Circuit Court for Montgomery County
Case No. C-15-FM-23-807912

UNREPORTED

IN THE APPELLATE COURT

OF MARYLAND*

No. 1556

September Term, 2023

TANYA NELSON

v.

DANIEL NELSON

Wells, C.J.
Graeff,
Alpert, Paul E.
(Senior Judge, Specially Assigned),

JJ.

Opinion by Graeff, J.

Filed: August 16, 2024

*This is an unreported opinion. This opinion may not be cited as precedent within the rule of stare decisis. It may be cited for its persuasive value only if the citation conforms to Rule 1-104(a)(2)(B).

On September 15, 2023, in the Circuit Court for Montgomery County, Tanya Nelson, appellant, was found to be in constructive criminal contempt for violating the terms of a protective order. In a subsequent hearing, the court found that appellant had complied with the terms of the protective order since the contempt hearing and it imposed no further contempt sanctions.

On appeal, appellant presents the following questions for this Court's review:

> 1. May the finding of criminal contempt stand where the circuit court violated Md. Rule 15-205 and Appellant's due process rights?
>
> 2. May the finding of criminal contempt stand where the circuit court violated Appellant's right to counsel and Appellant's right to a jury trial?
>
> 3. Was the evidence insufficient to sustain the conviction for criminal contempt?
>
> 4. Did the circuit court err in trying Appellant *in absentia*?

For the reasons set forth below, we shall vacate the judgment of the circuit court.

FACTUAL AND PROCEDURAL BACKGROUND

Appellant and Daniel Nelson were formerly married, and they have two children together. On September 19, 2022, the court granted Mr. Nelson sole legal custody and primary physical custody of the children, with appellant having supervised visitation. On November 22, 2022, the circuit court granted Mr. Nelson an absolute divorce from appellant.

I.

Protective Order and Petition for Contempt

On March 7, 2023, Mr. Nelson filed a petition for a protective order against appellant. Mr. Nelson alleged that appellant had assaulted him while attempting to force her way into his home.

On March 14, 2023, the circuit court held a hearing on Mr. Nelson's petition. The court granted the petition and entered a final protective order, which provided, among other things, that appellant shall not "contact, attempt to contact, or harass (in person, by telephone, in writing, or by any other means) DANIEL NELSON except to facilitate any child visitation ordered below."

On August 18, 2023, Mr. Nelson filed a petition for constructive civil contempt against appellant, alleging that she violated the protective order by sending harassing text messages to him and his extended family. On August 21, 2023, the court issued a show cause order, directing appellant to appear in court on September 15, 2023, and show cause why she should not be held in contempt of the court's March 14, 2023 order.[1]

On August 30, 2023, appellant filed a motion requesting dismissal of the petition for contempt. She alleged that the protective order "allows for contact to facilitate child visitation," and "[a]ll communication[s] sent to Daniel Nelson were requests to facilitate

[1] The show cause order included a notice pursuant to Md. Rule 15-206 informing appellant, *inter alia*, that it was alleged that she was in contempt and should go to jail, that she had a right to counsel at the contempt hearing, and that she could be subject to arrest if she did not appear at the hearing.

child visitation." She also argued that the communications sent to Mr. Nelson's family were "initiated by" him. On August 31, 2023, the court denied the motion.

On September 8, 2023, appellant filed a motion requesting a continuance of the September 15, 2023 hearing "until the completion of the investigation of fraud reported to the Maryland Administrative Offices of the Courts." Appellant requested that the court reschedule the hearing to a date after January 16, 2024. She also filed a motion to "shorten the time for a ruling on the motion for a continuance" of the hearing on the contempt petition. On September 12, 2023, the court denied appellant's motion to shorten the time for a ruling on the motion for a continuance.

II.

Contempt Hearings

On September 15, 2023, the circuit court held a hearing on Mr. Nelson's contempt petition. The court noted that appellant's motion for a continuance was pending, but appellant was not present in the courtroom. Mr. Nelson informed the court that appellant had been in the courtroom earlier, but the court proceeded without her and denied her motion for a continuance.

