COURT OF APPEALS
DECISION
DATED AND FILED

January 6, 1999

Marilyn L. Graves
Clerk, Court of Appeals
of Wisconsin

Nos. 98-2007
98-2008

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

TOWN OF WATERFORD,

PLAINTIFF-RESPONDENT,

v.

GARY R. ANDERSON,

DEFENDANT-APPELLANT.

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

NETTESHEIM, J. Gary R. Anderson appeals from a forfeiture judgment based upon a jury's determination that he had violated the building code of the Town of Waterford by using unauthorized construction materials. On appeal, Anderson contends that: (1) the jury verdicts are inconsistent because they do not relate to the charges recited in the original citations; (2) he did not receive advance written notice that he was not in compliance with the building code; (3)

the citations issued to him by the Town failed to adequately inform him of the possible penalties; and (4) the trial court improperly chastised him in front of the jury such that he was too intimidated to present a defense.

We hold that Anderson's inconsistent verdict argument is really a challenge to the trial court's amendment of the charge to conform to the evidence. Since Anderson never raised any objection to this action by the trial court, we deem this argument waived. Also waived are Anderson's arguments concerning inadequate notice of the violations and the penalties. Finally, we hold that the trial court did not preclude Anderson from presenting a defense. We affirm the forfeiture judgment.

FACTS AND PROCEDURAL HISTORY

From January 11, 1997, through April 19, 1997, the Town building inspector issued Anderson fourteen separate citations alleging a violation of ch. 9 of the Town's municipal code. Specifically, the citations alleged that Anderson had failed to complete construction of a residence within the time limit, and extensions thereof, recited in a building permit which the Town had previously issued to Anderson. Each citation recited a fine for the days covered by the citation on the basis of $50 per day and that a deposit of the fine was permitted in lieu of an appearance.[1] Anderson did not pay the permitted deposits, which totaled $4050.

On June 4, 1997, the building inspector issued a final, and fifteenth, citation to Anderson. This citation again alleged that Anderson had failed to

[1] The first citation covered three days for a total fine of $150. The remaining thirteen citations covered six days each for a total fine per citation of $300.

complete construction of the residence within the extended time limits. Unlike the prior citations, this final citation required Anderson to appear before the municipal court. Anderson did so, appearing pro se. The case was transferred to the circuit court for a jury trial. Anderson represented himself at the trial.

During the jury trial, the trial court began to express reservations as to whether the building permit issued to Anderson supported the charges recited in the citations. Specifically, the court noted that while the building permit authorized the construction of the residence during the extended time limits, the permit did not require *completion* of the residence within that time period. Since Anderson was not charged with performing any construction work beyond the extended time period, the court questioned whether the prosecution was well founded.

At the same time, the trial began to focus not on the time constraints of the permit but rather on whether Anderson had used proper materials in constructing the residence. At the close of the first day of testimony, the trial court spoke to this, asking the Town to reflect on the matter.

The trial court's concern about the correctness of the charges carried over into the informal jury instructions conference. Thereafter, the court summarized the conference on the record, stating:

> [I]t is my understanding from that conference informal that the parties are in agreement that the true issue here is whether or not the defendant complied with the building code with respect to the materials used at the site. And so the issue presented to the jury would then be along those same lines, did the defendant violate the code by using materials which were not in conformity with the code. That is at least my understanding from our rather lengthy off record discussion with the parties and they can amplify on that.

When the trial court asked the Town and Anderson whether they had any "comments, questions, objections, modifications, additions, deletions," Anderson replied, "No, I don't, your Honor." The court therefore composed jury instructions and verdicts which addressed the question of whether Anderson had violated the municipal code "by using building materials which did not comply with code." The jury returned guilty verdicts.

Following the trial, Anderson brought a Motion For Judicial Review. The motion sought dismissal of the charges on a variety of grounds, some of which are renewed on this appeal. Before the hearing on the motions, Anderson retained his present attorney. At the motion hearing, Anderson's counsel argued only one of the grounds raised in Anderson's pro se motion—that the verdicts returned by the jury were inconsistent because they were in conflict with the charges recited in the citations. The remaining issues that Anderson raises on appeal were not argued at this motion hearing. Instead, the balance of the proceedings debated the proper computation of any forfeiture that the court might impose if it rejected the argument of Anderson's counsel. The trial court continued the matter to consider Anderson's inconsistent verdict argument.

At the continued hearing, the trial court rejected Anderson's argument that the verdicts were inconsistent. The court then imposed a minimum forfeiture computed at the rate of $25 per each seventy days of violation for a total fine of $1950. Anderson appeals.

DISCUSSION

We first address Anderson's argument that the verdicts are inconsistent. Anderson reasons that the verdicts are inconsistent because the charges recited in the verdicts are different than those recited in the citations. However, that situation cannot form the basis for an inconsistent verdict. An inconsistent verdict is one in which the jury answers are logically repugnant *to one another*. *See* ***Fondell v. Lucky Stores, Inc.***, 85 Wis.2d 220, 228, 270 N.W.2d 205, 210 (1978). Here, Anderson makes no argument that the verdicts returned by the jury are inconsistent with one anther.

Anderson's actual argument, although couched in terms of an inconsistent verdict, is that the trial court improperly amended the charges from a failure to complete the construction within the extended time limits to the use of unauthorized building materials. However, when the trial court announced this ruling following the jury instructions conference, Anderson never voiced an objection. To the contrary, when the trial court asked if Anderson had any objections, Anderson expressly stated that he had none. The issue is waived. *See* ***Wirth v. Ehly***, 93 Wis.2d 433, 443, 287 N.W.2d 140, 145 (1980).[2]

The fact that Anderson raised this issue in his posttrial motion does not alter the fact that he waived this issue during the trial. The time for Anderson to object to the amendment of the charges and to the jury instructions and verdicts based on that amendment was when the trial court asked for objections.

