COURT OF APPEALS
DECISION
DATED AND FILED

July 25, 2000

Cornelia G. Clark
Clerk, Court of Appeals
of Wisconsin

NOTICE

No. 99-2755

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 and an order of the circuit court for Brown County: SUE E. BISCHEL, Judge. *Affirmed.*

Before Cane, C.J., Hoover, P.J., and Peterson, J.[1]

¶1 PER CURIAM. Donald Schleis appeals a judgment entered upon a jury's verdict finding him in violation of a City of Green Bay ordinance. The

[1] By this court's October 26, 1999, order, this decision is by a three-judge panel.

ordinance prohibits storing non-operating or partially dismantled vehicles on property for longer than seventy-two hours except when necessary to operate a legitimate business. Schleis also appeals the order denying his motion for a new trial. He argues that (1) the circuit court erroneously instructed the jury; (2) it misallocated the burden of proof; and (3) it applied the wrong standard of proof. We reject his arguments and affirm the judgment.

BACKGROUND

¶2 Schleis and his brothers own a large building in Green Bay that houses their various businesses. Since 1985, Schleis has parked a semi-trailer on his property that he uses for storage. The City inspected the trailer several times between 1997 and 1998 and found that the condition of the trailer was unchanged. Its taillights were missing and its tires were flat.

¶3 The City issued Schleis a citation for violating GREEN BAY, WI, ORDINANCE § 27.21(2)(b),[2] that provides:

> (b) Private Streets and Property. No person in charge or control of any property within the City, whether as owner, tenant, occupant, lessee, or otherwise, shall allow any partially dismantled, non-operating, wrecked, junked, discarded, or unlicensed vehicle to remain on such property within the City longer than 72 hours. This section shall not apply to a vehicle in an enclosed building, a vehicle on the premises of a business enterprise operated in a lawful place or depository maintained in a lawful place and manner when necessary to the operation of such business enterprise, a vehicle in an appropriate storage place or depository maintained in a lawful place and manner by or

[2] Schleis quotes GREEN BAY, WI, ORDINANCE § 27.21(2)(b) in his brief unaccompanied by record citation. *See* WIS. STAT. § 809.19(1)(e). The substance of the ordinance and the fact that it was adopted by the City of Green Bay is not disputed. Therefore, we derive the ordinance language from Schleis's brief; our citation is incomplete because his brief fails to identify the year it took effect.

> in behalf of the City, nor to a dismantled, non-operating vehicle which is licensed as an antique or collector's auto, and which is in the process of being restored.

¶4 After a municipal court found Schleis guilty of violating the ordinance, Schleis appealed to the circuit court. A six-person jury returned a verdict finding that the trailer was partially dismantled, non-operating and not necessary to the operation of Schleis's business. The circuit court entered judgment on the verdict, imposed a $200 forfeiture plus costs and denied Schleis's motion for a new trial. This appeal followed.

JURY INSTRUCTIONS

¶5 At trial, Schleis objected to the following instructions:

> A partially dismantled vehicle is a vehicle that has at least one, but not all, of its component parts either disconnected or removed. It is for you to determine whether the vehicle in question was partially dismantled.
>
> A non-operating vehicle is a vehicle that is incapable of immediate use on a highway. And it is for you to determine whether the vehicle in question was non-operating.

¶6 Schleis contends that the circuit court's definition of "dismantled" and "non-operating" was overly broad and not within the meaning of the ordinance. We are unpersuaded.

¶7 The following principles govern our review of assertions of instructional error:

> A trial court has broad discretion when instructing a jury. *White v. Leeder*, 149 Wis. 2d 948, 954, 440 N.W.2d 557, 559 (1989). We will not reverse if the instruction, as a whole, correctly states the law. *Id.* at 954-55, 440 N.W.2d at 559-60. If, however, the instruction is erroneous and

> probably misleads the jury, we will reverse because the misstatement constitutes prejudicial error. *Leahy v. Kenosha Memorial Hospital*, 118 Wis. 2d 441, 452, 348 N.W.2d 607, 613 (Ct. App.1984). A new trial is warranted when an erroneous instruction is prejudicial. *Hale v. Stoughton Hospital Ass'n, Inc.*, 126 Wis. 2d 267, 278, 376 N.W.2d 89, 95 (Ct. App. 1985).