During the hearing, Mr. Nelson testified that appellant had sent him several text messages following entry of the final protective order. Copies of those text messages were admitted into evidence. In one message, appellant told Mr. Nelson that "it's not good for me to agree to your limited interpretations of the current custody order," and "[i]t is better that I follow the same rules that they already made up until they realize how dumb they

are." In another message, appellant told Mr. Nelson that, although she had tried "to be in our coparent dynamic," she would "continue to oppose the current court order." She proposed that "you and I could circumvent the Court by having a private discussion to come up with solutions that actually serve the best interests of our kids." She asked for a good time to drop off a lasagna that she made for the kids, then texted that she did not need "to regularly inform the kids that you would not allow me to get the lasagna I made for them." In other messages, appellant made comments that Mr. Nelson characterized as harassing and unrelated to visitation with the children under the agreed terms of the custody order.

At the conclusion of the hearing, the circuit court issued the following ruling:

> The Court is going to find that [appellant] did, and certainly by her language, she clearly understood what she could and couldn't do regarding contacting [Mr. Nelson] and she clearly indicated that she was not going to abide by the Court's order in this case. I am going to find her in contempt at this time.
>
> * * *
>
> All right. I'm going to find that, due to the statements that she made in these communications, that [appellant] is guilty of criminal contempt.

During scheduling discussions for the upcoming sanctions hearing, but before the proceeding was concluded, appellant appeared in the courtroom. The judge instructed appellant to sit down, and he informed her that he had found her in criminal contempt. Appellant explained that she had been at the court since 9:30 a.m., but she did not hear the case called, and she went outside to wait. The court again advised that it had found her guilty of criminal contempt, and it scheduled a sanctions hearing for September 29, 2023.

That same day, the court entered an order stating that appellant was "in contempt." The courtroom hearing sheet stated that the court had found appellant to be "in criminal contempt."

On September 29, 2023, the parties returned to court for a sanctions hearing. Appellant appeared unrepresented. In response to the court's question whether she intended to represent herself, appellant stated that she was representing herself based on the information provided to her as she "explored [her] options for representation."

The court then heard from Mr. Nelson, who stated that appellant had "ceased . . . the harassing behavior." He asked the court to order mental health assistance for appellant. The court explained that it did not have the authority to order mental health treatment in the absence of evidence that appellant was a danger to herself or others. It then proceeded to address the issue of sanctions for the contempt finding.

Although the court stated at the September 15, 2023 hearing that it found appellant in constructive *criminal* contempt, the court discussed sanctions in the context of constructive *civil* contempt, stating the following:

> Civil contempt is the power the [c]ourt has to compel people to behave in a certain way. It's generally not to punish people, that would be criminal contempt. Civil contempt, which is what we have right here, is getting somebody to do something.

Mr. Nelson reiterated that, since the contempt hearing, appellant had been complying with the protective order.

Appellant stated that she did not believe that she had violated the protective order because she "was allowed to contact Mr. Nelson with respect to facilitating visitation

between myself and the children." The court told her that, pursuant to the protective order, she could contact Mr. Nelson regarding pick up and drop off times for the children, but discussions about dropping off food did not involve child visitation. Appellant indicated that, since she was not present at the contempt hearing, she could not review the communications provided, and she stated that, in her experience, Mr. Nelson sometimes edited information provided to the court. Nevertheless, she stated that, since the September 15, 2023 contempt hearing, she had "ceased all communication with Mr. Nelson with the exception of calling . . . or sending text messages, specifically with respect to having access to communicate with our shared children."

The court found that jail time with a purge provision would not do anything to compel appellant to comply with the protective order. The court stated its belief that appellant had "changed her conduct" and would continue to "stay within the limits placed by the protective order." Based on those findings, the court ordered that no further contempt sanctions were to be imposed against appellant.

This timely appeal followed.

DISCUSSION

Before addressing appellant's contentions, we briefly discuss the law on contempt. As we explained in *Maryland Department of Health v. Myers*, contempt proceedings can be classified as direct or constructive and as criminal or civil:

> Direct contempt occurs when the contempt is "committed in the presence of the judge presiding in court or so near to the judge as to interrupt the court's proceedings." Rule 15-202(b). Direct contempts may be summarily punished to protect the orderly administration of justice and vindicate the

dignity of the court. *Smith v. State*, 382 Md. 329, 338 (2004); *Espinosa v. State*, 198 Md. App. 354, 387 (2011).

'"Constructive contempt' means any contempt other than a direct contempt." Rule 15-202(a). In constructive contempt proceedings, the accused contemnor must have "an opportunity to challenge the alleged contempt and show cause why a finding of contempt should not be entered." *Fisher v. McCrary Crescent City, LLC*, 186 Md. App. 86, 119 (2009), *cert. denied*, 562 U.S. 1060 (2010).