[2] Within the context of this issue, Anderson also argues against the trial court's formulation of the jury instructions and the verdicts based on the amended charges. Because Anderson never objected to the amendment of the charges, these subissues are also waived.

Anderson next argues that his convictions for using building materials that did not comply with the Town's building code are invalid because he was not provided with advance written notice pursuant to WISCONSIN ADMINISTRATIVE CODE § DILHR 20.10(1)(c) that he was in noncompliance. However, while Anderson's posttrial motion alluded to various provisions of the administrative code, nowhere does the motion recite a claim of lack of prior written notice. Moreover, at the hearing on the motion after Anderson retained counsel, this subject was never argued. Understandably, the trial court did not address this issue when it ruled on the arguments raised by counsel. A party must raise an issue with sufficient prominence so that the trial court understands that it is being asked to rule on the matter. *See* ***State v. Salter***, 118 Wis.2d 67, 79, 346 N.W.2d 318, 324 (Ct. App. 1984). We deem this issue waived.[3] *See* ***Wirth,*** 93 Wis.2d at 443, 287 N.W.2d at 145.

Anderson next contends that the citations did not allow him to ascertain his penalty range when deciding whether to go to trial. Here, we will assume arguendo that Anderson's motion raised this issue.[4] At the motion hearing, the parties debated the proper amount of the forfeiture; the issue, arguably raised in Anderson's pro se motion, was never argued. Under those circumstances, it is understandable why the trial court did not speak to this issue when it issued its bench decision. Anderson simply did not alert the court with sufficient prominence that he was seeking a definitive ruling on this matter. *See* ***Salter***, 118 Wis.2d at 79, 346 N.W.2d at 324. At a minimum, Anderson should

[3] In his reply brief, Anderson contends that this issue travels to the trial court's subject matter jurisdiction. Anderson cites no authority for this proposition and we know of none.

[4] Our assumption gives Anderson's motion a very liberal interpretation.

have asked the court to rule on this additional matter when the court's bench decision did not address the issue.

Moreover, we are at a loss to understand Anderson's complaint of harm or prejudice. As we have noted, each citation, except the final one, stated a forfeiture amount computed at the rate of $50 per each day of violation. That figure is within the range of penalties recited by the building code for not only the original charges, but also the amended charges. And, in the final analysis, the trial court imposed a *lesser* penalty computed at the rate of $25 per day. In addition, Anderson provides no authority for his premise that an incorrect recitation of the possible penalty renders the citations or the ensuing prosecution a nullity.

Last, Anderson contends that the trial court improperly chastised him, including a threat of contempt, in the presence of the jury. As a result, Anderson argues that he was led to believe that he could not testify on his own behalf. Even if we were to assume (which we do not) that the trial court's remarks were improper, there is nothing in this record that supports Anderson's contention that the court's comments precluded him from presenting his own testimony.

At trial, Anderson proved to be a difficult pro se litigant. He repeatedly tried to inject irrelevant evidence into the record. As a result, the Town was often required to object, and the trial court was required to repeatedly instruct and warn Anderson regarding the rules of evidence and the proper procedure for the presentation of evidence. After these episodes, Anderson would sometimes continue a line of questioning that was directly contrary to the ruling that the court had just made. As the trial progressed, the trial court was required to use stronger language in an effort to get Anderson to abide by the rules. This finally resulted in the court's threat of contempt.

Despite the heightening tensions as the case progressed, there is no objective support for Anderson's claim that these developments intimidated him into not testifying. The Town called Anderson as an adverse witness as part of its case-in-chief. At the close of Anderson's adverse testimony, the trial court explained to Anderson that he would have the opportunity to testify later as part of his own defense. At a later time during the trial, the court excused the jury to explain to Anderson that he should not use narrative questions on cross-examination as a guise for presenting his own testimony. During this explanation, the court advised Anderson that he would have the opportunity to present his own testimony during his phase of the case. Still later, during a discussion regarding the admission of certain exhibits during the Town's case, Anderson stated that he would be using some of the exhibits in his own testimony. After the Town rested, Anderson presented his own witnesses. Following their testimony, the court inquired whether Anderson had anything further. Anderson replied that he did not. The parties and the court then discussed which exhibits would be received into evidence. At the conclusion of this discussion, the court again asked Anderson, "[A]re you resting, which is to say have you presented all the evidence that you want to present in this case?" Anderson replied, "The defense rests, your Honor."

The foregoing reveals that the trial court twice reminded Anderson of his right to present a defense, that Anderson expressed his intent to testify, and that Anderson twice responded after he had presented his last witness that he did not have any further evidence. Based upon our reading of the entire record, we see nothing which supports Anderson's claim that he was intimidated into not testifying.

Moreover, we conclude that the trial court's remarks were not improper. Subsections 906.11(1) and (2), STATS., give the trial court the authority to exercise reasonable control over the mode and order of interrogating witnesses, presenting evidence and limiting cross-examination. Here, the court repeatedly instructed Anderson as to the rules of the trial. When it became apparent that these measures were not working and in an effort to keep the trial on track and to avoid confusing the jury and wasting time, the court properly looked to other and stronger alternatives, including the threat of contempt. We therefore reject Anderson's related claim that the trial court's remarks constituted judicial misconduct warranting a new trial. *See* ***Carlson v. Drew of Hales Corners, Inc.***, 48 Wis.2d 408, 418-19, 180 N.W.2d 546, 551-52 (1970).

By the Court.—Judgment affirmed.

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