MISSOURI COURT OF APPEALS
WESTERN DISTRICT

STATE OF MISSOURI,	)	
	)	**WD80893**
Respondent,	)	
v.	)	**OPINION FILED:**
	)	
MARK C. BRANDOLESE,	)	**December 26, 2018**
	)	
Appellant.	)	

Appeal from the Circuit Court of Pettis County, Missouri
Honorable Robert Lawrence Koffman, Judge

Before Division Two:
Alok Ahuja, P.J., Thomas H. Newton, and Mark D. Pfeiffer, JJ.

Mr. Mark C. Brandolese appeals his conviction by a Pettis County jury of one count of second-degree domestic assault and one count of armed criminal action (ACA). The trial court sentenced him to ten years of imprisonment for domestic assault and fifteen years for ACA, to run concurrently. Mr. Brandolese challenges the instructions, the court's response to a jury question, evidentiary rulings, and the court's refusal to dismiss for cause a prosecutor's sister who sat on the jury. We reverse and remand for a new trial.

Sedalia police officers were called in March 2016 to the scene of a domestic disturbance and discovered the victim on a neighbor's porch, bleeding

from a number of injuries, including knife cuts across his chest and above one eye. The victim indicated to the neighbor and police officers that his housemate had beat him with a cane and had cut him with a knife. The State charged Mr. Brandolese with second-degree domestic assault and ACA. The case was tried before a Pettis County jury in May 2017; neither the victim nor Mr. Brandolese testified. The trial court overruled Mr. Brandolese's motions for judgment of acquittal at the close of the State's evidence and at the close of all the evidence. The jury returned guilty verdicts on the counts charged. After overruling Mr. Brandolese's motion for judgment of acquittal notwithstanding the verdict or in the alternative for new trial, the court sentenced him as indicated above. Mr. Brandolese timely filed this appeal.

Legal Analysis

Mr. Brandolese raises six points. Because the sixth is dispositive, we do not address the other five, other than to caution that, when the case is retried, the parties and the court take care to use the Missouri Approved Instructions—Criminal that were in effect when the conduct giving rise to the charges occurred.

During voir dire, a venireperson indicated that she was the sister of a prosecutor. This individual had responded to defense counsel's question about those who may have been a crime victim. She stated that her house was burglarized and indicated on further questioning that she believed the "system" had worked, because the burglar was caught and went to jail. Defense counsel and this venire member then had the following exchange:

MR. COOK: I notice your last name. Are you a relative of Tony Farkas?

JUROR NO. 16: Yes. That's my brother.

MR. COOK: Oh. So your brother is a prosecutor?

JUROR NO. 16: Yeah.

MR. COOK: Okay. Thank you. . . .

The trial court refused to strike her for cause, as requested, on the ground that defense counsel had failed to follow up with questions about her ability to be fair and impartial. When the trial court announced the names of those who would serve on the jury, including the juror Mr. Brandolese sought to strike for cause, and asked if defense counsel had any objection, he said, "No. We have no objections, Judge." Mr. Brandolese failed to raise this issue in his motion for new trial and thus has not preserved it for appellate review.[1] In the sixth and final point relied on, Mr. Brandolese seeks our plain-error review, claiming that section 494.470 statutorily disqualified Venireperson No. 16 from serving on the jury and the court was, accordingly, required to sustain his challenge for cause.[2] Arguing that the error resulted in manifest injustice because he was convicted by a disqualified juror, Mr. Brandolese seeks a new trial.

[1] While Mr. Brandolese failed to fully preserve the juror-disqualification issue for appellate review by failing to renew his objection in his new trial motion, in exercising plain error review we find it significant that the issue was raised to the trial court, by an appropriate objection, before the jury was seated.

[2] Statutory references are to RSMo (2016), unless otherwise indicated.

Plain-error review under Rule 30.20 requires first that we determine if we should exercise our "discretion to entertain a Rule 30.20 review of a claimed plain error." *State v. King*, 453 S.W.3d 363, 375 (Mo. App. W.D. 2015), *abrogated on other grounds by Hoeber v. State*, 488 S.W.3d 648 (Mo. banc 2016).

