidence to support the scoring. Since the scoring was correct, defense counsel was under no duty to advance an objection to it. *People v Rodriguez*, 212 Mich App 351, 356; 538 NW2d 42 (1995). In sum, defendant has failed to demonstrate that he was denied a fair trial because of his attorney's failure to adequately represent him.

Defendant also argues that the trial court erred in sustaining the prosecution's objection to defendant's cross-examination of the victim concerning the number of times she had previously engaged in sexual intercourse. A trial court's decision to exclude evidence is reviewed on appeal for an abuse of discretion. *People v Lugo*, 214 Mich App 699, 709; 542 NW2d 921 (1995). There was no abuse of discretion here since the evidence was barred by the rape-shield statute. Even assuming that such a question was proper as an effort to preserve defendant's right to confrontation, see *People v Haley*, 153 Mich App 400; 395 NW2d 60 (1986) -- a claim not raised here -- defendant was still required initially to make an offer of proof demonstrating the relevance and admissibility of such evidence. He did not do so. Accordingly, the trial court was obligated to deny admission of the evidence. *People v Byrne*, 199 Mich App 674, 678; 502 NW2d 386 (1993). The court did not abuse its discretion in sustaining the prosecution's objection to defendant's line of inquiry.

Next, defendant argues that he was denied a fair trial when the trial proceeded in his absence. We do not agree. The test for whether defendant's absence from a part of his trial requires reversal of his convictions is whether there was any reasonable possibility that defendant was prejudiced by his absence. *People v Armstrong*, 212 Mich App 121, 129; 536 NW2d 789 (1995). In this case,

defendant's absence from a portion of his trial posed no reasonable possibility of prejudice. Defendant does not claim to have been absent from the proceedings when the prosecution presented the victim's testimony. She testified that defendant engaged in sexual penetration with her on two occasions and that she was under thirteen years of age when defendant had intercourse with her, thus satisfying the elements of first-degree criminal sexual conduct. *People v Hammons*, 210 Mich App 554, 557; 534 NW2d 183 (1995). Officer Joseph Lash's testimony, for which defendant was absent, concerned what the victim told him when she reported being sexually assaulted. Indeed, Lash contributed little in the way of new evidence. Defendant was also absent from the proceedings during a portion of Dr. Daryl Patterson's testimony concerning his physical examination of the victim and his finding that sexual penetration had occurred. However, since the victim already testified that defendant penetrated her, Dr. Patterson's testimony was merely cumulative. Moreover, Dr. Patterson neither did, nor could, positively identify defendant as the source of penetration. Defendant remained free to argue this point in his closing. In light of defendant's brief absence from trial and the cumulative nature of the evidence submitted during his absence, we conclude that there was no reasonable possibility that he suffered prejudice by his absence.

Finally, we do not agree with defendant's argument that his sentence of forty to sixty years' incarceration was disproportionate. *People v Milbourn*, 435 Mich 630; 461 NW2d 1 (1990). Although he was sentenced as an habitual offender, defendant's sentence still falls within the sentencing guidelines range and is therefore presumptively proportionate. *People v Broden*, 428 Mich 343; 408 NW2d 789 (1987). Defendant has not presented any mitigating factors which would overcome that presumption. The sentence is proportionate to the circumstances surrounding the offense and the offender and does not constitute an abuse of discretion. *Milbourn, supra*.

Affirmed.

/s/ Barbara B. MacKenzie

/s/ Kathleen Jansen

/s/ Terrence R. Thomas