[Cite as *Kelleys Island v. Tremmel*, 2015-Ohio-804.]

IN THE COURT OF APPEALS OF OHIO
SIXTH APPELLATE DISTRICT
ERIE COUNTY

State of Ohio/Village of Kelleys Island

Appellee

v.

Martin J. Tremmel

Appellant

Court of Appeals Nos. E-13-076
E-14-026
E-14-027
E-14-028
E-14-029
E-14-030
E-14-031
E-14-032
E-14-033
E-14-034
E-14-035
E-14-036
E-14-037
E-14-038
E-14-039
E-14-040
E-14-041
E-14-042
E-14-043
E-14-044
E-14-045
E-14-046
E-14-047
E-14-048
E-14-049
E-14-050
E-14-051
E-14-052

E-14-053
E-14-054
E-14-055
E-14-056
E-14-057
E-14-058
E-14-059
E-14-060
E-14-061
E-14-062
E-14-063
E-14-064
E-14-065
E-14-066
E-14-067
E-14-068
E-14-069
E-14-070
E-14-071
E-14-072
E-14-073
E-14-074
E-14-075
E-14-076
E-14-077
E-14-078
E-14-079
E-14-080
E-14-081
E-14-082
E-14-083
E-14-084

Trial Court Nos. CRB 1300251
CRB 1300252
CRB 1300253
CRB 1300254
CRB 1300255
CRB 1300256
CRB 1300257
CRB 1300258

CRB 1300259
CRB 1300260
CRB 1300261
CRB 1300262
CRB 1300263
CRB 1300264
CRB 1300265
CRB 1300266
CRB 1300267
CRB 1300268
CRB 1300269
CRB 1300270
CRB 1300271
CRB 1300272
CRB 1300273
CRB 1300274
CRB 1300275
CRB 1300292
CRB 1300293
CRB 1300294
CRB 1300295
CRB 1300296
CRB 1300297
CRB 1300298
CRB 1300299
CRB 1300300
CRB 1300301
CRB 1300302
CRB 1300303
CRB 1300304
CRB 1300305
CRB 1300306
CRB 1300307
CRB 1300308
CRB 1300309
CRB 1300310
CRB 1300311
CRB 1300312
CRB 1300313
CRB 1300314
CRB 1300315

3.

CRB 1300316
CRB 1300317
CRB 1300318
CRB 1300319
CRB 1300320
CRB 1300321
CRB 1300322
CRB 1300323
CRB 1300324
CRB 1300325
CRB 1300326

DECISION AND JUDGMENT

Decided: March 6, 2015

* * * * *

Michael D. Kaufman, Prosecutor for Kelleys Island, for appellee.

Erik G. Chappell and Julie A. Douglas, for appellant.

* * * * *

SINGER, J.

{¶ 1} Appellant, Martin J. Tremmel, appeals from his convictions, following a jury trial, in the Erie County Court Municipal Court, on 60 counts of failing to comply with the Kelleys Island zoning inspector. For the reasons that follow, we affirm.

{¶ 2} We begin our analysis with a brief summary of the zoning ordinances relevant to this case. The Kelleys Island Zoning Code can be found in Chapter 152 of the Kelleys Island, Ohio Code of Ordinances.

{¶ 3} Kelleys Island Code of Ordinances 152.009 provides that no building or other structure, including fences, shall be erected without a permit issued by the zoning

inspector. Kelleys Island Code of Ordinances 152.010(C)(6) allows for fences, walls and hedges in any yard or along the edge of any yard "* * * provided that no fence, wall or hedge along the sides or front edge of any front yard [is over] 4½ feet in height."

{¶ 4} An Environmental Protection Overlay District ("EPOD") lies within the island. This can generally be identified as the land immediately adjacent to Lake Erie. Specifically, the Kelleys Island Code of Ordinances 152.043(2) defines the EPOD as:

> [T]hose areas of the village 125 feet from the natural shoreline district or as otherwise designated on the EPOD map as adopted by Council. This area shall be designated as an overlay zoning district over any and all of the underlying zoning districts relative to all of the land 125 feet from the natural shoreline * * *.

