[Cite as *Willoughby v. Lewis*, 2010-Ohio-6572.]

IN THE COURT OF APPEALS

ELEVENTH APPELLATE DISTRICT

LAKE COUNTY, OHIO

CITY OF WILLOUGHBY,	:	**O P I N I O N**
Plaintiff-Appellee,	:	**CASE NO. 2009-L-177**
- vs -	:	
BEVERLY LEWIS,	:	
Defendant-Appellant.	:	

Criminal Appeal from the Willoughby Municipal Court, Case No. 08 CRB 04779.

Judgment: Affirmed in part and reversed in part.

Richard J. Perez, Assistant Director of Law for City of Willoughby, City of Willoughby, One Public Square, Willoughby, OH 44094 (For Plaintiff-Appellee).

Richard P. Morrison, 30601 Euclid Avenue, Wickliffe, OH 44092 (For Defendant-Appellant).

CYNTHIA WESTCOTT RICE, J.

{¶1} This appeal stems from a judgment of the Willoughby Municipal Court in Lake County, Ohio, convicting appellant, Beverly Lewis, of violating three Willoughby Codified Ordinances. For the reasons discussed below, we affirm in part and reverse in part.

{¶2} In April of 2008, City of Willoughby code inspectors, Richard Smith and Karen Brooks, visited appellant's home due to complaints they received regarding the condition of appellant's property. Based upon the inspectors' observations, the City

charged appellant with various violations of Willoughby Codified Ordinances ("WCO") including failing to maintain exterior of dwelling and condition of accessory structures, in violation of WCO 1309.08(a); failing to keep the exterior of premises free of nuisances and unsanitary conditions, in violation of WCO 1309.07; failing to maintain yard structures in good repair, in violation of WCO 1131.11(j)(3); failing to require yard structures to be located a minimum of five feet from the side or rear lot lines, in violation of WCO 1131.11(a); and having offensive smells coming from the property, in violation of WCO 521.09.

{¶3} On November 5 and 13, the matter was tried to the bench. In support of its case, the City first called Brian Lutz, appellant's next-door neighbor. Lutz testified, during the several years leading to the trial, he regularly smelled foul odors emanating from appellant's property. He claimed the odors were a result of the abundance of animals appellant kept both inside her house and outside in her yard. During that time, Lutz specifically recalled appellant had kept a significant number of cats, several large dogs, guinea pigs, a snake, and a rooster. He testified the odors were so strong in the summer months that he and his family were unable to enjoy their backyard.

{¶4} Lutz additionally testified that, at or around April of 2008, appellant's yard was overgrown with vegetation with no scheme or design; the front of her house was covered in ivy, and her back yard was littered with animal waste and garbage bags filled with unidentified rubbish. Lutz testified appellant kept a "shed" covered with a tarp abutting a fence on his side yard. He also testified appellant kept several guinea pig cages in her back yard which had been stacked upon one another. Given the

foregoing, Lutz opined that appellant does not maintain her yard and its condition is out of keeping with the standards of other property in the neighborhood.

{¶5} The City next called Willoughby Code Inspector, Karen Brooks. Brooks testified she had visited appellant's property approximately 10 times over the years, including her inspection in April of 2008. She indicated that the property in April of 2008 was "unkempt" with items strewn about the yard including various aluminum and cat food cans (both in and out of bags) and bags of "debris" in an area where she housed three outdoor dogs. Brooks also identified several structures in appellant's back yard, one of which was covered with a tarp and resting against a fence demarcating the lot line. A comparison with the appearance of adjacent properties led Brooks to conclude that appellant's property was not maintained in a manner consistent with residential standards of the immediate neighborhood.

{¶6} Brooks additionally testified she inspected appellant's property on several occasions after the complaint was filed, in December of 2008. During an inspection in June of 2009, Brooks testified to noticing an offensive "animal odor" coming from appellant's property. At a later inspection, in July of 2009, the odors were still manifest and, according to Brooks, the property was in approximately the same condition as it was in April of 2008. Sixteen photos were taken by Brooks during the June and July visits to document the conditions of appellant's property. These photographs were introduced as exhibits at trial.

