UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 0347

September Term, 2016

WILLIAM HUSKEY

v.

STATE OF MARYLAND

Meredith,
Beachley,
Davis, Arrie W.
(Senior Judge, Specially Assigned),

JJ.

Opinion by Meredith, J.

Filed: December 29, 2016

The State charged William Huskey, appellant, with criminal contempt, and two counts of failure to pay child support in violation of Maryland Code (1984, 2012 Repl. Vol.), Family Law Article ("F.L."), § 10-203. Following a bench trial in the Circuit Court for Frederick County, the court found appellant guilty of all charges. The court imposed a prison sentence of eight years, with all but six months suspended, for criminal contempt; and concurrent suspended sentences of three years for each of the two counts of failure to pay child support. Three weeks later, the court modified appellant's sentences to time served after he paid the outstanding $11,968.30 in child support arrears. Appellant noted this appeal and presents two issues for our review:

> 1. Was the evidence sufficient to sustain the convictions for criminal contempt and failure to provide child support?
>
> 2. Did the circuit court err in ordering separate sentences for criminal contempt and failure to provide child support?

For the reasons stated below, we conclude that there was insufficient evidence of willful nonpayment to sustain the convictions for criminal contempt and failure to provide child support. We will reverse the judgments of the circuit court. Appellant's second issue is, therefore, moot.

BACKGROUND

Appellant is the father of two children in common with Stephanie Lindsay ("Mother").[1] At the time of trial, one child was 16 years old, and the other was 13 years old.

[1] We note that Mother's last name is spelled "Lenzi" in the transcript, but the record makes clear that "Lindsay" is the correct spelling.

In 2009, Mother filed a petition seeking child support from appellant. That litigation resulted in the entry of a consent order requiring appellant to pay child support in the amount of $250 per month, beginning on June 1, 2009. As of 2011, appellant was in arrears in payments, but Mother forgave that indebtedness.

Appellant's compliance with the consent order remained inconsistent throughout 2012 and into 2013. After August 2013, appellant paid very little child support. At trial in 2016, Krista Shup, an employee with the Frederick County Department of Social Services, testified that appellant had made no payments in 19 of the previous 25 months, and failed to fully pay in another six months. Ms. Shup stated that, from August 2013 until the date of trial – April 20, 2016 – appellant had paid a total of only $1,800 in child support.

The State charged appellant with criminal contempt for his failure to comply with the 2009 consent order, and two counts (one for each child) of failure to pay child support in violation of F.L. § 10-203. At trial, Mother testified that she and appellant did not have a speaking relationship. Mother expressed the opinion that appellant attempts to communicate with her only when he wants to negotiate some aspect of child support. Mother admitted that appellant speaks to the children via telephone, and he occasionally took the older child out to dinner. She also testified that she and the children twice saw appellant at sporting events, where he gave the children $20. Mother noted that, in one of his last communications, appellant expressed a desire to provide a car for the older child and also asked Mother to forego the child support payments. Mother also testified that appellant had worked previously and was not disabled.

The State introduced documentary evidence that appellant earned $1,890.00 in the third quarter of 2013. Additionally, the State introduced into evidence: a copy of appellant's resume, which was undated; a letter dated June 10, 2013, from MSI, Inc., offering appellant a job as a driver at a rate of $10.50 per hour; a letter dated August 7, 2013, from MSI, Inc., terminating appellant's employment because he had been a "no show"; and a 2013 W-2 tax form showing that appellant had earned wages of $2,432.22.