Young v. Professionals Ins. Co., 154 Wis. 2d 742, 746, 454 N.W.2d 24 (Ct. App. 1990).

¶8 Here, the challenged terms in the jury instructions were not defined by the ordinance. "The rules for the construction of statutes and ordinances are the same." ***Tesker v. Town of Saukville***, 208 Wis. 2d 600, 605, 561 N.W.2d 338 (Ct. App. 1997). "In the absence of a statutory definition, the common and generally understood meaning of a word should be applied in the construction of a statute." ***State v. Childs***, 146 Wis. 2d 116, 120, 430 N.W.2d 353 (Ct. App. 1988) (citation omitted). "The ordinary and common meaning of a word may be established by the definition in a recognized dictionary." ***Id.***

¶9 Resort to a recognized dictionary yields the following definitions. "To dismantle" includes: "to strip of … equipment or significant contents." WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 651 (Unabr. 1998). A definition of "partial" means: "[A]ffecting a part rather than the whole of something : not total or entire." ***Id.*** at 1646. Thus, a vehicle stripped of a piece of equipment would be partially dismantled under the above definitions. Accordingly, we conclude that the trial court's instruction reasonably reflects an ordinary and common meaning of the phrase "partially dismantled."

¶10 The term "to operate" means "to cause to function usu. by direct personal effort : work <[operate] a car>." ***Id.*** at 1581. The prefix "non-" means

"not." ***Id.*** at 1535. The definition of "direct" includes the following: "marked by absence of an intervening agency, instrumentality, or influence : immediate." ***Id.*** at 640. According to the common and ordinary meaning of the term, a non-operating car is one that cannot be caused to function by immediate personal effort. We are satisfied that the trial court's instructions reasonably reflected the meaning of the ordinance.

¶11 Schleis argues that the court's definitions yield an absurd result. For example, he claims that every trailer would be in violation of the ordinance because of the necessary delay in hooking it up. Schleis fails to recognize, however, that the ordinance would not apply unless the trailer is "*incapable* of immediate use on a highway." (Emphasis added.) Under the court's instruction, incapacity must be proved. The court's instruction does not require the trailer to pull itself down the highway.

¶12 Schleis's argument also fails to recognize that the ordinance does not apply unless the vehicle's non-operating condition has been present for a continuous period of at least seventy-two hours and the vehicle had not been moved inside an enclosed structure. *See* GREEN BAY, WI, ORDINANCE § 27.21(2)(b). The ordinance evinces an intent to control lengthy outdoor storage of non-operating vehicles. The court's interpretation of its terms is consistent with this purpose. We are unpersuaded that the court's interpretation yields absurd results.[3]

[3] Schleis also weaves into his argument the assertion that missing tail lights do not render the trailer inoperable. Schleis does not, however, develop a challenge to the sufficiency of the evidence. We are satisfied that sufficient evidence supports the verdict.

¶13 Schleis further argues that the trial court misinstructed the jury when it equated "necessary to the operation of a business" with "essential or indispensible" to its operation. In his defense, Schleis claimed that the trailer was necessary to the operation of his business and thus fell within the exceptions to the ordinance's prohibitions. Over Schleis's objection, the trial court instructed the jury that the vehicle must be an "essential or indispensable item in the operation of the business enterprise." Schleis maintains a more reasonable interpretation of the term "necessary" is "not [to] be absolutely necessary or indispensable to the business, but rather, that it be 'helpful to' or 'useful in'" the business enterprise. We are unpersuaded. The trial court's definition of necessary is consistent with a recognized dictionary definition. *See* WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 1510-11 (Unabr. 1998) ("absolutely required : essential, indispensable"). As a result, the instruction is not erroneous. It is also consistent with the ordinance's purpose that businesses do not keep unsightly junked vehicles outdoors when they are not indispensable or essential to the business's operation.

