COURT OF APPEALS
DECISION
DATED AND FILED

May 4, 1999

Marilyn L. Graves
Clerk, Court of Appeals
of Wisconsin

No. 98-2623

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

CITY OF GREEN BAY,

PLAINTIFF-RESPONDENT,

v.

DONALD J. SCHLEIS,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Brown County: RICHARD J. DIETZ, Judge. *Affirmed.*

HOOVER, J. Donald Schleis appeals a judgment of conviction for maintaining a public nuisance in connection with a semi-trailer parked on his property and the surrounding area. He contends that the judgment should be reversed because: (1) the evidence was insufficient as a matter of law; (2) the ordinance's public nuisance definition is constitutionally vague; (3) the prosecutor misstated the applicable legal standard to the jury and the court failed to issue a

correcting instruction; and (4) the trial court erred by excluding evidence of other trailers in similarly zoned areas.

This court rejects Schleis's contentions. The evidence was sufficient to convict Schleis of violating this constitutionally valid ordinance. Schleis waived his argument regarding the prosecutor's claimed legal standard misstatement by failing to object or request a correcting instruction. The trial court appropriately excluded his "other trailers evidence." Accordingly, the judgment is affirmed.

Schleis owned a warehouse in Green Bay zoned Industrial A. In 1976, he parked a semi-trailer on the property and had not moved it since. The trailer, which he used for storage, was located on the property's west side, between his building and railroad tracks. The trailer was visible from the road and partially surrounded by vegetation. Its tires were deflated and the wheels had sunk into the ground. The area underneath the trailer was littered with construction debris, including cement blocks, bricks and partially decomposed wood.

The neighborhood consisted of several food manufacturing businesses, including a dairy plant that manufactured butter, butter blends and cream cheese, a meat packing plant and a pizza crust producer. All were subject to governmental health and safety regulations and inspections. There was also a paper packaging manufacturing firm with offices immediately next to Schleis.

In 1997, the City received a complaint about the trailer. Timothy Meves, a zoning inspector, investigated. After his investigation, Meves issued an

order for Schleis to remove the trailer and clean up the surrounding area. Schleis failed to do so, and the City cited him for maintaining a public nuisance.

After being convicted in municipal court, Schleis appealed to the circuit court, where he had a jury trial. Meves testified at the trial and authenticated photographs he had taken of the trailer and surrounding area. Several neighbors[1] testified to the condition of Schleis' property and its effect on the use and enjoyment of their properties. Schleis testified on his own behalf. The court rejected his attempt to introduce photos of semi-trailers located on property within a two-mile radius. The jury found Schleis guilty of maintaining a public nuisance.

ANALYSIS

1. Sufficiency of the Evidence

On review of the sufficiency of the evidence to support a jury verdict, this court will affirm if any credible evidence under any reasonable view fairly admits an inference that supports the jury's verdict. *See* ***Bleyer v. Gross***, 19 Wis.2d 305, 307, 120 N.W.2d 156, 158 (1963). On review, we must accept the credible evidence most favorable to sustain the verdict. ***Id***.

Schleis was convicted of violating GREEN BAY, WIS. CODE § 28.01, which provides that "[n]o person shall erect, contrive, cause, continue, maintain, or permit to exist any public nuisance within the City." Section 28.02(1) defines a public nuisance as

[1] "Neighbors" refers to either the neighboring businesses or their representatives.

> a public nuisance is a thing, act, occupation, condition, or use of property which continues for such length of time as to:
>
> (a) Substantially annoy, injure, or endanger the comfort, health, repose, or safety of the public;
>
> (b) In any way render the public insecure in life or in use of property; [or]
>
> (c) Greatly offend the public morals or decency ….

Schleis contends that there was no evidence concerning subsecs. (b) or (c) and that the evidence regarding subsec. (a) was insufficient. The City asserts there was sufficient evidence to convict under all three subsections.

This court need not address all three subsections, but will uphold the verdict if the evidence supports a conviction under any one subsection. Meves's photographs, together with the neighbors' testimony, provided sufficient credible evidence to support the jury's verdict. The photos depict brush growing wild and debris strewn under the trailer, some of it rotting. Three neighbors testified that they considered the trailer offensive and that it was aesthetically unpleasant and potentially harbored rats. The dairy plant's representative testified that they are required to maintain rodent traps and are frequently inspected for pests. He considered the trailer and its surroundings a breeding ground for rodents and believed he would be able to decrease the number of rodent traps maintained and frequency of pest control inspections if the trailer were removed. The pizza crust manufacturer's representative expressed similar concerns and noted that anytime they have eliminated exterior problems, it seemed to help with rodent control. Two neighbors had asked Schleis or his family members to do something about the trailer for years. One also testified that the trailer appeared abandoned and that it was plowed in during the winter.

