COURT OF APPEALS
DECISION
DATED AND RELEASED

JULY 25, 1995

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. *See* § 808.10 and RULE 809.62(1), STATS.

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

No. 94-2554

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

DWIGHT TREANKLER, JR.,

Plaintiff-Appellant,

v.

CITY OF COLBY, GENERAL CASUALTY COMPANY, WAUSAU INSURANCE COMPANY and XYZ INSURANCE COMPANIES,

Defendants-Respondents,

PERRY-CARRINGTON ENGINEERING CORP. and ZURICH-AMERICAN INSURANCE COMPANY,

Defendants-Third Party Plaintiffs-Respondents,

v.

R & G EXCAVATORS, INC.,

Third Party Defendant-Respondent.

APPEAL from a judgment of the circuit court for Marathon County: VINCENT K. HOWARD, Judge. *Affirmed*.

Before Cane, P.J., LaRocque and Myse, JJ.

PER CURIAM. Dwight Treankler appeals a judgment that dismissed his negligence lawsuit against the City of Colby, Perry-Carrington Engineering Corp., and their liability insurers. Treankler suffered injuries when a trench collapsed around him at the City's sewer construction project that Perry-Carrington had designed. The jury found the City and Perry-Carrington not negligent, Treankler fifteen percent causally negligent, and his employer, R & G Excavators, eighty-five percent causally negligent. Although R & G Excavators enjoys worker's compensation immunity for employee tort claims, the City impleaded R & G Excavators by virtue of an indemnification agreement. Treankler raises several arguments: (1) the defendants improperly examined each other's witnesses with leading questions; (2) R & G Excavators' counsel made improper remarks during closing argument; (3) the trial court's demeanor, remarks, facial expressions, and tone of voice were improper; (4) the trial court wrongly excluded some of Treankler's evidence; and (5) the trial court improperly divulged its view of the evidence to the jury. We reject Treankler's arguments and therefore affirm the judgment.

Treankler first argues that the trial court improperly permitted defendants to examine each other's witnesses at trial with leading questions. Section 906.11(3), STATS., permits litigants to examine adverse witnesses with leading questions. Like other evidentiary questions, the trial court enjoyed considerable discretion on this issue. *See, e.g.*, ***State v. Pharr***, 115 Wis.2d 334, 342, 340 N.W.2d 498, 501 (1983). Here, the City and Perry-Carrington were directly adverse in one sense—each was attempting to place the responsibility for Treankler's injuries on the other, in an attempt to reduce its own and increase the other's share of the comparative negligence. Although the City and Perry-Carrington both had reason to prove that most of the negligence lay with Treankler and R & G Excavators, each had equal reason to prove that any residual negligence lay with the other. Both strategies transferred responsibility to someone else. As a result, the trial court properly exercised its evidentiary discretion in permitting the leading questions. Moreover, Treankler has not established that any error, if error had occurred, would have been anything

more than harmless. *See* ***Nischke v. Farmers & Merchants Bank & Trust***, 187 Wis.2d 96, 108, 522 N.W.2d 542, 547 (Ct. App. 1994). Treankler has not shown how the leading questions could have adversely contributed to the jury's verdict on comparative negligence.

Treankler next argues that R & G Excavators' counsel made an improper summation and that the trial court's improper demeanor, remarks, facial expressions, and tone of voice effectively influenced the jury's decision. Treankler did not have the court reporter transcribe the closing arguments. In the absence of transcription, we must assume that the nontranscribed proceedings support the judgment. *See* ***Nimmer v. Purtell***, 69 Wis.2d 21, 40, 230 N.W.2d 250, 268 (1975); ***Schimke v. Milwaukee & Suburban Trans. Corp.***, 34 Wis.2d 317, 320-21, 149 N.W.2d 659, 660-61 (1967). Likewise, the transcript contains no record of, or objection to, the trial court's allegedly improper demeanor, remarks, facial expressions, and tone of voice. Litigants who seek to challenge such occurrences have a duty to make a proper record, by laying out a proper description of such matters during the trial court proceedings. ***Bruenig v. American Family Ins. Co.***, 45 Wis.2d 536, 548, 173 N.W.2d 619, 626-27 (1970). With this record, we can only speculate about whether the trial court's allegedly improper demeanor, remarks, facial expressions, or tone of voice either occurred or could have had any prejudicial effect on the jury. ***Id***. As a result, we will not review Treankler's claims on these matters or order a new trial for these claims.

