

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

ARTHUR PIERCE,

Defendant-Appellant.

UNPUBLISHED

February 23, 2001

No. 217374

Wayne Circuit Court

Criminal Division

LC No. 98-003904

Before: Neff, P.J., and Holbrook, Jr., and Jansen, JJ.

PER CURIAM.

Defendant appeals as of right from his jury trial conviction of first-degree criminal sexual conduct, MCL 750.520c(1)(a); MSA 28.788(3)(1)(a), and one count of second-degree criminal sexual conduct, MCL 750.520b(1)(a); MSA 28.788(2)(1)(a). Defendant was sentenced to two concurrent prison terms of 3-1/2 to 15 years each. We affirm.

Defendant argues that he was denied a fair trial because of improper, prejudicial remarks made by the prosecutor. Specifically, defendant asserts that the prosecutor acted improperly in three ways: (1) by asking potential jurors during voir dire whether defendant looked like a child molester; (2) by challenging the testimony of defendant's brother-in-law during closing arguments; and (3) by arguing, during rebuttal closing argument, that the victim was taken to the hospital several months after the December 1997 assault in order to check for sexually transmitted diseases. Because defendant did not object to any of the allegedly improper remarks at trial, we review the alleged error under the plain error rule. "To avoid forfeiture under the plain error rule, three requirements must be met: 1) the error must have occurred, 2) the error was plain . . . , 3) and the plain error affected substantial rights. The third requirement generally requires a showing of prejudice" *People v Carines*, 460 Mich 750, 763; 597 NW2d 130 (1999). Further, if the three elements of the plain error rule are established, "[r]eversal is warranted only when the plain, forfeited error resulted in the conviction of an actually innocent defendant or when an error ""seriously affect[ed] the fairness, integrity or public reputation of judicial proceedings' independent of the defendant's innocence."" *Id.* at 763-764, quoting *United States v Olano*, 507 US 725, 736-737; 113 S Ct 1770; 123 L Ed 2d 508 (1993) (quoting *United States v Atkinson*, 297 US 157, 160; 56 S Ct 391; 80 L Ed 555 [1936]).

After reviewing the record, we find no prosecutorial misconduct. The prosecutor did not engage in misconduct by asking potential jurors whether defendant looked like a child molester.

Examined in context, the prosecutor was attempting to convey that the jury's decision should not be based on what a defendant looks like or doesn't look like, but rather, should be based on the facts adduced at trial. See *People v Bahoda*, 448 Mich 261, 266-267; 531 NW2d 659 (1995). Also, it was not improper for the prosecutor to argue that the brother-in-law's testimony was not worthy of belief. *People v Launsbury*, 217 Mich App 358, 361; 551 NW2d 460 (1996). Lastly, the prosecutor did not state that defendant had AIDS or some other sexually transmitted disease, but merely referred to those diseases in the context of explaining why it might be reasonable to have a child victim of alleged sexual abuse examined medically, even if the alleged facts did not suggest that an examination would otherwise reveal physical evidence of sexual abuse. The prosecutor's remarks were properly responsive to defense counsel's remarks suggesting that an examination was not really necessary and was sought solely to bolster the prosecution's case. *People v Schutte*, 240 Mich App 713, 721; 613 NW2d 370 (2000). Accordingly, because there is no plain error apparent from any of the challenged remarks, appellate relief is not warranted on the basis of this unpreserved issue.

Defendant also argues that trial counsel was ineffective. We disagree. "To prove a claim of ineffective assistance of counsel . . . , a defendant must show that counsel's performance fell below an objective standard of reasonableness and that the deficient performance prejudiced the defense so as to deny defendant a fair trial." *People v Smith*, 456 Mich 543, 556; 581 NW2d 654 (1998). Defendant must overcome the presumption that the challenged action constituted sound trial strategy. *People v Stanaway*, 446 Mich 643, 687; 521 NW2d 557 (1994). Because defendant failed to move for either a new trial or a *Ginther*¹ hearing, our review his claim of ineffective assistance of counsel is limited to the existing record. *People v Nantelle*, 215 Mich App 77, 87; 544 NW2d 667 (1996).

First, having found no plain error in connection with the challenged remarks by the prosecutor, we conclude that defense counsel was not ineffective for failing to object to those remarks. *People v Torres (On Remand)*, 222 Mich App 411, 425; 564 NW2d 149 (1997). Next, the extent to which trial counsel prepared for trial or interviewed potential witnesses is not apparent from the record. Therefore, defendant has failed to show that defense counsel was deficient in this regard. *People v Hurst*, 205 Mich App 634, 641; 517 NW2d 858 (1994). Further, the record does not support defendant's claim that defense counsel prevented him from testifying at trial. *Id.* On the contrary, the record indicates that, upon questioning by the trial court, defendant clearly and unequivocally waived his right to testify. Finally, defendant has failed to overcome the presumption that trial counsel's decision not to challenge two jurors for cause might be considered sound trial strategy. *People v LaVearn*, 448 Mich 207, 216; 528 NW2d 721 (1995); *People v Robinson*, 154 Mich App 92, 94-95; 397 NW2d 229 (1986).

Affirmed.

/s/ Janet T. Neff
/s/ Donald E. Holbrook, Jr.
/s/ Kathleen Jansen

¹ *People v Ginther*, 390 Mich 436; 212 NW2d 922 (1973).