From this evidence, the jury could find from this evidence that the conditions substantially endangered the public's health by reasonably inferring they provide an environment conducive to attracting harmful pests. This court rejects Schleis's contention that such an inference indulges pure speculation. The jury can apply its common knowledge and individual observations and experience to the evidence for the purpose of drawing inferences. *See* ***Coenen v. Van Handel***, 269 Wis. 6, 10, 68 N.W.2d 435, 437 (1955).

2. Constitutional Vagueness of Nuisance Definition

On appeal, Schleis contends for the first time that the ordinance is unconstitutionally vague. He focuses only on that portion of § 28.02(1)(a), STATS., that prohibits conditions that "[s]ubstantially annoy" because he claims that is the only violation the jury could have found.

Laws and ordinances that impose only civil penalties and that do not affect First Amendment rights survive constitutional scrutiny unless they are impermissibly vague in all applications. ***Village of Hoffman Estates v. Flipside, Hoffman Estates***, 455 U.S. 489, 498-99 (1982); ***State ex rel. Smith v. City of Oak Creek***, 139 Wis.2d 788, 802-03, 407 N.W.2d 901, 907 (1987). Schleis therefore has a heavy burden. This court will indulge every presumption to sustain an ordinance's constitutionality if at all possible. *See* ***Northwest Properties v. Outagamie Cty.***, 223 Wis.2d 483, 487, 589 N.W.2d 683, 685 (Ct. App. 1998). When doubt exists as to the constitutionality, it must be resolved by finding the legislative enactment constitutional. ***Id***. The burden is on Schleis to prove unconstitutionality beyond a reasonable doubt. *See* ***id***.

Schleis's constitutional challenge does not address the ordinance's health or safety components. He dismisses this portion of § 28.02(1)(a) as

speculative under the evidence, not as impermissibly vague. Yet, as indicated previously, the jury could have found the condition to be a public nuisance under these provisions. By adopting this strategy, he has thus waived the right to challenge this component of the ordinance. Under ***Village of Hoffman Estates***, if the ordinance has an application that survives a vagueness challenge, the ordinance survives. ***Id***. at 498-99. For this reason Schleis's challenge fails.

Schleis also maintains that because Industrial A zoning permitted junk yards, the conditions in question could not possibly constitute a nuisance. The City maintains that Industrial A zoning does not permit such use without complying with additional conditions. Schleis has not countered that contention or indicated that he could comply. This court rejects Schleis's argument because it is inadequately briefed and because the facts are inadequately developed to make a reasoned determination. *See* ***Shannon v. Shannon***, 150 Wis.2d 434, 446, 442 N.W.2d 25, 31 (1989).

3. Misstatement of Applicable Legal Standard

Next, Schleis contends that the City presented evidence misrepresenting the applicable law. He also claims the City argued to the jury that it did not matter where this trailer was located because it would constitute a nuisance anywhere in the City.[2] Schleis acknowledges that he cannot raise this

[2] He asserts this arose from questions the City directed to Schleis and Meves regarding the ordinance's application to residential as well as industrial zoned property. Schleis claims the City was implying the trailer would constitute a nuisance regardless where in the City it was located. Schleis also claims that the City may have argued this during closing arguments. Those arguments were not recorded and therefore are not part of the record for us to review.

(continued)

issue as a matter of right because he did not object to the argument or introduction of evidence supporting this argument at trial and did not request a curative jury instruction. Schleis is correct that he has waived this issue. *See* § 805.13(3), STATS.; ***State v. Glenn***, 199 Wis.2d 575, 589, 545 N.W.2d 230, 236 (1996); *see also* § 901.03(1)(a), STATS.; ***Caccitolo v. State***, 69 Wis.2d 102, 113, 230 N.W.2d 139, 145 (1975). Rather, he asks this court to exercise its power of discretionary reversal under § 752.35, STATS., because the real controversy was not tried.

