STATE OF MICHIGAN

COURT OF APPEALS

IN RE CONTEMPT OF PETER C. KLAMKA.

PETER C. KLAMKA,

Plaintiff-Appellant,

v

SHONDELA MORTON,

Defendant-Appellee.

UNPUBLISHED
November 17, 2011

No. 299174
Washtenaw Circuit Court
LC No. 09-000650-DM

Before: WHITBECK, P.J., and MURRAY and DONOFRIO, JJ.

PER CURIAM.

Plaintiff Peter C. Klamka appeals as of right the order finding plaintiff in criminal contempt after plaintiff stopped payment on child support checks made payable to defendant Shondela Morton. We affirm.

Plaintiff argues that neither he nor his attorney was aware that the trial court was conducting a criminal contempt proceeding until nearly the conclusion of the hearing. Thus, convicting plaintiff of criminal contempt was a violation of his due process rights. Further, plaintiff argues that because the only sanction sought by defendant for his actions was remedial, the trial court abused its discretion by finding plaintiff in criminal contempt. An issue is preserved for appellate review if it was raised before, addressed, or decided by, the trial court. *Polkton Charter Twp v Pellegrom*, 265 Mich App 88, 95; 693 NW2d 170 (2005). Whether plaintiff's due process rights were violated by lack of notice that the proceedings were for criminal contempt, and whether the trial court abused its discretion by finding criminal contempt even though the only sanction sought was remedial were issues that were not raised before, addressed, or decided by, the trial court. Therefore, these issues are not preserved. *Id*. Unpreserved issues are reviewed for plain error affecting plaintiff's substantial rights. *Veltman v Detroit Edison Co*, 261 Mich App 685, 690; 683 NW2d 707 (2004); *Kern v Blethen-Coluni*, 240 Mich App 333, 336; 612 NW2d 838 (2000).

Neither argument has any merit, and thus no plain error occurred. "'Criminal contempt differs from civil contempt in that the sanctions are punitive rather than remedial.'" *Porter v Porter*, 285 Mich App 450, 455; 776 NW2d 377 (2009), quoting *DeGeorge v Warheit*, 276 Mich

App 587, 591; 741 NW2d 384 (2007). Further, a party accused of criminal contempt must "be informed of the nature of the charge against him or her and … be given adequate opportunity to prepare a defense[.]" *Id*. at 456 (quotation marks and citations omitted). MCR 3.606(A), which is the court rule under which defendant brought her motion for an order to find plaintiff in contempt, refers to "punishment" and allows for a "bench warrant" to be issued, both of which imply criminal contempt. The sanctions sought by defendant were not merely remedial, but were also punitive. In fact, defendant moved for "substantial sanctions" in her motion and not just for the remedial sanction of receiving the money owed. In addition, shortly after the show cause hearing began, plaintiff's counsel argued that plaintiff could not be held in criminal contempt because he acted on the advice of counsel. Thus, he appeared prepared for a criminal contempt hearing. Moreover, before plaintiff testified, plaintiff's counsel directly inquired of the trial court whether the proceedings were criminal, and at that time plaintiff was informed by the trial court that the trial court considered the contempt proceedings to be criminal. Based on the foregoing, we conclude that plaintiff had adequate notice of the proceedings against him, *Porter*, 285 Mich App at 456, and there was no plain error affecting plaintiff's substantial rights. *Veltman*, 261 Mich App at 690; *Kern*, 240 Mich App at 336.

Plaintiff also argues that his right to confront witnesses against him was violated because defendant did not attend the hearing so he did not have the opportunity to cross-examine her. This unpreserved issue is reviewed for plain error affecting plaintiff's substantial rights. *Veltman*, 261 Mich App at 690; *Kern*, 240 Mich App at 336. Initially, we note that this issue was not contained in the statement of questions presented and is thus waived on appeal. *English v Blue Cross Blue Shield of Mich*, 263 Mich App 449, 459; 688 NW2d 523 (2004). Regardless, this issue has no merit.

The Confrontation Clause bars the admission of testimonial statements of a witness who did not appear at trial unless the witness was unavailable to testify, and the defendant had a prior opportunity for cross-examination. *People v Payne*, 285 Mich App 181, 197; 774 NW2d 714 (2009), citing *Crawford v Washington*, 541 US 36, 53-54; 124 S Ct 1354; 158 L Ed 2d 177 (2004) and *People v Walker (On Remand)*, 273 Mich App 56, 60-61; 728 NW2d 902 (2006). "Testimony" has been defined as a "solemn declaration or affirmation made for the purpose of establishing or proving some fact." *Crawford*, 541 US at 51 (quotation marks and citations omitted). Moreover, testimonial statements involve "statements that were made under circumstances which would lead an objective witness reasonably to believe that the statement would be available for use at a later trial." *Id*. at 52 (quotation marks and citations omitted). Plaintiff's statement made in an e-mail was "[y]ou now [sic] its my attorney. You stop the check we will go right back to court." The challenged statement cannot reasonably be understood to be a "solemn declaration or affirmation made for the purpose of establishing or proving some fact" because plaintiff clearly knew who was defendant's attorney. *Id*. at 51 (quotation marks and citations omitted). Further, the Confrontation Clause bars the admission of statements, not inferences that can be drawn from the statements. *Payne*, 285 Mich App at 197. And, although defendant indicated that if plaintiff stopped payment on the check, they would be going right back to court, "there is nothing to indicate that the statement[] … [was] made with the intent to preserve evidence for later possible use in court." *People v Bauder*, 269 Mich App 174, 182; 712 NW2d 506 (2005). Accordingly, defendant's statement was nontestimonial; thus, no Confrontation Clause violation occurred. *Id*.; *Crawford*, 541 US at 50-52, 59, 61, 68; *Walker*, 273 Mich App at 61-65. Hence, there was no plain error. *Kern*, 240 Mich App at 336.

Plaintiff also argues that defendant's statement in the e-mail was hearsay. We review this preserved issue for an abuse of discretion. *People v Lukity*, 460 Mich 484, 488; 596 NW2d 607 (1999). Questions of law are reviewed de novo. *Id*. "'Hearsay' is a statement, other than the one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." MRE 801(c). The "statement" may be an oral or written assertion. MRE 801(a). A hearsay statement is generally not admissible. MRE 802. Defendant's statement was not hearsay because it was not a statement that was "offered in evidence to prove the truth of the matter asserted." MRE 801(c). As noted above, the record clearly reflected that plaintiff knew who defendant's attorney was. The challenged statement was not admitted in order to prove that plaintiff knew that information. The trial court did not abuse its discretion when it admitted defendant's statement. *Lukity,* 460 Mich at 488.

Plaintiff finally argues that because he cancelled the check on the advice of counsel, the trial court erred when it found proof beyond a reasonable doubt that plaintiff was guilty of criminal contempt. It is no defense that the contemnor violated a court order on the advice of counsel. *Brown v Brown*, 335 Mich 511, 518-519; 56 NW2d 367 (1953); *Chapel v Hull*, 60 Mich 167, 175; 26 NW 874 (1886).[1] Accordingly, plaintiff's argument that he could not be found guilty of criminal contempt when he was following the advice of counsel has no merit.

Affirmed.

/s/ William C. Whitbeck
/s/ Christopher M. Murray
/s/ Pat M. Donofrio

[1] Plaintiff's citation to *In re Contempt of Rapanos*, 143 Mich App 483; 372 NW2d 598 (1985) is to no avail, since we must follow a Supreme Court decision rather than a Court of Appeals decision. *People v Beasley*, 239 Mich App 548, 559; 609 NW2d 581 (2000).