> First, we determine whether or not the claimed error facially establishes substantial grounds for believing that manifest injustice or miscarriage of justice has resulted. If not, we should not exercise our discretion to conduct plain error review. If, however, we conclude that we have passed this threshold, we may proceed to review the claim under a two-step process pursuant to Rule 30.20. In the first step, we decide whether plain error has, in fact, occurred. All prejudicial error, however, is not plain error, and plain errors are those which are evident, obvious and clear. In the absence of evident, obvious, and clear error, we should not proceed further with our plain error review. If, however, we find plain error, we must continue to the second step to consider whether or not a miscarriage of justice or manifest injustice will occur if the error is left uncorrected. Plain error can serve as the basis for granting a new trial on direct appeal only if the error was outcome determinative.

Id. (citations omitted).

Because the facts are not in dispute and the point involves only a question of statutory interpretation, this Court's review is *de novo*. *In re Brockmire*, 424 S.W.3d 445, 446-47 (Mo. banc 2014) (citing *Crockett v. Polen*, 225 S.W.3d 419, 420 (Mo. banc 2007)).

Section 494.470.1 states, in relevant part, "[N]o person who is kin . . . to the . . . prosecuting or circuit attorney in a criminal case within the fourth degree of consanguinity or affinity shall be sworn as a juror in the same cause." Mr. Phillip T. Sawyer, who was introduced to the venire panel and tried the case for the prosecution, was not Venireperson No. 16's brother. Still, an assistant

prosecuting attorney, Mr. Robert Anthony Farkas, who had signed some of the early pleadings, including the complaint, and had appeared for the State during a few preliminary hearings, was Venireperson No. 16's brother. Nothing in the record indicates that he was present in the courtroom during trial, and his name was not mentioned during voir dire as anyone involved in the case. The issue here appears to be one of first impression. Neither party has cited case law precisely on point, nor has our research found any.[3] This degree of kinship has been referred to as *per se* disqualifying as to a venireperson's potential bias, Michael L. Matula and G. Nicole Hininger, *The Law of Jury Selection in Missouri State Courts*, 66 J.Mo.B. 136, 139 (2010). The courts, however, have not addressed whether a familial relationship to an assistant prosecuting attorney who does not appear at trial is disqualifying under section 494.470.

Some guidance is provided by the statute, which states that the disqualifying kinship is with the prosecuting attorney "in the same cause." § 494.470.1. This narrows the disqualification such that it would not appear to apply, for example, to a potential juror related within the fourth degree of

[3] The most analogous case is *State v. Jones*, 64 Mo. 391 (1877). There, because the court had reversed and remanded on another point, its statement about a juror's relationship to the prosecutor was dicta. *Id.* at 397 ("[T]he fact that La Forge was the father-in-law of the prosecuting attorney did not render him incompetent as a juror."). The relevant statute at that time stated,

> Where any indictment alleges an offense against the person or property of another, neither the injured party, nor any person of kin to him, shall be a competent juror on the trial of such indictment, nor shall any person of kin to the prosecutor or defendant, in any case, serve as a juror on the trial thereof.

MoGSA 849 §10 (1866).

consanguinity to a prosecutor in another state or even another county, unless that person were involved "in the same cause." Here, the assistant prosecuting attorney was a prosecutor in the same cause to the extent that he had signed the complaint and appeared at several pre-trial hearings. This Court has determined in a civil suit that, even on plain-error review, a trial court's refusal to strike for cause a venireperson who was not qualified to be seated as a juror under the consanguinity statute then in effect was reversible error. *Gordon v. Oidtman*, 692 S.W.2d 349, 356 (Mo. App. W.D. 1985). This was so, because the import of the statute was "so basic to the elements of a fair trial that the question is reviewable for plain error. . . ." *Id.* If we found in a civil case that the refusal to strike for cause a disqualified juror, who did not ultimately sit on the jury panel, was reversible error, then we are constrained to so rule in a criminal matter where a fundamental liberty interest is at stake and the disqualified juror did sit in judgment of the defendant. A clear violation of section 494.470.1 deprived Mr. Brandolese of his statutory right to have a fair and impartial jury decide his case, thus constituting manifest injustice. *See also State v. Amick*, 462 S.W.3d 413, 416 (Mo. banc 2015) (reversing judgment where trial court violated statute relating to juror substitution). This point is granted.

Conclusion

Because the trial court erred in refusing to strike for cause a venireperson related to a prosecutor who participated in the case, we reverse the conviction and remand for a new trial.

/s/ Thomas H. Newton
Thomas H. Newton, Judge

Alok Ahuja, P.J., and Mark D. Pfeiffer, J. concur.