Upon this court's view of the record, it appears the City's case rested primarily on the neighbors' testimony and took into account the nature of Schleis's neighborhood. This is consistent with, not contrary to, our supreme court's pronouncement that location is a significant factor in determining a nuisance. *See* ***State v. Quality Egg Farm,*** 104 Wis.2d 506, 516, 311 N.W.2d 650, 655 (1981). This court is satisfied that the real controversy was tried.

4. Other Trailer Evidence

Finally, Schleis contends that the trial court erred by excluding his photos of other trailers located on property in the City. The admission of evidence is a matter within the trial court's discretion. *See* ***State v. Peters***, 166 Wis.2d 168, 175, 479 N.W.2d 198, 200 (Ct. App. 1991). The trial court appropriately exercises

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Schleis requests that we remand to permit him to reconstruct the record. This court declines to do so. His motion speculates that the perceived improper arguments were made; he does not contend they were in fact advanced. In addition, this case is significantly different from cases in which an appellate court has remanded for record reconstruction. In those cases, portions of witnesses' testimony were missing because parts of the transcript were lost or damaged. *See* ***State v. Perry***, 136 Wis.2d 92, 401 N.W.2d 748 (1987); ***State v. DeLeon***, 127 Wis.2d 74, 377 N.W.2d 635 (Ct. App. 1985). It is difficult to understand how counsels' arguments would be reconstructed. Absent the parties' stipulation to a record, the trial court would either have to attempt to elicit testimony of what was said in argument, or let the parties reargue, at which time the City could merely avoid any reference to the offensive argument. This is radically different from having a witness retestify as to the same facts observed.

its discretion if it employed proper legal standards and a demonstrated process of reasoning pertinent to the issue at hand based upon facts of record. *See* ***State v. Thomas***, 150 Wis.2d 374, 387, 442 N.W.2d 10, 16-17 (1989). It is this court's duty to support the exercise of discretion whenever facts of record support that decision. ***Id***. at 388, 422 N.W.2d at 17.

The trial court rejected the proffered other trailers evidence on two grounds: Schleis could not raise the defense of selective enforcement, and the witness offered was not competent to testify that the photos tended to show what is thought to be a public nuisance. *See* ***Village of Menomonee Falls v. Michelson***, 104 Wis.2d 137, 154, 311 N.W.2d 658, 667 (Ct. App. 1981) (a claim of selective enforcement is inappropriate for trial to a jury).

Schleis claims on appeal that he wanted the jury to hear the evidence because "general acceptance of similar conditions in similar areas undermines the city's desired inference" that the condition of his property was a nuisance. He acknowledges that the trial court appropriately rejected the selective enforcement claim as a basis to introduce the evidence.

First, and most significant, the record demonstrates that the photos *were* offered exclusively to prove selective prosecution.[3] Schleis concedes on appeal that it would be inappropriate to try to prove selective enforcement at the jury trial. Thus, the trial court did not err by rejecting the photos on the grounds

[3] The record does not clearly establish that Schleis ever argued at trial that he offered the photos for any reason other than to show selective enforcement. The trial court does not erroneously exercise its discretion when a party fails to present its argument for the court to consider. *See, e.g.,* ***Fowler v. Fowler***, 158 Wis.2d 508, 518, 463 N.W.2d 370, 373 (Ct. App. 1990). Moreover, despite how the offered evidence is recharacterized for appeal, it is nonetheless in essence and in its most accessible sense evidence of "selective prosecution."

proffered. Second, Schleis's proffer simply indicated that these pictures were of trailers on property zoned for industrial/business use. The record does not support Schleis's representation that the photos depict conditions in industrially zoned areas. Indeed, the trial court rejected the photos in part because it concluded that the photographer was not able in fact to lay such a foundation.

Finally, the conditions in the photos are irrelevant to whether Schleis's conditions constitute a public nuisance. Community tolerance of conditions does not mean those conditions are not public nuisances. *See, e.g.*, ***City of Kenosha v. C & S Mgmt.***, 223 Wis.2d 373, 416, 588 N.W.2d 236, 256 (1999).

CONCLUSION

The record provides ample evidence for the jury to infer that Schleis's trailer and its surroundings endangered public health and safety and to conclude that he was guilty of permitting and maintaining a public nuisance. His constitutional vagueness challenge failed to address the ordinance's health or safety components and is therefore waived. He also waived his claim that the City misstated the applicable legal standard. Finally, the trial court's decision to exclude the other trailers evidence employed proper legal standards and a demonstrated process of reasoning pertinent to the issue and based upon facts of record. Accordingly the judgment is affirmed.

By the Court.—Judgment affirmed.

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