Kelleys Island Code of Ordinances 152.004 defines natural shoreline as the "ordinary high water elevation of 573.4 feet."

{¶ 5} The purpose of the EPOD is to preserve the natural environment of the island by ensuring that uncontrolled development does not destroy it. Kelleys Island Code of Ordinances 152.043(1). Essentially, the EPOD is in place to protect the scenic view of the lake for everyone on the island. Towards that purpose, property within the EPOD is subject to regulations in addition to the general regulations found in the zoning portion of the Kelleys Island Code of Ordinances.

{¶ 6} Before a property owner constructs a new structure or alters an existing structure within the EPOD, the owner must submit a site plan to the planning

commission. If approved, the zoning commissioner can issue a zoning permit for the proposed new or altered structure.

{¶ 7} Kelleys Island Code of Ordinances 152.067 provides that any person who violates, disobeys, neglects, or refuses to comply with any lawful order of the zoning inspector issued in pursuance of the zoning code shall be guilty of a misdemeanor of the fourth degree.

2011

{¶ 8} Appellant owns a vacation home on Kelleys Island. His property lies within the EPOD. In the spring of 2011, appellant began construction of a fence on his property. Kelleys Island Zoning Inspector, William Minshall, received notification from another island resident that appellant had erected posts on his property that were approximately ten feet tall. They were six feet apart and extended from his southerly lot line towards the lake. Minshall paid a visit to appellant to ask him if he had acquired a permit. He had not. Appellant explained that he did not need a permit because he already had an existing fence in the form of a natural hedge. Minshall disagreed, telling appellant to stop construction and seek a building permit.

{¶ 9} On March 28, appellant filed a zoning permit application for his fence construction. The permit was granted contingent upon appellant removing the nonconforming, existing posts. Appellant was granted permission to construct a four and one-half foot fence along his westerly lot line north to a point 125 feet from the ordinary high water mark.

{¶ 10} On May 3, appellant filed an application for an interpretation of the EPOD. He testified that he did this because he did not believe the EPOD should be applied to his fence because a number of other structures on the island have been built within 125 feet of the EPOD. In July, appellant submitted a site plan under the EPOD to the planning commission wherein he requested permission to construct a fence within the EPOD. Following an August hearing, the planning commission voted unanimously to deny appellant's request. Appellant appealed the planning commission's decision to the Village Council pursuant to Kelleys Island Code of Ordinances 152.043(F). Following an October hearing, the council denied his appeal. Appellant then filed an administrative appeal with the Erie County Court of Common Pleas.

2013

{¶ 11} On February 19, the Erie County Court of Common Pleas denied appellant's administrative appeal, noting the purpose of the EPOD and calling it an important part of the zoning code. The court disagreed with appellant that the fence was equivalent to the trees that had previously existed which required no permit. The court found that appellant had not shown that the denial of his permit would deny him reasonable use of his land.

{¶ 12} The ten foot tall posts remained on appellant's property so, on April 5, Minshall sent appellant a letter telling him he must remove the posts by April 26 because he did not have a zoning permit for the posts.

{¶ 13} Appellant did not remove the posts. On April 15, appellant filed a zoning permit application for construction of a six foot six inch high fence on his property. His application was denied. In a letter dated April 29, Minshall explained the reasons behind the denial:

> Your drawing shows the fence beginning 125 feet from the water's edge. It must begin 125 feet from the high water elevation of 573.4 feet. See village code sections 152.004 and 152.043 [EPOD]. Your fence height of 6.5 feet is acceptable from a point 125 feet south of the high water elevation to the beginning of your front yard, which is 50 feet from any part of your southerly lot line, from this point the fence must be 4.5 feet in height * * *.

{¶ 14} Minshall closed the letter by instructing appellant to remove the existing posts along his westerly lot line by May 6. Minshall warned that if the posts were not removed, appellant would be cited pursuant to Kelleys Island Code of Ordinances 152.999 which states that a property owner who constructs a structure without first obtaining a permit or permission from the planning commission, shall correct any violations within a stated reasonable amount of time as determined by the zoning inspector. Failure to correct the violations within the time prescribed will constitute a misdemeanor of the fourth degree. The ordinance further provides: "[E]ach day such violation continues shall be deemed a separate offense."