Civil contempt proceedings are "intended to preserve and enforce the rights of private parties to a suit and to compel obedience" with court orders and decrees. *Dodson v. Dodson*, 380 Md. 438, 448 (2004) (quoting *State v. Roll and Scholl*, 267 Md. 714, 728 (1973)). "Civil contempt 'proceedings are generally remedial in nature and are intended to coerce future compliance.'" *Royal Inv. Group, LLC v. Wang*, 183 Md. App. 406, 447 (2008) (quoting *Roll*, 267 Md. at 728), *cert. granted*, 408 Md. 149 (2009), *appeal dismissed*, 409 Md. 413 (2009). Regardless of the penalty imposed in a civil contempt action, it "must provide for purging." *Dodson*, 380 Md. at 448. A purge provision offers the party "the opportunity to exonerate him or herself, that is, 'to rid him or herself of guilt and thus clear himself of the charge.'" *Jones v. State*, 351 Md. 264, 281 (1998) (quoting *Lynch v. Lynch*, 342 Md. 509, 520 (1996)).

Criminal contempt proceedings, in contrast, are intended to '"punish for past misconduct, which may no longer be capable of remedy."' *Bradford* [*v. State*, 199 Md. App. 175, 193 (2011)] (quoting *Arrington v. Dep't of Human Res.*, 402 Md. 79, 93 (2007)). The sanctions in these proceedings are "punitive in nature," and therefore, they do not require a purging provision. *Id.* at 194 (quoting *Arrington*, 402 Md at 83). Unlike civil contempt, which generally must be proved by a preponderance of the evidence, the burden of proof in criminal contempt proceedings is beyond a reasonable doubt. *Gertz v. Md. Dep't of Env't*, 199 Md. App. 413, 423, *cert. denied*, 423 Md. 451 (2011).[2]

[2] "Maryland Rule 15-207(e)(2) sets forth an exception to the rule that civil contempt must be proved by a preponderance of the evidence. When the constructive civil contempt proceeding is to enforce a spousal or child support order, the burden of proof is 'clear and convincing evidence that the alleged contemnor has not paid the amount owed.'" *Md. Dep't of Health v. Myers*, 260 Md. App. 565, 615 (quoting Rule 15-207(e)(2)), *cert. denied*, 487 Md. 267 (2024).

260 Md. App. 565, 614-15 (internal citations omitted) (quoting *State v. Crawford*, 239 Md. App. 84, 109-11 (2018)), *cert. denied*, 487 Md. 267 (2024).

Here, there were conflicting statements about the contempt finding. Although Mr. Nelson filed a petition for constructive civil contempt, and the court discussed civil contempt at the sanctions hearing, the court found appellant guilty of criminal contempt.[3]

Appellant contends that the court erred in finding her guilty of constructive criminal contempt for several reasons. She argues that the court violated Md. Rule 15-205 and her due process rights, and it erred in trying her *in absentia*. Appellant also asserts that the evidence was insufficient to support the finding of constructive criminal contempt.

"A court's interpretation and application of a statute or case law in its finding of contempt is reviewed *de novo* for legal error." *Md. Dep't of Health*, 260 Md. App. at 614. The interpretation of the Maryland Rules governing contempt is also a question of law subject to *de nov*o review. *Mayor of Baltimore v. Prime Realty Assocs., LLC*, 468 Md. 606, 616 (2020).

I.

Procedure

Although constructive civil contempt proceedings may be initiated by "[a]ny party to an action in which an alleged contempt occurred," Md. Rule 15-206(b)(2), constructive criminal contempt proceedings can be initiated only by the court, the State's Attorney, the

[3] The court stated its finding of criminal contempt three times during the September 15, 2023 hearing, and the courtroom hearing sheet and docket entry also stated a finding of criminal contempt.

Attorney General, or the State Prosecutor. Rule 15-205(b). Such a proceeding must "be docketed as a separate criminal action" and cannot "be included in any action in which the alleged contempt occurred." Rule 15-205(a). The order or petition must contain the information required in a charging document, as set forth in Rule 4-202(a), and it must be served with a summons or a warrant and in compliance with Rule 4-212. *See* Rule 15-205(d). In addition, in a constructive criminal contempt proceeding, a court must comply with the provisions of Rule 4-215, regarding a defendant's waiver of counsel, and Rule 4-246, relating to a defendant's waiver of his right to a trial by jury. *See* Rule 15-205(e), (f).