Treankler next argues that the trial court improperly prevented him from introducing evidence of the Perry-Carrington's safety responsibilities as the project's engineering firm. He states that the construction contract gave Perry-Carrington the responsibility of enforcing the contract and that Perry-Carrington could stop the project on the basis of unsafe conditions. According to Treankler, the trial court's ruling effectively permitted the jury to hear misleading evidence that minimized Perry-Carrington's safety responsibilities. Treankler does not identify the point in the trial when he attempted to introduce this evidence or claim that he made an offer of proof. Litigants who make no offers of proof have no basis to complain on appeal about the evidence's exclusion. *See* ***Wengerd v. Rinehart***, 114 Wis.2d 575, 580, 338 N.W.2d 861, 865 (Ct. App. 1983). In the absence of a proper offer of proof, we cannot determine whether the excluded evidence would have been admissible or whether it would have had any prospect of altering the trial's outcome. Rather,

we must assume that the trial court correctly excluded the evidence. In sum, Treankler has waived the matter, and we will not consider this issue further.

Finally, Treankler argues that the trial court improperly divulged its personal view of the case's merits to the jury. Before the trial court's comments, Treankler had been attempting to prove what he considered inconsistencies between a witness's trial and deposition testimony. The trial judge sustained an objection on the ground that some of the statements were consistent, telling Treankler, "You're trying to split hairs," and later, "You're splitting hairs." Treankler also claims that the trial court wrongly staked out a position on a factual issue—that the mayor was standing near the trench—when the court limited Treankler's examination of his expert witness. Treankler further claims that the trial court improperly took the initiative in placing a red sticker on an exhibit to identify a witness's position at the work site. Although Treankler correctly states that trial courts should not impart their views of the case to the jury, *see* ***Swonger v. Celentano***, 17 Wis.2d 303, 305, 116 N.W.2d 117, 119 (1967), none of these incidents, even if inappropriate, evinced an intent by the court to meddle in the jury's prerogative.

To begin with, the "splitting hairs" comments simply illustrated the trial court's basis for terminating Treankler's line of questioning—Treankler had failed to show an apt inconsistency in a witness's statements. If Treankler was pursuing a series of questions that was not establishing a bona fide inconsistency, the trial court had a duty to stop the questioning and explain the basis for its decision. The other incidents had similarly innocent origins. Treankler was examining his expert witness about the forces that caused the trench's collapse, suggesting to the witness that the mayor was near the trench at the time of the collapse. In response to an objection, the trial court disallowed the question, ruling that Treankler had not adequately proven the mayor's location. Regardless of whether this ruling was correct, the trial court's comment was not intended to take a position on the evidence; it merely explained that Treankler had not laid an adequate foundation to ask the question. Similarly, Treankler has not shown that the trial court placed a red sticker on an exhibit. The transcript contains an obvious error, attributing comments made by the person placing the sticker to the trial court, when they are plainly those of the witness, the Perry-Carrington engineer. The person placing the sticker several times identified where he had stood at the accident site, thereby showing that the testifying engineer, not the court, was the speaker.

Further, Treankler has not shown that any of these occurrences, when considered by the jury with the substantive evidence, would have affected the jury's verdict in any way. *See* ***Swonger***, 17 Wis.2d at 305-06, 116 N.W.2d at 119. These incidents were a small part of the trial, which the jury observed along with the evidence of the parties, the arguments of counsel, and the instructions of the court. Considered in context with the remainder of the proceedings, which Treankler has not succeeded in challenging, these episodes would have had a negligible impact on the trial's outcome. A rational jury that reasonably considered the facts would not have had its verdict hinge on any of these incidents. Moreover, if Treankler feared that the trial court's comments would adversely influence the jury's verdict, he could have requested the trial court to give a curative instruction, which would have presumptively eliminated any prejudice. *See* ***Genova v. State***, 91 Wis.2d 595, 622, 283 N.W.2d 483, 495 (Ct. App. 1979). Treankler has not indicated, however, that he sought such an instruction, and the record contains no evidence of either a request or the instruction itself. Under these circumstances, we see no basis for a new trial.

By the Court.—Judgment affirmed.

This opinion will not be published. *See* RULE 809.23(1)(b)5, STATS.