{¶7} Next, Chief Building and Zoning Inspector Richard Smith testified for the City. His testimony essentially reflected Brooks' testimony. In particular, Smith testified he accompanied Brooks to appellant's property in April of 2008. During this visit, Smith

observed the property in an unkempt and messy condition with "a lot of garbage bags with rubbish in them, cans, [and] a lot of overgrowth ***." He further testified he observed a "tarped" structure in appellant's back yard set against the property line. At a later visit, in August of 2009, Smith testified he detected a very strong odor of "cats" emanating from appellant's property. According to Smith, the scent "made [his] eyes water when [he] went to the door." As a result of his observations during his visits in conjunction with a comparison with other properties in the neighborhood, Smith also opined that appellant's property did not reflect a level of maintenance in keeping with residential standards of the immediate neighborhood.

{¶8} After the City rested, appellant presented several witnesses in her defense and testified on her own behalf. First, the defense called Wayne Thomas, who testified he became acquainted with appellant in November of 2008 when he contacted her about certain health problems two of his four cats were experiencing. Thomas testified appellant kept his two cats and nursed them back to health. During this time, Thomas testified he had visited appellant's home approximately six or seven times. During his visits, Thomas testified appellant was keeping between 10-15 cats inside her home. He also stated appellant's property looked "normal" and "clean" to him when he visited. Although Thomas did not testify to living near appellant, he opined her property was "congruent" with other properties in the immediate neighborhood.

{¶9} Appellant testified next. She admitted she had a chicken coop in her backyard covered by a tarp which was situated against a fence. She testified while the coop rested on the ground, it was moveable and not anchored into the earth. Appellant also submitted several photographs of her property that she took approximately one

week before the hearing. The photos revealed appellant's property was relatively groomed and free of significant clutter. Appellant testified, however, that the Building Department had been to her home "a number of times" since 2008 requesting her to "do certain things." She further admitted that the City filed its complaint only after she failed to "remove all the things they wanted removed." Appellant conceded at the time of trial she had "[a]bout ten" cats; but there have been times when she has had more than ten.

{¶10} Appellant next called Barbara Wilson to testify. Wilson indicated she and appellant developed a friendship as a result of appellant's involvement in placing cats for adoption. Although Wilson was not one of appellant's neighbors, she has visited appellant's property approximately 30 times in the two years leading to trial. Wilson testified she was aware that appellant received complaints from her neighbors regarding the condition of her property, but denied smelling offensive odors. She also denied observing any refuse collecting on appellant's property. Wilson testified appellant keeps more than fifteen, and maybe more than twenty, cats along with three dogs at any given time. She stated appellant keeps the dogs outdoors and the cats indoors with eight litter boxes.

{¶11} Lauren Clare Pauline was appellant's final witness. Pauline, like Wilson, met appellant as a result of her work with cats. Wilson testified she is not one of appellant's neighbors, but has visited her property approximately 10 times since April 30, 2008. During her visits, Pauline denied noticing any odors coming from appellant's property. She further denied observing any garbage on the property. Indeed, Pauline opined that appellant maintained her property at a level consistent with neighborhood standards.

{¶12} At the conclusion of trial, the trial court found appellant guilty of violating WCO 1309.08(a), WCO 1309.07, and WCO 1131.11(a); she was acquitted of the other charges. Appellant now appeals and alleges two assignments of error. Her first assigned error provides:

{¶13} "The trial court erred to the prejudice of the defendant-appellant in denying her motion for acquittal made pursuant to Crim.R. 29(A).

{¶14} "An appellate court reviewing whether the evidence was sufficient to support a criminal conviction examines the evidence admitted at trial and determines whether such evidence, if believed, would convince the mind of the average juror of the defendant's guilt beyond a reasonable doubt." *State v Troisi*, 179 Ohio App.3d 326, 329, 2008-Ohio-6062. A reviewing court may not reweigh or reinterpret the evidence; rather, the proper inquiry is, after viewing the evidence most favorably to the prosecution, whether the jury could have found the essential elements of the crime proven beyond a reasonable doubt. *State v. Jenks* (1991), 61 Ohio St.3d 259, 273.

