COURT OF APPEALS
DECISION
DATED AND FILED

July 1, 2014

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2013AP2632 **Cir. Ct. No. 2013FO174**

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

COUNTY OF FOREST,

PLAINTIFF-RESPONDENT,

V.

DWAYNE PASTERNAK,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Forest County: LEON D. STENZ, Judge. *Reversed and cause remanded with directions.*

¶1 MANGERSON, J.[1] Dwayne Pasternak appeals a forfeiture judgment for violating Forest County's nuisance ordinance. Pasternak argues the evidence was insufficient to establish that his uncut lawn constituted a public

[1] This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2). All references to the Wisconsin Statutes are to the 2011-12 version unless otherwise noted.

nuisance. He also argues the circuit court erred by failing to allow him to present a defense. We conclude the evidence supporting Pasternak's conviction was insufficient. We therefore reverse and remand with directions to vacate the judgment and dismiss the citation.

BACKGROUND

¶2 Pasternak failed to cut a portion of his lawn. The area Pasternak failed to cut abutted property owned by his neighbor, Robert Lawrence. Lawrence filed a nuisance complaint with Pamela LaBine, the Forest County zoning, solid waste, and recycling administrator. On June 21, 2013, LaBine sent an enforcement letter to Pasternak, providing Pasternak had "ten days in which to mow this lawn and to maintain it in the future."

¶3 On July 15, 2013, LaBine issued Pasternak a nuisance citation, in violation of Forest County Ordinance No. 0-84-02. *See* FOREST CNTY., WIS., ORDINANCES No. 0-84-02 (1984). Pasternak filed a motion to dismiss, arguing the nuisance ordinance did not regulate grass height. In his brief in support of his motion, Pasternak also argued the uncut portion of his lawn did not constitute a public nuisance because it was not injurious to the public's health, was not "offensive" to the senses, and did not interfere with his neighbor's property.

¶4 At the court trial, LaBine testified the uncut portion of Pasternak's lawn was over the sanitary system and this "could be" a public health concern because it may interfere with the system's evaporation. She also testified that a noxious weed was growing on the uncut portion of the lawn. The weed had a potential to spread, but LaBine conceded it had not yet spread. LaBine testified the existence of the weed violated the "noxious weed" ordinance; however, after a

recess, the County was unable to present the ordinance declaring that particular weed to be noxious.

¶5 LaBine also testified Pasternak's uncut lawn was a public nuisance because it violated the part of the nuisance ordinance regarding "[f]ailure to maintain the exterior or interior [of] any structure used for human habitation … so as to avoid health hazards." She explained the uncut lawn violated that particular subsection because Pasternak's property was between two public buildings.

¶6 Finally, LaBine testified that Pasternak's uncut lawn violated the general definition of a public nuisance. She stated the uncut portion of the lawn promoted pollen and hay weed; promoted the concealment of filth, dirt or other garbage; probably would increase the breeding of mosquitoes and other insects; and encouraged vermin and other small animals. LaBine testified Pasternak's neighbor was affected because he complained about the uncut lawn, and the three Town of Armstrong Creek board members did not like the uncut portion of the lawn.

¶7 At the close of evidence, the County argued Pasternak had violated three sections of its nuisance ordinance—section I, and subsections 2. and 6. of section III. The nuisance ordinance provides, in relevant part:

> SECTION I. PUBLIC NUISANCE—DEFINED
>
> A public nuisance is any condition which is injurious to health, offensive to the senses, or interferes with public or private use of property.
>
> ….
>
> SECTION III. PUBLIC NUISANCES AFFECTING HEALTH
>
> The following are hereby declared to be public nuisances affecting health.
>
> ….

> 2. Failure to maintain the exterior or interior or any structure used for human habitation or storage purposes so as to avoid health hazards.
>
> ….
>
> 6. Failure to comply with any law or rule regarding sanitation and health[.]

FOREST CNTY., WIS., ORDINANCES No. 0-84-02 (1984).

¶8 Pasternak argued the uncut portion of his lawn did not violate section I because it was not injurious to the public's health, it was not "offensive" to the senses, and it did not interfere with his neighbor's property. He then argued his uncut lawn did not violate section III subsection 2. because that subsection referred to maintaining a structure and the lawn is not a structure. Finally, he argued the County had failed to identify any sanitary or noxious weed law or rule that his uncut lawn violated and therefore the County did not prove he violated section III subsection 6.

