COURT OF APPEALS
DECISION
DATED AND FILED

September 30, 1999

Marilyn L. Graves
Clerk, Court of Appeals
of Wisconsin

No. 99-0475

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

CITY OF MADISON,

PLAINTIFF-RESPONDENT,

V.

ROBERT R. SCHULTZ,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Dane County: ROBERT A. DECHAMBEAU, Judge. *Affirmed.*

VERGERONT, J.[1] Robert Schultz appeals his judgment of conviction for violating two city ordinances resulting from his failure to repair his front porch. He argues we should vacate the jury's verdicts and grant a new trial because the trial court erred in not allowing him to present evidence of past

[1] This appeal is decided by one judge pursuant to § 752.31(2)(b), STATS.

lawsuits he filed against the City and evidence of possible code violations at other properties in the neighborhood—evidence that Schultz contends is relevant to a claim of selective prosecution. Alternatively, Schultz argues the fine should be reduced because it is excessive and in violation of the Eighth Amendment. We conclude the trial court did not erroneously exercise its discretion in ruling that the proposed evidence was not relevant to any fact of consequence in the trial, and we conclude the fine was not unconstitutionally excessive.

BACKGROUND

On September 18, 1997, a code enforcement officer for the City of Madison revisited Schultz's property, which had previously been the subject of code violations for which Schultz had been fined. That case had been closed without compliance. The code enforcement officer, Rebecca Parish, reissued orders to Schultz to repair the siding above his front porch and the roof above that porch by November 23, 1997.[2] When she reinspected the property on November 24, she reported that the repairs had not been made.

A criminal complaint was filed in municipal court charging Schultz with two violations of the Madison General Ordinances. In the first count, the complaint alleged that Schultz violated § 27.05(2)(i), MADISON GENERAL ORDINANCES (1997),[3] by failing to replace the rotten decking in the front porch roof and failing to reshingle the roof. The second count alleged that Schultz

[2] The original due date was allegedly earlier, but it is not relevant to this appeal.

[3] Section 27.05(2)(i), MADISON GENERAL ORDINANCES (1997), provides, in pertinent part, "every porch … shall be kept in proper condition and repair and shall present an attractive appearance."

violated § 27.05(2)(g)2, MADISON GENERAL ORDINANCES (1997),[4] by failing to install the missing piece of siding above the front porch roof. After a trial in municipal court, Schultz was found guilty of both counts. He appealed to the circuit court for a trial de novo. After a jury trial in circuit court in which Schultz proceeded pro se, the jury found him guilty of both counts. Schultz appeals this judgment.

DISCUSSION

Schultz argues the trial court erred in not allowing him to present certain evidence, which, he contends, would have supported a defense that the charges were a result of selective prosecution. The first alleged error occurred when Schultz asked Parish, "Are you aware I sued the building inspector unit under Mr. Tom Hank on it [sic] in two different occasions?" The City objected to the question and the court sustained the objection on the grounds of relevance. At a sidebar conference, the following discussion took place between Schultz and the trial court:

> THE COURT: Who you sued is not relevant.
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> MR. SCHULTZ: It is if I can show animosity towards me.
>
> THE COURT: No, it isn't. It is just not -- plain not relevant.
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> MR. SCHULTZ: Okay, your Honor.
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> THE COURT: The jury -- the City has the burden of proving the violation. If there is a violation, that's their burden of proof, not their -- their basis for doing it. The ordinance violation [sic] here is whether there has been a violation of the ordinance, period.

[4] Section 27.05(2)(g)2, MADISON GENERAL ORDINANCES (1997), provides, in pertinent part, "Every … exterior wall … shall be reasonably weathertight, watertight and rodent proof and shall be kept in proper repair…."

MR. SCHULTZ: All right, your Honor.

The other alleged error occurred when the trial court did not allow Schultz to present to the jury pictures he had taken of other houses in his neighborhood that allegedly revealed code violations, which, Schultz alleges on appeal, were not prosecuted by the City. Schultz showed the pictures to Parish and she stated that she did not recognize the houses. She also testified that she was not necessarily responsible for inspecting those properties. The trial court ruled that the pictures were not admissible, stating, "Unless they are code violations on this property, which is the question of this lawsuit, they are not relevant."

On appeal, Schultz argues the trial court erred by not allowing what he characterizes as "evidence of City of Madison bias against [him]" and he cites cases regarding selective enforcement and selective prosecution to support his theory of relevance. Selective enforcement and prosecution are violations of the Equal Protection Clause of the Fourteenth Amendment and require a showing of an intentional, systematic and arbitrary discrimination. ***Village of Menomonee Falls v. Michelson***, 104 Wis.2d 137, 145, 311 N.W.2d 658, 662 (Ct. App. 1981). Such a determination is not one for the jury to make, but is a question of constitutional law for the court. ***Id.*** at 154, 311 N.W.2d at 667.