The contempt proceedings here did not comply with Rule 15-205. *See Pinkney v. State*, 427 Md. 77, 87 (2012) (the Maryland Rules are "precise rubrics" that must be followed). The criminal contempt proceeding was not docketed as a separate criminal action, and it was not initiated by the court, the State's Attorney, the Attorney General, or the State Prosecutor. Rule 15-205(b)(2)-(5).[4] Moreover, neither the show cause order nor the petition for contempt served on appellant indicated that she was being charged with criminal contempt as required by Rule 15-205(d). *See Dorsey v. State*, 356 Md. 324, 349 (1999) (criminal contempt conviction reversed where petition failed to notify defendant that he was being charged with a crime and court improperly converted constructive civil contempt proceedings into constructive criminal contempt proceedings).

[4] Because the court did not properly initiate a criminal contempt proceeding, a prosecutor was not appointed under Rule 15-205(c), and the State never became a party to the matter below. The State, therefore, is not a party to this appeal.

Moreover, the court abused its discretion in finding appellant in constructive criminal contempt *in absentia.* "Trial *in absentia* is not favored." *Pinkney v. State*, 350 Md. 201, 218 (1998). Rule 4-231(b) provides that a "defendant is entitled to be physically present in person at a preliminary hearing and every stage of trial, except (1) at a conference or argument on a question of law; [or] (2) when a nolle prosequi or stet is entered pursuant to Rules 4-247 and 4-248."

To be sure, a defendant may waive the right to be present. Rule 4-231(c) provides as follows:

> **Waiver of right to be present. —** The right to be present under section (b) of this Rule is waived by a defendant:
> (1) who is voluntarily absent after the proceeding has commenced, whether or not informed by the court of the right to remain; or
> (2) who engages in conduct that justifies exclusion from the courtroom; or
> (3) who, personally or through counsel, agrees to or acquiesces in being absent.

Before a court may try a defendant *in absentia*, it "must both (i) find a knowing and voluntary waiver of the right to be present at trial and (ii) exercise sound discretion in determining whether to proceed" in the absence of the defendant. *Pinkney*, 350 Md. at 213. "[V]oluntary absence must be clearly established and will not be presumed." *Id.* at 217 (quoting *Haley v. State*, 40 Md. App. 349, 361 (1978)). This principle "is especially pertinent in a criminal case where the entire trial is conducted without the presence of the defendant" and where constitutional guarantees such as the right to confront witnesses are implicated. *Id.* at 214.

When determining whether a defendant waived the right to be present, the court "must generally be satisfied of two primary facts: that the defendant was aware of the time and place of trial, and that non-appearance was both knowing and sufficiently deliberate to constitute an agreement or acquiescence to the trial court proceeding in his or her absence." *Id.* at 215-16. Although there are no required "investigatory measures" that a court must take before finding a voluntary waiver of the right to be present, "the record must reflect that adequate inquiry has been made to ensure that a defendant's absence is not in fact involuntary. A court cannot presume waiver from a silent record." *Id.* at 216-17.

Here, although the record supports the court's finding that appellant was aware of the time and place of the hearing, it does not indicate that appellant knowingly and voluntarily waived her right to appear. At the start of the hearing, Mr. Nelson informed the court that appellant "was in the courtroom" earlier. The court stated: "It seems like [appellant] just assumed that we were going to grant [her motion for a continuance]. But I can't hear from her because she's not here . . . ." The court then proceeded with the contempt hearing.

At the end of the hearing, after the court had already made its contempt finding, appellant appeared in the courtroom. She explained that she had been at the courthouse since 9:30 a.m., and that she went outside to wait for the case to be called, but she "didn't hear it called."

Given that Mr. Nelson stated that he saw appellant at the courthouse earlier that morning and that appellant was actively engaged the proceedings against her, filing

motions to dismiss the contempt petition and for a continuance of the hearing, the court should have made an effort to locate or reach appellant or determine why she was not present when the hearing began. Without any such inquiry, the court did not have a sufficient basis to presume appellant voluntarily waived her appearance based on her absence alone. *Pinkney*, 350 Md. at 223 ("[I]nadequate inquiry into [defendant]'s whereabouts on the morning of trial did not give it a sufficient basis to conclude that his absence was the product of voluntary choice.").