{¶15} Appellant first challenges the trial court's judgment as it relates to her conviction for violating WCO 1309.08(a). Appellant asserts the City failed to provide any evidence to demonstrate that the condition of her property contributed to any deterioration of the immediate neighborhood because it offered no evidence that the value(s) of homes in the neighborhood had diminished. As a result, she maintains, the City failed to introduce sufficient evidence to prove she violated WCO 1309.08(a). We disagree with appellant's argument as it is based upon an unnecessarily narrow construction of the ordinance.

{¶16} WCO 1309.08(a) provides, in relevant part:

{¶17} "Residential. The exterior of the premises, the exterior of dwelling structures and the condition of accessory structures shall be maintained so that the appearance of the premises and all buildings thereon shall reflect a level of maintenance in keeping with the residential standards of the immediate neighborhood so that the appearance of the premises and structures shall not constitute a blighting factor for adjoining property owners nor an element leading to the progressive deterioration and downgrading of the immediate neighborhood with the accompanying diminution of property values ***." (Emphasis sic.)

{¶18} Recently, in *Willoughby v. Taylor*, 180 Ohio App.3d 606, 2009-Ohio-183, this court had occasion to interpret WCO 1309.08(a), observing:

{¶19} "The ordinance at issue prohibits conditions which are 'blighting factors' on a specific neighborhood and 'elements leading to the progressive deterioration and downgrading of the immediate neighborhood with the accompanying diminution of property values ***.'" *Taylor*, at ¶18.

{¶20} With these points in mind, one way to prove a violation of WCO 1309.08(a) would be to introduce evidence that the appearance of a defendant's property is so out of keeping with the residential standards of the immediate neighborhood that it has led to diminished property values. Another way to prove a violation is to establish that the appearance of the property is so out of keeping with the residential standards that it constitutes a blighting factor for adjoining property owners. A review of the record in this case indicates the City chose to prove its case using the latter as opposed to the former approach. The issue, therefore, does not hinge on whether the City introduced evidence of diminished property values, but on whether it

introduced sufficient evidence to prove, inter alia, appellant's property constituted a blighting factor for adjoining property owners.

{¶21} To this end, Richard Smith, Chief Building Inspector and Zoning Inspector for the City, testified that "blighted conditions" involve:

{¶22} "[The] [d]eterioration of property, rubbish, overgrowth, just general lack of maintenance, general lack of upkeep."

{¶23} Smith also testified that he and Brooks, the Zoning Code Inspector for the City, visited appellant's property in April of 2008, and observed "*** a lot of garbage bags with rubbish in them, cans, a lot of overgrowth, generally in [an] unkept [sic] condition." Brooks similarly testified that "*** [t]he property was unkempt. There were items about the yard area that made it appear messy. There were some structures that were covered with tarps. Mostly it was items about the yard area." Both Smith and Brooks testified that appellant's property did not reflect a level of maintenance in keeping with the residential standards of the immediate neighborhood.

{¶24} Moreover, Brian Lutz, appellant's immediate neighbor, testified regarding the condition of appellant's property in April of 2008:

{¶25} "The front yard is and has always been completely overgrown with vegetation, no scheme of anything, ivy over the front of the house. *** [A]t that time she had numerous trash bags full of - - I have no idea. She has - - again, the vegetation on that side is full. If you go into her backyard, which is very small, the vegetation is totally grown, especially in the back third of our house to where you can't see under it."

{¶26} Lutz also observed that appellant's back yard included piles of rubble, pens "where hamsters or guinea pigs used to be" stacked on top of one another in the

middle of the yard, and "something" with a large tarp over it situated "right up against the fence" adjoining the respective properties. Lutz testified that appellant's yard "stands out" from other properties in the neighborhood:

{¶27} "*** everyone else has grass, it's mowed, they have flower's out and [appellant's], just looking at the front of the house, the vegetation is totally overgrown and consuming it, you just want to go 'what's this?'"

