

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

JOHN WARNER JENSEN,

Defendant-Appellant.

UNPUBLISHED

February 17, 2005

No. 251590

Ogemaw Circuit Court

LC No. 03-002100-FC

Before: Fort Hood, P.J. and Griffin and Donofrio, JJ.

MEMORANDUM.

Defendant appeals as of right his jury convictions for three counts of first-degree criminal sexual conduct, MCL 750.520b, armed robbery, MCL 750.529, and assault with intent to do great bodily harm, MCL 750.84. We affirm.

Defendant's convictions arise out of the brutal beating and sexual assault of his former girlfriend. On appeal, he argues that he was denied the effective assistance of counsel where his trial attorney failed to file a timely motion to admit evidence concerning his prior sexual activity with complainant, as required by MCL 750.520j(2).

To establish an ineffective assistance of counsel claim, a defendant first must show that counsel's performance was below an objective standard of reasonableness under prevailing professional norms. The defendant must overcome a strong presumption that counsel's actions constituted sound trial strategy. Second, the defendant must show that there is a reasonable probability that, but for counsel's error, the result of the proceeding would have been different. *People v Carbin*, 463 Mich 590, 599-600; 623 NW2d 884 (2001).

Under the rape shield statute evidence of past instances of sexual conduct with a complainant is only admissible in certain circumstances. The proposed evidence must be material to a fact at issue in the case and its inflammatory or prejudicial nature may not outweigh its probative value. MCL 750.520j(1). A defendant who seeks to admit such evidence is required to file within ten days after the arraignment on the information a written motion and offer of proof. MCL 750.520j(2).

Although defendant argues that counsel was ineffective for failing to timely file the required motion, the trial court reviewed the merits of defendant's argument. The court observed that the proposed evidence was only marginally relevant, and that the probative value was

substantially outweighed by the danger of unfair prejudice. Thus, even if counsel had filed the required motion, the court would not have admitted the evidence. Had the court admitted the evidence, it would not have affected the outcome of the case.¹ The sexual conduct alleged took place two weeks before the incident. Where medical testimony indicated that complainant's injuries were incurred within 48 hours of the examination, evidence of sexual activity that occurred two weeks previously would not be probative of the cause of those injuries.

Affirmed.

/s/ Karen M. Fort Hood
/s/ Richard Allen Griffin
/s/ Pat M. Donofrio

¹ The complainant's testimony of sexual contact with defendant two weeks earlier was part of the record evidence. The sexual contact with defendant testimony was not stricken from the record.