{¶ 15} On May 4, appellant filed another zoning permit application. This request was for a six and one-half foot high fence that was to be installed 125 feet back from the ordinary high water mark. Also on May 4, appellant filed an application for a variance with the Kelleys Island Board of Zoning Appeals.

{¶ 16} Minshall testified that he approved the May 4 zoning permit application pursuant to the attached drawings because appellant's proposed fence complied with the zoning code.

{¶ 17} As of May 6, appellant still had not removed the fence posts that had been in place since 2011. On May 7, appellant was cited, in violation of Kelleys Island Code of Ordinances 152.067, for failing to comply with the Kelleys Island zoning inspector on removing the fence posts, a fourth degree misdemeanor. Thereafter, appellant was issued separate, identical citations each day after, until July 5. In total, appellant received 60 citations.

{¶ 18} Appellant entered not guilty pleas to the charges. On October 7, a jury found him guilty of all 60 charges. For each charge, he was sentenced to ten days in jail and fined $250. His jail time was suspended and he was put on probation for five years. Appellant now appeals setting forth the following assignments of error:

I. The trial court erred when it denied Tremmel's motion to dismiss.

II. The trial court erred when it denied Tremmel's timely request for essential findings of fact in support of trial court's denial of his motion to dismiss.

III. The trial court erred when it refused to admit evidence regarding selective enforcement of zoning regulations.

IV. The trial court erred when it refused to instruct the jury regarding selective enforcement of zoning regulations.

V. The trial court erred when it refused to instruct the jury regarding the zoning code that defendant was alleged to have violated.

VI. The trial court erred when it failed to admit copies of the code sections from the Kelleys Island zoning code.

VII. The trial court's answer to a question from the jury during deliberations was erroneous and prejudicial which constituted an abuse of discretion and an error of law warranting a new trial.

VIII. The trial court erred when it denied defendant's motion for judgment of acquittal pursuant to Ohio Crim.R. 29(A) and (C).

IX. The trial court erred when it denied defendant's motion for a new trial.

X. The jury verdict and the subsequent judgment entry finding defendant guilty of violating section 152.067 of the Kelley's Island Zoning Code were against the manifest weight of the evidence, insufficient as a matter of law, or contrary to law.

XI. The trial court's judgment of sentence was against the manifest weight of the evidence, insufficient as a matter of law, or contrary to law.

{¶ 19} In his first assignment of error, appellant contends that the court erred in denying his motion to dismiss. Crim.R. 12(C) provides in pertinent part:

> Prior to trial, any party may raise by motion any defense, objection, evidentiary issue, or request that is capable of determination without the trial of the general issue. The following must be raised before trial:
>
> (1) Defenses and objections based on defects in the institution of the prosecution;

{¶ 20} Prior to trial, appellant filed a motion to dismiss all 60 citations arguing that he filed an appeal on May 4, 2013, which effectively stayed all proceedings. Appellant argued that because of the stay, the Kelleys Island police lacked the authority to issue the citations. In support, appellant cited the Kelleys Island Code of Ordinances 152.107 which governs appeals to the Board of Zoning Appeals. The ordinance reads in pertinent part:

> (A) Appeals to the Board of Zoning Appeals may be taken by the applicant, or any other person, firm or corporation, or by any officer, board or department of the village, located within 500 feet of the permitted property, deeming himself, herself, themselves or itself to be adversely affected by the decision of the administrative official pertaining hereto. Appeals should be made no later than 30 calendar days after the date of any adverse decision.
>
> * * *

> (C) An appeal shall stay all proceedings in furtherance of the action appealed from * * *.

{¶ 21} Ohio statutes provide for the creation of a board of zoning appeals. R.C. 303.13, 303.14, 519.13 and 519.14.

> The board is an administrative body. Its function is to hear and decide appeals from administrative determinations regarding a zoning code's enforcement and to authorize variances, minor departures from the strict and literal interpretation of the zoning code. Stuart Meck and Kenneth Pearlman, *Ohio Planning and Zoning Law*, Section 4.14, 90 (2014).