BURDEN OF PROOF

¶14 Next, Schleis argues that the trial court's instructions misallocated the burden of proof. It instructed that Schleis must establish the exception "to a reasonable certainty by evidence that's clear, satisfactory, and convincing." Schleis contends that the burden should have been placed on the City to disprove his affirmative defense. He acknowledges that, in general, in a civil case it is the defendant's burden to establish an affirmative defense. *See* ***Crisp v. Checker Cab Co.,*** 10 Wis. 2d 603, 609, 103 N.W.2d 527 (1960). He contends, nonetheless, that his ordinance violation proceeding is "quasi-criminal" and, therefore, should follow the criminal rule of imposing the burden to disprove the exception on the prosecutor. We disagree.

¶15 "This court has held on numerous occasions that a proceeding to enforce a municipal ordinance is a civil action." ***State v. Thierfelder***, 174 Wis. 2d 213, 221, 495 N.W.2d 669 (1993). In practice, our supreme court "has consistently treated the proceedings to enforce an ordinance as a civil action." ***Neenah v. Alsteen***, 30 Wis. 2d 596, 601-02, 142 N.W.2d 232 (1966). While our courts have occasionally characterized an ordinance violation case as "quasi-criminal," they have done so in the context of an ordinance violation that has a criminal statutory counterpart. *See* ***Janesville v. Wiskia***, 97 Wis. 2d 473, 482-83, 293 N.W.2d 522 (1980); ***Milwaukee v. Cohen***, 57 Wis. 2d 38, 46, 203 N.W.2d 633 (1973). Neither party identifies any criminal statutory counterpart. We are satisfied that the trial court did not err when it required Schleis to bear the burden of proving his affirmative defense.

STANDARD OF PROOF

¶16 Schleis next claims that the trial court erred when it imposed the middle burden of proof, i.e., that Schleis establish his exception by clear, satisfactory and convincing evidence. He alleges the correct standard is the lesser preponderance standard. An allegedly erroneous jury instruction warrants reversal, however, only if the error was prejudicial. *See* ***Finley v. Culligan***, 201 Wis. 2d 611, 620, 548 N.W.2d 854 (Ct. App. 1996). Here, the record demonstrates that the error, if any, is harmless.

¶17 Schleis maintains that the erroneous instruction was prejudicial because if correctly instructed, a jury could have found that the trailer was necessary to his business, as demonstrated by the following evidence:

> The Schleises have used the trailer for storage since 1976. They store certain items used for repairs and valuable antique pieces in the trailer because it is convenient, safe,

> and locked. The trailer is more secure for these items than the building because others have access to the various areas of the building on the property, but not to the trailer. The trailer also is needed for storage because they have no space available in the unrented portion of the building without making materials already stored there inaccessible.
>
> The Schleises also have the trailer as a backup refrigeration unit should they need it in connection with the liquor business.

¶18 We are not persuaded. Accepting Schleis's assertions of fact as true, no reasonable jury could find that the trailer was necessary to the operation of his business within the meaning of the ordinance. While the jury could accept as true that Schleis's business needs storage space, there is no evidence that the trailer was the only means to accomplish this objective. There is no evidence that Schleis would not have been able to erect a storage shed, build an addition, or rent space elsewhere. Schleis's evidence, taken as true, fails to demonstrate that the trailer was indispensable or essential to his business operation under any standard of proof. Accordingly, the court's instruction to the middle burden, rather than the lowest burden, is not prejudicial error. *See* ***Burg v. Miniature Precision***

Components, Inc., 111 Wis. 2d 1, 12, 330 N.W.2d 192 (1983) (whether the proof meets a legal standard is a question of law).[4]

By the Court.—Judgment and order affirmed.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)5.

[4] Schleis also argues that he is entitled to a twelve-person rather than a six-person jury. He contends that previous decisions of our court are wrong in excluding forfeiture proceedings from art. I, § 5. *See* ***Kenosha v. Leese***, 228 Wis. 2d 806, 811-12, 598 N.W.2d 278 (Ct. App. 1999). While acknowledging that we are bound by our prior rulings, *see* ***Cook v. Cook***, 208 Wis. 2d 166, 560 N.W.2d 246 (1997), he nonetheless raises this objection to preserve the issue of further review. Given that we are bound by our previous decisions, we do not address the issue.