Schultz did not make a motion to the trial court arguing that his equal protection rights had been violated. Because Schultz is pro se, we have considered whether he apprised the trial court of his intent to raise this issue despite his failure to make an appropriate motion, and we conclude he did not. Schulz did not express to the trial court the theory of defense he is apparently proposing on appeal—that the City intentionally discriminated against him in

enforcing the building code violations and therefore violated his Fourteenth Amendment equal protection rights. He only argued that the jury should be allowed to hear evidence that shows "animosity towards me" and evidence that would "show arbitrariness and capriciousness." In the context of a jury trial on the question of whether Schultz violated §§ 27.05(2)(i) and 27.05(g)2, MADISON GENERAL ORDINANCES, these two brief comments are not specific enough to apprise the court that he is claiming his constitutional rights were violated. We therefore conclude Schultz waived this constitutional claim and the only issue before the court in Schultz's jury trial was whether he violated the ordinances.[5]

In light of this conclusion, we now consider whether the trial court erroneously exercised its discretion in ruling that evidence of a prior lawsuit and evidence of possible code violations at other properties in the neighborhood were

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[5] Even if Schultz had made a motion to the court for an evidentiary hearing on selective enforcement and selective prosecution, the evidence Schultz offered at his trial would not, as a matter of law, have met his burden of proof on such a claim. As we stated in ***State v. Barman***, 183 Wis.2d 180,187, 515 N.W.2d 493, 497 (Ct. App. 1994):

> The conscious exercise of some selective enforcement is not a constitutional violation. Rather, it is the selective, persistent and intentionally discriminatory prosecution in the absence of a valid exercise of prosecutorial discretion that violates a defendant's equal protection rights and constitutes a defense to the charge.

The defendant must establish a prima facie case of discriminatory prosecution before the burden shifts to the State to show an exercise of valid prosecutorial discretion. ***Id.*** A prima facie showing requires, at a minimum, the defendant prove he or she has been singled out for prosecution while others similarly situated have not, and that the prosecutor's discriminatory selection was based on an impermissible consideration such as race, religion or the exercise of constitutional rights. ***County of Kenosha v. C&S Management, Inc.***, 223 Wis. 2d 373, 401, 588 N.W.2d 236, 249-50 (1999). Potential defendants are considered "similarly situated" when their circumstances present no distinguishable legitimate factors that might justify making prosecutorial decisions with respect to them. ***Id.*** at 404-05, 588 N.W.2d at 251. Parish testified that it was the "regular practice" of the building inspection unit to reissue orders when cases were closed without compliance. Schultz did not offer any evidence that other cases that were closed without compliance were not prosecuted.

relevant to the issue of whether Schultz violated the ordinances.[6] *See* ***State v. Pharr***, 115 Wis.2d 334, 342, 340 N.W.2d 498 (1983) (reviewing court will not disturb trial court's ruling on admissibility of evidence unless there was an erroneous exercise of discretion). We conclude the trial court's determination that the proffered evidence did not have "any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence" was a valid exercise of the court's discretion.[7] *See* § 904.01, STATS.; *see also* ***State v. Denny***, 120 Wis.2d 614, 623, 357 N.W.2d 12, 16 (Ct. App. 1984).

Schultz also contends the fine the court ordered him to pay was excessive and in violation of the Eighth Amendment. The City cites ***State v. Weller***, 109 Wis.2d 665, 672, 327 N.W.2d 172 (Ct. App. 1982), and urges us not to consider this argument because Schultz did not properly raise it before the trial court. We may, however, decide to consider constitutional questions not raised below, *see* ***State v. Dean***, 105 Wis.2d 390, 402, 314 N.W.2d 151, 158 (Ct. App. 1981), and we choose to do so here. Schultz's argument presents an issue of law on the undisputed facts already of record. *See* ***State v. Hammad***, 212 Wis.2d 343, 347, 569 N.W.2d 68, 70 (Ct. App. 1997).

The possible penalty range for Schultz's ordinance violations were $1 to $200 per day per count. The City recommended $7 and informed the court

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[6] We note the trial court ruled the pictures of alleged ordinance violations in Schultz's neighborhood were not admissible for a second reason—Schultz did not lay a proper foundation in that Parish testified that she did not recognize the houses in the pictures. In light of our decision, we need not consider this alternative reasoning.

[7] Schultz does not argue his proffered evidence was relevant to this issue, only that it was relevant to selective prosecution.

that the building inspector had visited Schultz's home more than twenty times to extend deadlines and encourage compliance without a fine. The trial court assessed a forfeiture of $4 per day on each count plus costs, which totaled $819. Schultz argues that this $819 amount violates the Excessive Fines Clause of the Eighth Amendment.

Because the fine was assessed as a penalty, we agree with Schultz that the protections of the Eighth Amendment do apply. However, the amount of the penalty is modest in view of the potential penalty and Schultz's failure to comply. We therefore conclude that this fine is not "so disproportionate to the offense committed, as to shock public sentiment and violate the judgment of reasonable people concerning what is right and proper under the circumstances." ***Hammad***, 212 Wis.2d at 356, 569 N.W.2d at 73 (quoting ***State v. Seraphine***, 266 Wis. 118, 122, 62 N.W.2d 403, 405 (1954)).

By the Court.—Judgment affirmed.

This opinion will not be published in the official reports. *See* § 809.23(1)(b)4, STATS.