{¶ 22} Appellant did file a document on May 4, 2013, with the Kelleys Island Board of Zoning Appeals. Specifically, appellant filed an application for a variance, not an appeal from a decision of the zoning inspector. Nowhere on the document is it indicated that the filing is an "appeal" from an adverse decision. Accordingly, Kelleys Island Code of Ordinances 152.107(C) does not apply here. Appellant's first assignment of error is found not well-taken.

{¶ 23} In his second assignment of error, appellant contends that the court erred in failing to comply with his request for findings of fact and conclusions of law regarding the denial of appellant's motion to dismiss.

{¶ 24} A defendant must demonstrate prejudice from the trial court's failure to state its "essential factual findings" on the record. *State v. Brewer*, 48 Ohio St.3d 50, 60

(1990). Such prejudice is lacking if an appellate court can fully review the issues pertaining to the pretrial motion. *Id*.; *State v. Brown*, 2d Dist. No. 24297, 2012-Ohio-195, ¶ 10, citing *State v. Benner*, 40 Ohio St.3d 301, 317-318 (1988).

{¶ 25} Given our above determination of appellant's first assignment of error, we find no prejudice to appellant and his second assignment of error is found not well-taken.

{¶ 26} In his third assignment of error, appellant contends that the court erred in refusing to admit evidence to support his claim that the zoning inspector violated his equal protection rights by selectively enforcing the zoning code against him. Appellant sought to admit copies of approved zoning permit applications from other island residents to show that the zoning inspector, in the past, has allowed construction within the EPOD.

It is well-settled that the admission or exclusion of evidence lies within the sound discretion of the trial judge, and will not be disturbed on appeal absent a finding of an abuse of that discretion that materially prejudiced the party. *State v. Dupuis*, 6th Dist. Lucas No. L-12-1035, 2013-Ohio-2128, ¶ 46. An abuse of discretion is demonstrated where the trial court's attitude in reaching its decision was unreasonable, arbitrary or unconscionable. *Blakemore v. Blakemore*, 5 Ohio St.3d 217, 219, 450 N.E.2d 1140 (1983).

{¶ 27} The conscious exercise of some selectivity in enforcement is not in itself a violation of the United States Constitution. *Osler v. Boles*, 368 U.S. 448, 456, 82 S.Ct. 501, 505, 7 L.Ed.2d 446 (1962). In order for selective enforcement to reach the level of unconstitutional discrimination the discrimination must be "intentional or purposeful."

Snowden v. Hughes, 321 U.S. 1, 8, 64 S.Ct. 397, 401, 88 L.Ed. 497 (1944). This concept of "intentional or purposeful discrimination" was explained in *United States v. Berrios*, 501 F.2d 1207, 1211 (2d Cir.1974) as follows:

> To support a defense of selective or discriminatory prosecution, a defendant bears the heavy burden of establishing, at least prima facie, (1) that, while others similarly situated have not generally been proceeded against because of conduct of the type forming the basis of the charge against him, he has been singled out for prosecution, and (2) that the government's discriminatory selection of him for prosecution has been invidious or in bad faith, i.e., based upon such impermissible considerations as race, religion, or the desire to prevent his exercise of constitutional rights. These two essential elements are sometimes referred to as "intentional and purposeful discrimination."

{¶ 28} Evid.R. 401 defines relevant evidence as "evidence having 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."

{¶ 29} Merely because zoning permits have been granted to other residents is not proof that the inspector is selectively enforcing the zoning code against appellant. The record shows that the inspector attempted to get appellant to comply with the zoning code for approximately two years before resorting to citations. If anything, the inspector showed restraint. We find no abuse of discretion in the trial court's decision to exclude

the evidence of granted permits. Appellant's third assignment of error is found not well-taken.

{¶ 30} In his fourth assignment of error, appellant contends that the court erred in denying appellant's request for a jury instruction on the issue of selective enforcement.