Moreover, even if a court finds that a defendant waived the right to be present at trial, that is not the end of the inquiry. *Id.* at 218. The court must next "exercise . . . careful discretion," *id.* at 221, to determine "whether to proceed in the defendant's absence," recognizing "that the public interest and confidence in judicial proceedings is best served by the presence of the defendant at trial." *Id.* at 218. "The State's legitimate interest in 'keeping the trial calendar moving' is not, standing alone, sufficient justification to try a defendant *in absentia*." *Id.* at 220. "Trial *in absentia* should be the extraordinary case." *Id.* at 221.[5]

[5] We note that appellant was not represented by an attorney in the contempt proceeding, and therefore, "no one was present . . . to object to inadmissible evidence [and] to cross-examine [Mr. Nelson]." *Pinkney v. State*, 350 Md. 201, 223 (1998). This is a "weighty factor for the court to consider in deciding whether to proceed in the defendant's absence." *Id.* at 223-24. Here, the court did not consider this factor at all.

Under these circumstances, we conclude that the court erred in finding appellant in contempt *in absentia*. Based on this error, and the failure to comply with Rule 15-205, we vacate the court order finding appellant in constructive criminal contempt.[6]

II.

Sufficiency of the Evidence

Appellant next claims that the evidence adduced at trial was insufficient to sustain the court's finding of constructive criminal contempt. In that regard, she argues that the evidence failed to establish that she willfully or deliberately failed to comply with the protective order. Although we have vacated the finding of constructive criminal contempt, we need to address appellant's sufficiency claim because it implicates double jeopardy principles. *Scott v. State*, 454 Md. 146, 167 (2017).

"The standard for appellate review of evidentiary sufficiency is whether, after viewing the evidence in the light most favorable to the prosecution, *any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *Scriber v. State*, 236 Md. App. 332, 344 (2018) (quoting *Darling v. State*, 232 Md. App. 430, 465 (2017)). *Accord Ashford v. State*, 358 Md. 552, 570-71 (2000). The relevant question "is not whether the evidence *should have or probably would have* persuaded the majority of fact finders but only whether it *possibly could have* persuaded *any* rational fact finder." *Scriber*, 236 Md. App. at 344 (quoting *Darling*, 232 Md. App. at 465). "When

[6] We note that, even if the court mistakenly found appellant in constructive criminal contempt and meant to find her in civil contempt, such finding could not be upheld here because there was no purge provision. *Myers*, 260 Md. App. at 615.

making this determination, the appellate court is not required to determine 'whether *it* believes that the evidence at the trial established guilt beyond a reasonable doubt.'" *Roes v. State*, 236 Md. App. 569, 583 (2018) (quoting *State v. Manion*, 442 Md. 419, 431 (2015)). "This is because weighing the credibility of witnesses and resolving conflicts in the evidence are matters entrusted to the sound discretion of the trier of fact." *Scriber*, 236 Md. App. at 344 (quoting *Darling,* 232 Md. App. at 465).

Here, the court's criminal contempt finding was based on appellant's violation of the terms of the protective order. To sustain that finding, the evidence needed to show that appellant acted with the requisite intent in violating the protective order. *Dorsey*, 356 Md. at 352. In other words, there needed to be "a deliberate effort or a wil[l]ful act of commission or omission by the alleged contemnor committed with the knowledge that it would frustrate the order of the court." *Id.* (quoting *In re Ann M.*, 309 Md. 564, 569 (1987)). This *mens rea* requirement, "like scienter generally in criminal cases . . . 'may be proven by circumstantial evidence and by inferences drawn therefrom.'" *Id.* (quoting *Dawkins v. State*, 313 Md. 638, 651 (1988)).

Viewing the evidence in the light most favorable to the State, we hold that the evidence was sufficient to support the court's finding that appellant acted with the requisite intent. The protective order prohibited appellant from contacting Mr. Nelson for any reason other than to facilitate visitation with the children pursuant to the terms of the parties' custody order. Mr. Nelson testified that appellant contacted him by text message and came to his residence for reasons unrelated to visitation. The text messages, which

were admitted into evidence, show that appellant made comments indicating that she was unhappy with the custody order, that she would continue to oppose it, and that she and Mr. Nelson should "circumvent the Court" and privately discuss solutions involving the children. This evidence supported the finding that appellant's contacts with Mr. Nelson constituted a willful violation of the court's order. *See id.* The evidence was sufficient to support the court's finding of criminal contempt.

JUDGMENT OF THE CIRCUIT COURT FOR MONTGOMERY COUNTY VACATED; COSTS TO BE PAID BY THE COUNTY.