¶9 The court found

> that the high grass does promote pollen, hay[ ]fever and other conditions injurious to health. It is adjacent to a church, so those who attend mass on Sunday or Saturday could very well be subjected to the pollen, weeds, and high grass that the high grass occasioned. And there's an outdoor deck on the bar [adjacent to Pasternak's property] and patrons of the bar who are sitting there would, likewise, be subjected to the potential effect of the pollen and may increase the risk for asthma with those with asthma.
>
> So, clearly, I think it is injurious to health and clearly is offensive to the senses. I mean, it is even more so when you look at how nice Mr. Pasternak's lawn is. He leaves this part growing long, in my opinion, simply to bug Mr. Lawrence. … So, certainly [it] is offensive to the senses, to the senses of sight, perhaps the sense of smell.
>
> There is clearly testimony that the Town thought it was offensive to the sight and potentially impacted their ability to receive grants.

> Certainly [it] does not look nice under the exhibits, and so I think it is offensive to the sight at least. I think it interferes with the public or private use of property, clearly the private use of [the] residence attached to the bar is [a]ffected as is the bar and the deck. As [are] those patrons that go to church in the adjacent Catholic Church and interferes with it, that it creates problems for them to have asthma or hay[ ]fever, as suggested.
>
> Also appears testimony supports the suggestion that it breeds mosquitoes. I think it is understood that the high grass like that would promote additional breeding grounds for mosquitoes, for keeping pockets of water concealed and moist so mosquitoes could hide during the hot summer days and breed more effectively in the tall grass.
>
> …. It is an area where muskrats and other vermin may be able to hide. And that's not a good situation adjacent right immediately adjacent to the bar and to the church.
>
> It also appears that a portion of the septic system at least the set back provisions even are underneath this high grass. The zoning administrator has indicated that shorter grass is required to aid in the evaporation from [the] field and may not be—it's unclear to the Court actually whether any part of the system is under the high grass.

The court concluded Pasternak's uncut lawn constituted a public nuisance. Pasternak appeals.

DISCUSSION

¶10 On appeal, Pasternak first argues the evidence does not support the circuit court's determination that his uncut lawn constitutes a public nuisance. He renews his argument that his uncut lawn does not violate section III, subsection 6. of the ordinance because the County never introduced or identified what law or rule, relating to the alleged noxious weed or the sanitary system, his uncut lawn violated. He also argues his uncut lawn does not violate section III, subsection 2. of the ordinance because his uncut lawn is not the exterior or interior of a

structure. Finally, he asserts his uncut lawn did not violate section I of the ordinance because the evidence was insufficient.

¶11 The County responds that Pasternak's conviction was not based on a violation of section III subsections 2. or 6. It contends Pasternak's conviction was based on his violation of section I.

¶12 Based on the County's assertion, we will limit our analysis to whether the County established, by clear and convincing evidence, that Pasternak's uncut lawn constitutes a public nuisance under section I of the nuisance ordinance.[2] *See* ***City of Milwaukee v. Milbrew***, 240 Wis. 527, 531, 3 N.W.2d 386 (1942) (When determining whether a nuisance exists, a conviction should not be sustained without a showing by clear and convincing evidence that a particular use is detrimental or prejudicial to public health or welfare.). Further, when reviewing the sufficiency of the evidence to support a conviction, we will affirm if any credible evidence under any reasonable view supports the verdict. *See* ***Bleyer v. Gross***, 19 Wis. 2d 305, 307, 120 N.W.2d 156 (1963).

¶13 The County first argues that "[m]unicipal corporations, in the valid exercise of their police power, have wide discretion in declaring certain conditions to constitute a public nuisance." Although we agree with the County's general principle, as explained by our supreme court in ***Milbrew***, 240 Wis. at 533, the

[2] As an aside, we question whether Pasternak's forfeiture conviction may be based on a violation of section I. After all, section I is simply the definition of a public nuisance without any prohibition attached. Section II of the ordinance prohibits public nuisances, and section II subsection 1. specifically prohibits an individual from maintaining a public nuisance (as defined in section I), "which unreasonably injures or endangers the safety or health of the public." FOREST CNTY., WIS., ORDINANCES No. 0-84-02 (1984). However, because this issue is not raised by the parties, we will not address it further.

mere fact that a municipality declares something to be a nuisance does not make it so—otherwise, every house, business, and property would be at the uncontrolled will of the temporary local authorities. "A municipality's interest is aroused only when the injury is substantial, the facts are weighty and important, and the public is affected." ***Id.*** at 531. Further, when a municipality declares something to be a nuisance, "all of a kind must be treated with the same degree of fairness." ***Id.*** at 535.