The court made the following findings:

> The evidence in this case – when – whenever there is – the Court or the fact finder is required to determine someone's mental state, as the Defense pointed out, the mens rea in this case, which, uh, for these counts is deliberate, knowing, and willful, um, that can be proven with direct evidence, but it can also be proven with circumstantial evidence. And the, the fact finder can also infer certain mental things, because we can never read[] anybody's mind, through the actions of the party whose mental – mens rea that we need to determine.
>
> In this case there is ample evidence that the **Defendant entered into a consent agreement to, uh, pay child support**. It was at **$250 a month**. **There was ample evidence that he did not do that on, generously, most occasions, um, that he had tried to enter into some negotiations to pay it on the side**, uh, with, uh, the mother in this case. Um, **there is evidence that the parties don't get along**. Um, **there is evidence that the Defendant was looking for other ways to pay it, to keep out of court**, which clearly shows, uh, a – certainly a knowingness.
>
> Um, but in this case **the Court does find, also, beyond a reasonable doubt, that the actions of the Defendant**, the facts of this case, uh, show me, be – uh, **prove beyond a reasonable doubt that he was deliberate and willful, also, in his failure to pay**. Uh, so the Court does find the Defendant guilty beyond a reasonable doubt of Count 1, 2, and 3.

(Emphasis added.)

After the court found appellant guilty of all charges, the court sentenced him as indicated above. The trial court set a purge amount of $11,968.30, which was the total

amount of child support in arrears. The court stated that it would modify appellant's sentence to time served if appellant paid this amount. Approximately three weeks after the trial, appellant did, in fact, pay that amount, and the court modified appellant's sentence accordingly.[2] This appeal followed.

STANDARD OF REVIEW

In reviewing the sufficiency of the evidence, we ask "'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.'" *Grimm v. State*, 447 Md. 482, 494-95 (2016) (quoting *Cox v. State*, 421 Md. 630, 656-57 (2011)). In making that determination, we "defer to the fact finder's 'resolution of conflicting evidence, and, significantly, its opportunity to observe and assess the credibility of witnesses.'" *Riley v. State*, 227 Md. App. 249, 256 (2016) (quoting *State v. Suddith*, 379 Md. 425, 430 (2004)), *cert. denied*, 448 Md. 726 (2016). Stated another way, "'when evaluating the sufficiency of the evidence in a non-jury trial, the judgment of the trial court will not be set aside on the evidence unless clearly erroneous[.]'" *State v. Manion*, 442 Md. 419, 431 (2015) (quoting *State v. Raines*, 326 Md. 582, 589 (1992)). But, "where the determination of the

[2] In civil contempt proceedings, the paying of the purge amount – *i.e.*, the amount necessary for the contemnor to avoid a finding of contempt – ordinarily serves to make moot the appeal, as there is no remedy this Court could order to rectify any error. *See Bradford v. State*, 199 Md. App. 175, 190 (2011). In criminal contempt proceedings, however, the contemnor faces other consequences, such as the existence of a conviction on his or her record, which may impact the defendant's employment, housing, or other opportunities. *See Bryant v. Howard Cnty. Dept. of Social Servs. ex rel Costley*, 387 Md. 30, 45 (2005) (citing *Williams v. Williams*, 63 Md. App. 220, 226 (1985), *aff'd*, 305 Md. 1 (1985)).

accused's guilt is formed entirely upon the basis of circumstantial evidence, such evidence must permit the trier of fact to infer guilt beyond a reasonable doubt, and must not rest solely upon inferences amounting to 'mere speculation or conjecture.'" *Manion, supra*, 442 Md. at 432 (quoting *Smith v. State*, 415 Md. 174, 185 (2010)).

DISCUSSION

The Court of Appeals has observed that there are two forms of contempt: "'direct and constructive – and two types of each form – criminal and civil. Direct contempt is committed in the presence of the trial judge . . . while constructive contempt is any other form of contempt.'" *Hammonds v. State*, 436 Md. 22, 33 (2013) (quoting *Smith v. State*, 382 Md. 329, 338 (2004)). "'Criminal contempt serves a punitive function, while civil contempt is remedial or compulsory and must provide for purging.'" *Id.* (quoting *Smith, supra*, 382 Md. at 338). The Court remarked in *Dodson v. Dodson*, 380 Md. 438, 452 (2004), that "constructive criminal contempt [] is the appropriate means to punish **a past willful violation** of a court order." (Emphasis added.) The Court of Appeals explained in *Ashford v. State*, 358 Md. 552, 562 (2000), that an act of criminal contempt is characterized by "**a deliberate effort or willful act of commission or omission and committed with the knowledge that it would frustrate the order of the court**." (Emphasis added) (citing *State v. Roll & Scholl*, 267 Md. 714, 730 (1973)).