{¶ 31} "[A] trial court's determination as to whether the evidence produced at trial warrants a particular instruction is reviewed for an abuse of discretion." *Burns v. Adams,* 4th Dist. Scioto No. 12CA3508, 2014-Ohio-1917, ¶ 52. "A party must demonstrate not merely that the trial court's omission or inclusion of a jury instruction was an error of law or judgment but that the court's attitude was unreasonable, arbitrary or unconscionable." *Freedom Steel v. Rorabaugh,* 11th Dist. Lake No. 2007-L-087, 2008-Ohio-1330, ¶ 10.

{¶ 32} For the same reasons we found that the trial court did not abuse its discretion in excluding the evidence discussed above, we find that the trial court did not abuse its discretion in failing to instruct the jury on selective enforcement. The evidence at trial does not support appellant's contention that he was the victim of "purposeful and intentional" discrimination. The evidence at trial does show that appellant was repeatedly warned he was in violation of the code and he repeatedly refused to comply with the code. Appellant's fourth assignment of error is found not well-taken.

{¶ 33} In his fifth assignment of error, appellant contends that the court erred when instructing the jury on the particular ordinance appellant was accused of violating. The court instructed the jury that appellant was accused of failing to remove fence posts from an area within 125 feet of the ordinary high water mark.

{¶ 34} Kelleys Island Code of Ordinances 152.043(2) defines the EPOD in pertinent part as: "[a]n overlay zoning district over any and all of the underlying zoning districts relative to all of the land 125 feet from the natural shoreline * * *."

{¶ 35} Kelleys Island Code of Ordinances 152.004 defines the natural shoreline of Lake Erie:

> as the ordinary high water elevation of 573.4 feet International Great Lakes Datum (1985), which defines the southerly shore of Lake Erie and the boundary of navigable waters of the United States as regulated by the U.S. Department of the Army, Corps of Engineers.

{¶ 36} Kelleys Island Code of Ordinances 152.004 also defines shoreline as "[T]hat point where the general land contour of Kelleys Island meets the water's edge of Lake Erie."

{¶ 37} Appellant contends that the code is ambiguous in that it does not provide a specific definition for "natural shoreline," only definitions for "natural shoreline of Lake Erie" and "shoreline." Appellant contends that the court's jury instructions should have reflected this ambiguity.

{¶ 38} We find no ambiguity. Kelleys Island Code of Ordinances 152.043(2) specifically states "natural shoreline" as opposed to "shoreline." Even though 152.043(2) does not include the language "of Lake Erie" in its definition of the EPOD, the fact that the more specific language of "natural shoreline" is used leads us to the conclusion that

the court properly instructed the jury. Appellant's fifth assignment of error is found not well-taken.

{¶ 39} In his sixth assignment of error, appellant contends that the court erred in failing to admit copies of the relevant code sections into evidence. We find no abuse of discretion as the court properly instructed the jury on the language of the code sections. Appellant's sixth assignment of error is found not well-taken.

{¶ 40} In his seventh assignment of error, appellant contends that the court erred in answering a question from the jury during deliberations. The jury asked "[D]oes the defendant by law have the legal right to wait for an answer * * * response * * * from a filed variance before removing a structure." The trial judge responded that their question was a matter of law for him to consider. As this question essentially addressed the issue raised and determined by the trial court in appellant's motion to dismiss prior to trial, we do not find that appellant was prejudiced by the court's response to the jury question. Appellant's seventh assignment of error is found not well-taken.

{¶ 41} In his eighth assignment of error, appellant contends that the court erred in denying his motion for an acquittal.

{¶ 42} We review a ruling on a Crim.R. 29 motion for acquittal under the same standard used to determine whether there was sufficient evidence to sustain a conviction. *State v. Merritt*, 6th Dist. Fulton No. F-12-009, 2013-Ohio-4834, ¶ 8. Crim.R. 29 provides that upon a defendant's motion or the court's own motion, after the evidence of

either side is closed, the court shall order entry of judgment of acquittal if the evidence is insufficient to sustain a conviction of the charged offense.

{¶ 43} Appellant contends he was entitled to an acquittal because the state failed to prove that appellant had acted recklessly.