¶14 Here, the County needed to prove Pasternak's uncut lawn was a "condition which is injurious to health, offensive to the senses, or interferes with public or private use of property." *See* FOREST CNTY., WIS., ORDINANCES No. 0-84-02 (1984). In the circuit court, the County argued, and the court concluded, Pasternak's uncut lawn constituted a public nuisance because it promoted mosquitos, pollen, weeds, and small animals. However, if we agreed Pasternak's uncut lawn constituted a public nuisance on that basis, that determination has no standard of enforcement and has the potential of applying to all lawns in Forest County.

¶15 In ***Milbrew***, the ordinance at issue declared offensive odors to be dangerous to public health and therefore a nuisance. ***Id.*** at 531. When considering whether a certain odor violated that ordinance, our supreme court explained, "that someone is annoyed by what to him is a disagreeable smell or noise is not in and of itself such evidence of a nuisance as to warrant a prosecution." ***Id.*** Here, based on ***Milbrew***, the mere fact that mosquitos, pollen, weeds, and small animals may be present in Pasternak's uncut lawn does not mean his lawn rises to a "condition which is injurious to health, offensive to the senses, or interferes with public or private use of property." *See* FOREST CNTY., WIS., ORDINANCES No. 0-84-02 (1984). This is especially true when, as explained

above, mosquitoes, pollen, weeds, and small animals are present in almost every yard.

¶16 The County, in support of its assertion that Pasternak's uncut lawn constitutes a public nuisance, cites cases in which various municipalities have enacted ordinances that regulate, in part, the maximum height of a property's vegetation. The County argues these cases show a municipality's regulation of vegetation height is a proper exercise of its police power. The problem with the County's argument is that, in this case, Pasternak was not cited for violating an ordinance that specifically regulated the maximum height of vegetation. Rather, his uncut lawn of an unspecified height was alleged to be a "condition which is injurious to health, offensive to the senses, or interferes with public or private use of property." *See* ***id.***

¶17 The County also argues the circuit court's determination that the uncut portion of Pasternak's lawn was visually "offensive" was a "subjective determination that was within the court's discretion to make" and therefore the lawn is a public nuisance. However, in ***Milbrew***, when construing the municipal ordinance, our supreme court noted that "offensive" means "giving pain or unpleasant sensation," "revolting" or "obnoxious." ***Milbrew***, 240 Wis. at 538. It stated, "[T]o construe this ordinance as attempting to condemn as 'offensive' any odor that is merely disagreeable to, or disliked by, an indefinite number of persons in a given neighborhood would render the legislation void as too vague and indefinite for enforcement[.]" ***Id.***

¶18 Here, the circuit court concluded Pasternak's uncut lawn was visually "offensive" because it "does not look nice[.]" Nothing in the record supports a determination that the uncut lawn was "giving pain or unpleasant

sensation," "revolting" or "obnoxious." At most, the record establishes that Pasternak's uncut portion of lawn was disagreeable and disliked by the three members of the town board, the circuit court, and Pasternak's neighbor. However, as explained in ***Milbrew***, that something is disliked or disagreeable does not rise to the level of a public nuisance. *See* ***id.*** Accordingly, we conclude the evidence is insufficient to establish Pasternak's uncut lawn is a public nuisance under section I of the nuisance ordinance. We therefore reverse the forfeiture judgment and remand with directions to dismiss the citation.

¶19 Finally, because we conclude the evidence was insufficient, we need not address the parties' arguments regarding what "type" of public nuisance occurred in this case and whether actual harm was required. *See* ***State v. Blalock***, 150 Wis. 2d 688, 703, 442 N.W.2d 514 (Ct. App. 1989) (cases should be decided on the narrowest possible ground). We also need not address Pasternak's argument that the circuit court erred by failing to allow Pasternak an opportunity to present a defense to the citation. *See* ***id.***

By the Court.—Judgment reversed and cause remanded with directions.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)4.