{¶28} Given these points, Lutz testified appellant's property has affected his ability to enjoy and use his property and emphasized that appellant's property is not in keeping with the residential standards of other properties in the neighborhood.

{¶29} In conjunction with this testimony, the City also introduced photographic exhibits from Smith's and Brooks' visits to appellant's property in June and July of 2009. The photographs primarily depict appellant's backyard. The photos show appellant's backyard, where she kept three dogs and their shelters, scattered with clutter, junk, and several unidentifiable items covered in tarps. Although the pictures were taken over a year after Smith's and Brook's first visit, they support their testimony that appellant's property included various conditions which could be construed as "blight" as defined by Smith.

{¶30} Viewed in a light most favorable to the City, we hold there was sufficient evidence to establish that the appearance of appellant's property was so out of keeping with the residential standards of the immediate neighborhood that it constituted a blighting factor for adjoining property owners. The trial court's judgment convicting appellant of violating WCO 1309.08(a) is therefore affirmed.

{¶31} Appellant next challenges the trial court's judgment of conviction on the charge that she failed to require yard structures to be located a minimum of five feet from her property line in violation of WCO 1131.11(a). Appellant contends that because the structure at issue, a chicken coop, was mobile and had no roof or back, it did not meet the definition of a "structure" under the code Thus, appellant alleges, the City failed to prove the coop was an item prohibited by WCO 1131.11(a).

{¶32} WCO 1131.11(a) regulates "accessory buildings" and "structures." Appellant was charged with failing to keep the coop, a "yard structure" according to the prosecution, at least five feet from the side or rear of her lot lines.

{¶33} Although appellant was charged with having a "yard structure" situated in a proscribed area, WCO does not specifically define the phrase "yard structure." A "structure," however, is defined as:

{¶34} "*** anything constructed or erected, the use of which requires a fixed location on the ground or is attached to something having a fixed location on the ground, and including, but not limited to buildings, barriers, bridges, decks, fences, gazebos, outdoor seating facilities, platforms, poles, backstops for tennis courts, pergolas, pools, patios, paved areas, sidewalks, tanks, tents, towers, sheds, signs and walls; but not including trailers and other vehicles, whether on wheels or other supports." WCO 1103.03(b)(143).

{¶35} Although the City correctly points out that the ordinance does not require a structure to have "three or four walls or a roof," it *does* require the item to have a "fixed location" or be attached to something having a fixed location.

{¶36} In *State v. Mezget*, 169 Ohio App.3d 714, 2006-Ohio-6347, this court was asked to consider whether the prosecutor submitted sufficient evidence to sustain the defendant's conviction for violating a township ordinance requiring a zoning certificate for the construction of accessory buildings. This court first pointed out that, pursuant to the zoning resolution, accessory buildings were buildings and buildings are structures.[1] Id. at ¶17. The ordinance in question defined a "structure" in substantially the same fashion as WCO 1103.03(b)(143); to wit, "'[a]nything constructed or erected, the use of which requires a fixed location on the ground or attachment to something having a fixed location on the ground.'" (Emphasis omitted.) *Mezget*, supra, at 717-718, quoting Leroy Township Zoning Resolution, Section 2. In reversing and vacating Mezget's conviction, this court held:

{¶37} "*** a 'structure' requires a fixed location yet, at trial, the evidence demonstrated the five buildings upon which [the zoning inspector] based his allegations were all described as sitting on the ground, without foundations or footers, and were capable of being moved. Thus, pursuant to the relevant definitions set forth [in the resolution], the disputed 'edifices' could not be considered buildings or structures under the resolution because they lack an essential attribute, i.e., a fixed location." Id. at 718.