Constructive criminal contempt is governed by Maryland Rule 15-205 and requires the filing of a separate action. *See* Rule 15-205(a). "[I]n order to convict an accused of constructive criminal contempt, [the State] has the burden of proving, beyond a reasonable doubt, **'a deliberate effort or a willful act of** commission or omission by **the alleged**

contemnor committed with the knowledge that it would frustrate the order of the court.'" *Dorsey v. State*, 356 Md. 324, 352 (1999) (emphasis added) (quoting *In re Ann M.*, 309 Md. 564, 569 (1987)). "These *mens rea* elements **must be established by evidence**, and cannot simply be 'assumed.' Nevertheless, … **they 'may be proven by circumstantial evidence and by inferences drawn therefrom**.'" *Id.* (emphasis added) (quoting *Dawkins v. State*, 313 Md. 638, 651 (1988)).

In this case, the trial court determined that there was sufficient evidence to convict appellant of criminal contempt and failure to pay child support stemming from his failure to abide by the child support consent order. Commenting on appellant's intent, the court identified the supporting evidence as follows: "There was ample evidence that he did not [pay] on, generally, most occasions, . . . that he had tried to enter into some negotiations to pay it on the side . . . . [T]he parties don't get along. . . . [T]here is evidence that the Defendant was looking for other ways to pay it, to keep out of court, which clearly shows … certainly a **knowingness**." (Emphasis added).

The State argues that the trial court correctly found that the evidence was sufficient to support appellant's convictions for criminal contempt and failure to pay child support. The State recognizes that the Court of Appeals found the evidence of criminal intent insufficient in *Ashford*, *supra*, and *Dorsey*, *supra*, but contends that there are several facts that distinguish this case from those. The State directs our attention to four features of this case: 1) Mother testified that appellant had originally avoided entering into the consent order and wanted to pay her only when she had a need for it; 2) Mother stated that appellant had contacted her about providing a car for the older child; 3) the prosecutor noted that

appellant had sought a continuance so that he could travel out-of-state for another child's sports tournament; and 4) appellant's resume indicated the sudden end of appellant's business in 2013 which, the State contends, supports an inference that the "unexplained termination of this source of income" was to avoid his child support obligations. We are not persuaded that these points support a rational finding beyond a reasonable doubt that appellant willfully refused to make payments that he had the financial capability to make.

In *Dorsey, supra*, the Court of Appeals consolidated the cases of Mr. Dorsey and Mr. Craft, two men who had been convicted of criminal contempt based on their failure to pay child support. 356 Md. at 329-41. The Court of Appeals reversed and remanded both cases so that the trial court could enter "not guilty" verdicts because of insufficient evidence. *Id.* at 355. In Mr. Dorsey's case, the State had presented evidence that he had failed to make support payments for ten months, and there was no employment information available in the State's records. *Id.* at 354. The State also noted that Mr. Dorsey's address was incorrect in agency records. *Id.* Mr. Dorsey had testified that he worked for a couple of weeks at a fast food restaurant, that he did not make much money there, and that, during the rest of the period in question, he was incarcerated or unable to find work. *Id.* at 354-55. The Court of Appeals concluded: "This testimony does not reasonably create an inference that Dorsey's failure to comply was accompanied by the *mens rea* necessary for a criminal contempt conviction." *Id.* at 355.

