

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

NIJAI TYREE FLOYD,

Defendant-Appellant.

UNPUBLISHED

January 2, 2001

No. 217287

Oakland Circuit Court

LC No. 98-159750-FC

Before: Doctoroff, P.J., and Cavanagh and Meter, JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of one count of first-degree criminal sexual conduct, MCL 750.520b(1)(f); MSA 28.788(2)(1)(f), and acquitted of a second count. He was sentenced as a second habitual offender, MCL 769.10; MSA 28.1082, to a term of fifteen to thirty years' imprisonment. He appeals as of right. We affirm.

Defendant first argues that trial counsel was ineffective because she failed to object to certain rebuttal testimony offered by the prosecution. He argues that the testimony was not proper rebuttal evidence and that it was also inadmissible under MRE 404(b). We find no merit to this argument.

Because defendant did not raise the issue of ineffective assistance of counsel in the trial court, we review this issue for mistakes apparent on the record. See *People v Noble*, 238 Mich App 647, 661; 608 NW2d 123 (1999). To establish ineffective assistance of counsel, defendant must show that counsel's performance fell below an objective standard of reasonableness, and that the representation so prejudiced defendant that he was denied the right to a fair trial. *People v Toma*, 462 Mich 281, 302; 613 NW2d 694 (2000). Defendant must overcome the presumption that the challenged action might be considered sound trial strategy. *Toma, supra* at 302. To establish prejudice, the defendant must show that there was a reasonable probability that, but for counsel's error, the result of the proceeding would have been different. *People v Johnson*, 451 Mich 115, 124; 545 NW2d 637 (1996).

First, we find no merit to defendant's claim that the witness in question did not offer proper rebuttal testimony. The witness' testimony directly refuted defendant's substantive testimony concerning an incident that occurred about a week before the charged offense, which

defendant maintained was supportive of his defense of consent. See *People v Figgures*, 451 Mich 390, 399; 547 NW2d 673 (1996).

We also disagree with defendant's claim that the evidence was inadmissible under MRE 404(b). During his testimony, defendant claimed that the witness and the victim were dancing around partially nude in his apartment about a week before the charged offense, and that the women had encouraged defendant to touch them. It was that incident, according to defendant, that allegedly caused defendant to believe that the victim would consent to sexual relations with him. Defendant also stated that he had sexually touched the witness. On rebuttal, the witness disputed defendant's testimony, explaining that defendant never touched her with her consent, but rather, made sexual advances towards her that included inappropriate touching without her consent. Because it was the defense who opened the door to this evidence, the prosecution was entitled to explore the subject matter and present any contradictory evidence that existed without running afoul of MRE 404(b). See *Figgures, supra* at 401; *People v Marrow*, 210 Mich App 455, 465-466; 534 NW2d 153 (1995). Accordingly, we conclude that counsel was not ineffective for failing to object to this evidence.

Next, defendant argues that the trial court improperly excluded evidence that another person's semen was detected during testing of bodily fluids collected from the victim. Defendant contends that this evidence was admissible under an exception to the rape-shield statute. MCL 750.520j(1)(b); MSA 28.788(10)(1)(b). We disagree.

Defendant did not dispute that his semen was found among the samples collected from the victim, but wanted to introduce the evidence of another source of semen pursuant to the exception in subsection (1)(b), under the theory that it would show that another person may have inflicted the personal injuries that the victim suffered to her wrists. However, because the source or origin of semen found was not at issue in the case, we conclude that the excluded evidence was not admissible under the exception prescribed in subsection (1)(b). Defendant's argument that another individual could have been responsible for the injuries to the victim did not justify admission of the evidence under subsection (1)(b), especially considering that the injuries to the victim's wrists were not related exclusively to sexual activity. Defendant's reason for introducing the challenged evidence was neither material nor probative of the theory for which he sought to introduce the evidence. Accordingly, the trial court did not abuse its discretion in refusing to admit the evidence. See *People v Adair*, 452 Mich 473, 485; 550 NW2d 505 (1996). Further, because the evidence was not relevant, defendant was not deprived of his right to confront the witnesses against him. *Id.* at 488-489.

Affirmed.

/s/ Martin M. Doctoroff

/s/ Mark J. Cavanagh

/s/ Patrick M. Meter