{¶38} At trial, appellant testified that, while the coop is resting on the ground, "it's moveable." She additionally clarified that the coop is not "sunk in the ground in any way." Regarding its location, appellant testified that the coop is "butted up, but not attached to the fence." The City did not dispute appellant's testimony and, in fact, Brian Lutz's testimony confirmed appellant's characterization of the coop's location. Hence,

1. Similarly, pursuant to WCO definitions, an "accessory building" is a "building," and a "building is a "structure."

the evidence demonstrated that appellant kept a two-sided, mobile chicken coop which was resting against or adjacent to a boundary fence. Even when viewed in a light most favorable to the City, we hold the evidence was insufficient to establish the coop was in a fixed location or attached to a fixed location. Accordingly, appellant could not be convicted for keeping a "yard structure" in a prohibited area. Appellant's conviction for violating WCO 1131.11(a), therefore, must be reversed. In this regard, appellant's first assignment of error is sustained.

{¶39} Appellant does not appeal her conviction for violating WCO 1309.07, i.e., failing to maintain the exterior of her premises free of all nuisances and free of unsanitary conditions including refuse and natural growth. As no argument is advanced on this issue, we need not consider it.

{¶40} Given the above analysis, appellant's first assignment of error has merit as it pertains to her conviction for violating WCO 1131.11(a), but is overruled as it relates to her conviction for violating WCO 1309.08(a)

{¶41} Appellant's second assignment of error alleges:

{¶42} "The trial court erred to the prejudice of the defendant-appellant when it returned a verdict against the manifest weight of the evidence."

{¶43} A challenge to the weight of the evidence examines whether the prosecution produced enough credible evidence to meet its burden of persuasion. With respect to this inquiry, this court has stated:

{¶44} "'In determining whether the verdict was against the manifest weight of the evidence, *** the court reviewing the entire record, weighs the evidence and all reasonable inferences, considers the credibility of the witnesses and determines

whether in resolving conflicts in the evidence, the [trier of fact] clearly lost its way and created such a manifest miscarriage of justice that the conviction must be reversed and a new trial ordered. ***'" (Citations omitted.) *State v. Schlee* (Dec. 23, 1994), 11th Dist. No. 93-L-082, 1994 Ohio App. LEXIS 5862, at *14-*15

{¶45} A trial court's judgment will be reversed on a challenge to the evidentiary weight only in those exceptional situations in which the evidence weighs heavily against the conviction. *Mezget*, supra, at 718.

{¶46} Under her second assignment of error, appellant first argues the evidence, viewed as a whole, militates against her convictions for violating WCO 1309.08(a) and WCO 1309.07 (failing to maintain the exterior of the premises and free of unsanitary conditions including refuse and overgrowth.)

{¶47} Appellant specifically asserts these convictions are against the manifest weight of the evidence because the City failed to provide any evidence appellant's property caused some deterioration to her immediate neighborhood. As with her sufficiency argument, appellant underscores the City failed to introduce evidence of a decrease in home values and, as a result, any evidence relating to the diminution in property values was purely speculative. Appellant further highlights the testimony of the witnesses called on her behalf, all of whom indicated her home always appeared to be maintained.

{¶48} With respect to WCO 1309.08(a), appellant assumes the City needed to prove the property values had decreased in the neighborhood. As discussed above, however, even assuming the City did not produce adequate evidence to prove the condition of appellant's property was "*** an element leading to the progressive

deterioration and downgrading of the immediate neighborhood with the accompanying diminution of property values[,]" it did submit sufficient evidence to demonstrate her property constituted a "*** blighting factor for adjoining property owners" that did not reflect a level of maintenance in keeping with the neighborhood standards. Given the language of the ordinance, this evidence sufficed to achieve a conviction under WCO 1309.08(a).