{¶ 44} Appellant was charged with 60 counts of violating Kelleys Island Code of Ordinances 152.067. His citations stated:

> Every person, corporation, or firm who violates, disobeys, neglects, or refuses to comply with any provision of this chapter or any permit, license, or exception granted hereunder, or any lawful order of the Zoning Inspector, Board of Appeals, Planning Commission, or Village Council issued in pursuance of this chapter shall be guilty of a misdemeanor of the fourth degree.
>
> To wit: Failure to comply with the Kelleys Island Village Zoning Inspector on removing fence posts at 117 Hamilton Road.

{¶ 45} R.C. 2901.21(B) states:

> When the section defining an offense does not specify any degree of culpability, and plainly indicates a purpose to impose strict criminal liability for the conduct described in the section, then culpability is not required for a person to be guilty of the offense. When the section neither specifies culpability nor plainly indicates a purpose to impose strict liability, recklessness is sufficient culpability to commit the offense.

{¶ 46} As the zoning ordinance at issue does not specify culpability or impose strict liability, recklessness is the element we look to. "Recklessness" is defined in R.C. 2901.22(C):

> A person acts recklessly when, with heedless indifference to the consequences, he perversely disregards a known risk that his conduct is likely to cause a certain result or is likely to be of a certain nature. A person is reckless with respect to circumstances when, with heedless indifference to the consequences, he perversely disregards a known risk that such circumstances are likely to exist.

{¶ 47} Here, it is undisputed, that appellant was repeatedly warned, for two years, that he was not in compliance with the zoning code. In a letter from the zoning inspector dated April 29, 2013, appellant was specifically told that if the posts were not removed by May 6, 2013, he would be cited. Yet, appellant did not remove the posts. We find this to be sufficient evidence that with heedless indifference to the consequences, he perversely disregarded a known risk that certain circumstances were likely to exist. Appellant's eighth assignment of error is found not well-taken.

{¶ 48} In his ninth assignment of error, appellant contends that the court erred in denying his motion for a new trial. The basis for his motion, the same issue addressed in appellant's seventh assignment of error, was the trial court judge's action in answering a jury question. Given our disposition of appellant's seventh assignment of error, appellant's ninth assignment of error is found not well-taken.

{¶ 49} In his tenth assignment of error, appellant contends his convictions were against the manifest weight of the evidence. In support of his argument, he cites his arguments in his first six assignments of error. Given our disposition of those assignments of error, appellant's tenth assignment of error is found not well-taken.

{¶ 50} In his eleventh and final assignment of error, appellant contends that the court lacked authority to impose jail time or probation on appellant. In support, appellant cites Kelleys Island Code of Ordinances 152.999 which states:

> The owner or owners of any parcel of real estate, building or premises who causes the construction of any structure, building or part thereof without first obtaining a zoning permit or obtaining any other approvals required by this chapter from the Zoning Inspector, Planning Commission or other authority, and is cited for non-compliance with this chapter, shall correct any violations within a stated reasonable amount of time as determined by the Zoning Inspector. Failure to correct the conditions in violation with the provisions of this Zoning Code, as ordered by the Zoning Inspector, shall constitute a misdemeanor of the fourth degree. *Upon conviction of such violations, the responsible person or party shall be fined not more than $250*. (Emphasis added.)

{¶ 51} Appellant contends that this section only authorizes the court to issue fines after a conviction. We disagree. Clearly the intent of this section is to also punish the

offender criminally as it specifically states the offense constitutes a misdemeanor of the fourth degree. Appellant's eleventh assignment of error is found not well-taken.

{¶ 52} The judgment of the Erie County Municipal Court is affirmed. Appellant is ordered to pay the costs of this appeal pursuant to App.R. 24.

Judgment affirmed.

A certified copy of this entry shall constitute the mandate pursuant to App.R. 27. *See also* 6th Dist.Loc.App.R. 4.

Arlene Singer, J. _____
JUDGE

Thomas J. Osowik, J. _____
JUDGE

James D. Jensen, J. _____
CONCUR.
JUDGE