COURT OF APPEALS
DECISION
DATED AND FILED

September 3, 1997

Marilyn L. Graves
Clerk, Court of Appeals
of Wisconsin

No. 97-0992-CR

STATE OF WISCONSIN **IN COURT OF APPEALS**
DISTRICT III

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

v.

LONNIE J. KVAPIL,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Eau Claire County: GREGORY A. PETERSON, Judge. *Affirmed.*

HOOVER, J., Lonnie J. Kvapil was convicted by a jury of two counts of disorderly conduct in violation of § 947.01, STATS. He appeals, claiming that the trial court should have impaneled a new jury, sua sponte, in response to a prospective juror's comment on Kvapil's character. This court concludes that Kvapil failed to preserve the issue for appeal as a matter of right

and that the court's failure to impanel a new jury on its own motion was not plain error. The judgment is therefore affirmed.

One of the first questions the court asked during its voir dire was whether anyone on the jury panel knew Kvapil. When Karen Dorn-Porter responded affirmatively, the following exchange ensued:

> THE COURT: Miss Porter, how do you happen to know him?
>
> [MS.] PORTER: Well, I just know him in the past in bars, just seeing him and knowing that he's a troublemaker.
>
> THE COURT: So you know who he is? Mr. Thelen, you also know him?
>
> ….
>
> … Ms. Porter, would your past acquaintance with Mr. Kvapil influence you if you were selected as a juror?
>
> [MS.] PORTER: No.
>
> THE COURT: Can you listen to whatever the testimony is and decide the case based on the testimony, base on – rather than on something that you know from outside the courtroom?
>
> [MS.] PORTER: Yes.
>
> THE COURT: Okay ….

Kvapil did not conduct voir dire and thus did nothing to determine whether Porter's characterization of him tainted panel members. Nor did he ask the court to impanel a new jury. Kvapil merely moved to strike Porter for cause at the conclusion of voir dire. The court accepted Porter's assessment of her ability

to treat Kvapil fairly and impartially[1] and therefore denied the motion. She was preemptively stricken from the panel.

Kvapil argues that he was prejudiced when the jury was exposed to a patently prejudicial characterization of him that would not be permitted into evidence at trial under § 904.04(1), STATS., and the source of which could not be confronted. Under these circumstances, he asserts the court was obliged to arrest the proceedings on its own.

Porter's comment was of a prejudicial nature and, for purposes of this opinion, probably inadmissible if offered by a witness during trial. It does not follow, however, that Kvapil is entitled to relief. He did not voir dire to essay prejudice or to neutralize any taint.[2] He failed to make a timely request for relief from the prejudicial effect on the panel he now believes the comment caused. Without voicing a timely objection, even error based upon an alleged violation of a constitutional right may be waived. ***State v. Damon***, 140 Wis.2d 297, 300, 409 N.W.2d 444, 446 (Ct. App. 1987). By failing to address or attempt to establish actual prejudice or to request postconviction relief in the trial court, Kvapil has waived his right to a review of the claimed error.

Kvapil asserts in his reply brief that the court's failure to sua sponte bring the matter before a new panel constituted plain error. Waiver notwithstanding, an appellate court may consider plain error affecting the

[1] Evaluating a juror's sincerity is a task best left to trial court discretion. ***State v. Messelt***, 185 Wis.2d 254, 269, 518 N.W.2d 232, 238 (1994). A trial court's findings on issues of juror credibility and honesty are determinations peculiarly within a trial judge's province. ***Wainwright v. Witt***, 469 U.S. 412, 428 (1985); ***Messelt,*** 185 Wis.2d at 270, 518 N.W.2d at 230.

[2] "[T]he *voir dire* examination of the jurors furnishes the most reliable evidence of whether any… prejudice existed." ***Butler v. United States***, 351 F.2d 14, 19 (8th Cir. 1965).

substantial rights of a defendant. ***State v. Sonnenberg***, 117 Wis. 2d 159, 176, 344 N.W.2d 95, 103 (1984). Plain error is an error so fundamental or substantial that a new trial or other relief must be ordered even though it was not brought to the court's attention. ***Id***. at 177, 344 N.W.2d at 103. The plain error exception is to be used sparingly and only where an accused has been denied a basic constitutional right. ***Id.*** at 177, 344 N.W.2d at 103-04. This court is not persuaded that the trial court's failure to impanel a new jury, even if error, was so fundamental or substantial that a new trial must be ordered.

The ***Damon*** case is instructive. Damon was charged with first-degree murder. ***Id***. at 299, 409 N.W.2d at 445. At trial, both parties presented forensic experts. To rebut the defendant's expert, the State called an attorney who had previously worked with Damon's expert. The attorney testified, without objection, to the defense witness' qualifications as a fingerprint expert. ***Id***. On appeal, Damon asserted that permitting improper impeachment of the expert's character and impeachment by use of extrinsic evidence constituted error. ***Id***. at 300, 409 N.W.2d at 445. He also claimed that the lawyer's testimony was inadmissible hearsay and its admission therefore violated his Sixth Amendment right to confrontation. ***Id***. at 300, 409 N.W.2d at 446.

This court ruled that the admission of the offending testimony was not plainly erroneous in that it was not so fundamental or substantial as to require a retrial. ***Id***. at 301, 409 N.W.2d at 446. While ***Damon*** involved evidence offered against a witness and not a juror's unsolicited opinion concerning a defendant, the underlying concerns are materially similar.

In this case, other aspects of the record lead to the conclusion that Kvapil's failure to seek an immediate remedy constituted waiver and the court's

failure to supply one on its own was not plain error, if it was error at all. First, the characterization itself, "trouble maker," is so abstract and amorphous as to be only marginally prejudicial. Further, this court infers that the circumstances surrounding Porter's assessment of Kvapil were more benign than might appear in black and white to one searching for error. Whether it was, for example, the manner in which it was said or the declarent's demeanor, apparently neither the experienced and able judge nor defense counsel perceived evidence of an affect on the panel inviting rehabilitation. Indeed, defense counsel's failure to voir dire the panel on the effects of Porter's statement serves, in part, to rebut the prejudice that Kvapil presumes. *See* ***Thompson v. Borg***, 74 F.3d 1571, 1576 (9th Cir. 1996) Moreover, the court's voir dire of Porter alerted the panel as a whole of the impropriety of considering matters extraneous to the trial testimony. This implicit admonition was reinforced by the court's charge to the jury, which, taken as a whole, instructed it to confine its deliberations to the trial evidence.

Finally, any taint on the proceedings caused by Porter's comment was overwhelmed by the evidence of guilt adduced at trial. The victim's testimony was corroborated by physical evidence and the observations of law enforcement officials. The strength of the evidence against the defendant is a factor when determining whether alleged error is harmless or plain. ***Virgil v. State***, 84 Wis.2d 166, 191, 267 N.W.2d 852, 865 (1978).

In light of the foregoing considerations, this court cannot conclude that the juror's characterization of Kvapil was "seriously prejudicial" or a "grave" error that seriously affected his right to due process or a fair trial. Therefore the judgment of conviction is affirmed.

By the Court.—Judgment affirmed.

This opinion will not be published. RULE 809.23(1)(b)4, STATS.