{¶49} Regarding appellant's conviction for violating WCO 1309.07, the City introduced enough evidence, through the testimony of Smith and Brooks, as well as its photographic exhibits, to demonstrate she failed to maintain the exterior of the premises. There was ample evidence that appellant failed to keep the front and back yards uncluttered and free of refuse as well as excessive natural growth in keeping with the maintenance standards of the neighborhood. Although appellant introduced her own photographs to rebut this testimony, she conceded the photos were taken approximately one week before the hearing. Moreover, appellant admitted, on cross-examination, the City's building department had visited her property "a number of times" since 2008 explaining what she would need to do in order to meet code specifications. She also admitted a complaint was only filed after she failed "to remove the things they wanted removed." Given this evidence, we hold the City produced enough evidence to sustain the conviction for violating WCO 1309.07.

{¶50} The only issue remaining is whether the testimony of appellant's witnesses so undermined the City's evidence that appellant's convictions resulted in a manifest miscarriage of justice. We hold the City's evidence was sufficiently compelling

to sustain the trial court's judgment of conviction for violating WCO 1309.08(a) and WCO 1309.07.

{¶51} The record indicates none of the three individuals testifying on appellant's behalf were her neighbors or residents of her neighborhood. As a result, unlike Mr. Lutz, they could not provide an account of the day-to-day condition of appellant's property over the relevant timeframe. Indeed, the witnesses indicated they were not present on any of the days relevant to the charges at issue. Further, although each of appellant's witnesses testified appellant's property was relatively clean or, at least, not noticeably disordered during their semi-regular visits, they also testified they became associated with appellant due to their interest in her humane work with cats. Because each witness testified their association with appellant, and, in many cases, their visits to appellant's residence were oriented around their common interest in cats, the trier of fact could reasonably conclude that the witnesses were present more to attest to appellant's good character than to provide an objective assessment of the condition of her property. Balancing the City's case against the testimony of the defense's witnesses, we hold the trial court did not lose its way in finding appellant guilty of violating WCO 1309.08(a).

{¶52} Finally, because we conclude appellant's conviction for violating WCO 1131.11(a) was based upon insufficient evidence, we need not consider her argument relating to the persuasiveness of the City's evidence in support of that charge.

{¶53} Appellant's second assignment of error is overruled.

{¶54} For the reasons discussed above, appellant's first assignment of error has merit to the extent indicated in the body of this opinion. Appellant's second assignment of error, however, is overruled. The judgment of the Willoughby Municipal Court is accordingly affirmed in part and reversed in part.

DIANE V. GRENDELL, J., concurs in judgment only,

TIMOTHY P. CANNON, J., concurs in part, dissents in part, with Concurring/ Dissenting Opinion.

TIMOTHY P. CANNON, J., concurring in part and dissenting in part.

{¶55} I respectfully concur in part and dissent in part with the majority.

{¶56} I dissent with respect to the conclusion that there is insufficient evidence of a violation of WCO 1131.11(a). Appellant was charged with failing to keep a chicken coop, which was alleged to be a "yard structure," at least five feet from the side or rear of her lot lines. "Yard" is defined at WCO 1103.03(b)(156), and "structure" is defined, as set forth in the majority opinion, at WCO 1103.03(b)(143).

{¶57} In a bench trial, the trial court found appellant guilty of violating WCO 1131.03(a). Appellant made no request for findings of fact.

{¶58} There are minimum side yard setbacks for a variety of things under WCO 1131.11(a), including a detached shed (3 feet) and yard structures (5 feet). There was testimony that appellant maintained a chicken coop in her "yard," consisting of two sides propped up against the fence on the property line, and covered with chicken wire and a

tarp. Appellant admitted this was originally used as a chicken house, and admitted it relied on the fence to enclose it. Testimony was clear that the fence, being in a fixed location on the ground, was an integral part of the coop. As a result, I believe it was a factual question as to whether this constituted a "yard structure" under the ordinance. The interpretation that some part of appellant's portion of the coop must be a fixed location, when the coop could not exist without the fixed fence, is too narrow. The entire purpose of this property maintenance ordinance is to protect property owners from neighbors who have no regard for the neighborhood or their own property.

{¶59} I would not disturb the factual finding of the trial court that this coop fit the definition of "yard structure."