As for Mr. Craft, the State had proffered that he had failed to make support payments for nine months, that his weekly income was $80 to $100, and his weekly rent was $75. *Id.* The trial court recognized that Mr. Craft lacked the ability to pay, but convicted him on the

basis of the court's belief that he could have obtained a better-paying job. *Id.* The trial court took "judicial notice" that Mr. Craft could "probably" make $240 at another job, despite the lack of evidence regarding employment opportunities, his qualifications, or his ability to get to these other jobs. *Id.* The Court of Appeals determined that, even if the State's proffered statements were deemed evidence, they would be insufficient "to support an inference that Craft's failure to comply was accompanied by a contumacious intent." *Id.*

In *Ashford*, *supra*, Mr. Ashford was convicted of criminal contempt for failure to pay child support. 358 Md. at 555-56. At trial, a representative of the agency tasked with collecting Mr. Ashford's child support payments testified that he had failed to pay child support as ordered by the court, and he was in arrears in the amount of $19,240.25. *Id.* at 557-58. Furthermore, the representative stated that Mr. Ashford had failed to contact the agency to report any mental or physical disabilities that prevented him from abiding by the court order. *Id.* at 558.

The Court of Appeals concluded that there was insufficient evidence to sustain Ashford's conviction for criminal contempt because, in addition to proving the *actus reus*, the State needed to demonstrate Mr. Ashford's *mens rea* in willfully avoiding compliance with the court's order. *Id.* at 571. The Court stated: "The record is simply devoid of any evidence that the appellant's failure to pay was deliberate or willful." *Id.* at 572. The Court also found significant the fact that the State's only witness had no knowledge of Mr. Ashford's financial or employment situation since the date of his last payment. *Id.* at 574. "[I]n limiting its proof to lack of compliance with the order, the State has failed to offer

sufficient evidence to prove the crime of constructive criminal contempt beyond a reasonable doubt." *Id.*

We conclude, similarly, that there was insufficient evidence in the record in appellant's case to support a finding that appellant's failure to pay was willful beyond a reasonable doubt. As in *Ashford* and the cases of Dorsey and Craft, the State has merely introduced evidence that appellant had an obligation to pay child support, and that he failed to pay it. There was no evidence introduced at trial regarding appellant's employment efforts or financial situation since August 2013, and the meager evidence of income prior to that date was insufficient to prove that he had substantial assets from which he could have made payments. The State would have us infer that appellant's termination from MSI, Inc., and the ending of his own business prior to that were deliberate efforts to avoid paying child support, but there was no evidence to support this notion, and a fact-finder would need to resort to speculation to make that finding.

Moreover, the State's purported distinguishing facts in this case do not serve to separate this case from *Ashford* and *Dorsey*. The circuit court characterized appellant's negotiations with Mother as a "knowingness," not a willful or deliberate attempt to avoid paying child support. Although Mother testified that appellant offered to provide a car to the older child, there was no testimony that appellant would, or could, buy the car, much less the type or price of car appellant might provide. Indeed, when the State asked Mother specifically if appellant had offered to buy a car, she responded, "I don't know if he said 'buy.' He said, 'I am looking at a car for [the older child].'" As to appellant's request for a continuance to travel out-of-state, there was no evidence provided of the amount of

appellant's expenses for this trip. Although the State's evidence included testimony from the children's mother that appellant attempted to negotiate child support payments and asked Mother to drop the child support, a party's desire to pay less does not rise to the level of a contumacious intent to frustrate the authority of the court. Finally, as we have noted, there was no evidence presented as to why appellant's business ended in 2013 or what efforts he had taken to become employed since August 2013.[3]

We conclude, therefore, that there was insufficient evidence to sustain appellant's conviction for criminal contempt.

For the same reason, we reverse the two convictions for failure to pay child support. F.L. § 10-203(a) provides: "A parent may not **willfully** fail to provide for the support of his or her minor child." (Emphasis added). As we have noted above, the State did not produce sufficient evidence to demonstrate that appellant's failure to pay child support was the result of a willful or deliberate effort to avoid paying it. Accordingly, we reverse appellant's convictions for these charges, as well.

JUDGMENTS OF THE CIRCUIT COURT FOR FREDERICK COUNTY REVERSED. COSTS TO BE PAID BY FREDERICK COUNTY.

[3] The State asserts in its brief that, after the trial, appellant, facing time in jail, was somehow able to pay the arrearage of $11,968.30. But this was not in evidence at the time the court found appellant guilty, and cannot be considered by us as evidentiary support for the trial court's findings made at the close of evidence.