

STATE OF MICHIGAN
COURT OF APPEALS

ALBERT LEE GOODING,

Plaintiff-Appellee,

v

MARK ANTHONY GOODING,

Defendant-Appellant.

UNPUBLISHED

January 12, 2006

No. 254528

Oakland Circuit Court

LC No. 2004-688561-PP

Before: O’Connell, P.J., and Smolenski and Talbot, JJ.

PER CURIAM.

Following a bench hearing, defendant was found in criminal contempt for violating a personal protection order, MCL 600.2950(23). He was committed to jail for ninety-three days, with credit for seven days served, and ordered to undergo anger management counseling. He appeals as of right. We reverse and remand. This appeal is being decided without oral argument pursuant to MCR 7.214(E).

Defendant argues that his due-process rights were violated by the trial court’s failure to apply the correct standard of proof in his criminal contempt hearing. We agree. Defendant failed to object to the use of the improper burden of proof standard and otherwise did not preserve a claim of constitutional error. Therefore, we will not reverse his conviction unless we find plain error that affected his substantial rights. *People v Carines*, 460 Mich 750, 763-764; 597 NW2d 130 (1999).

During the show cause hearing, the prosecution, in its opening statement and closing argument, stated that it would prove defendant’s guilt by a preponderance of the evidence. In its findings of fact, the trial court found “by a preponderance of the evidence that the Respondent did, in fact, violate the personal protection order.” However, this is a criminal contempt action, so “[t]he petitioner or the prosecuting attorney has the burden of proving the respondent’s guilt of criminal contempt beyond a reasonable doubt” MCR 3.708(H)(3).

It is clear from the record that the trial court did not merely misstate the standard of proof, but that the incorrect, and lower, standard of proof was used to evaluate the evidence. The United States Supreme Court has held that the “use of the reasonable-doubt standard is indispensable to command the respect and confidence of the community in applications of the criminal law.” *In re Winship*, 397 US 358, 364; 90 S Ct 1068; 25 L Ed 2d 368 (1970). The court made it clear that “the Due Process Clause protects the accused against conviction except upon

proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged.” *Id.* Applying the incorrect standard was plain error. Furthermore, using the preponderance of the evidence standard seriously affected the fairness and integrity of the proceedings. *Carines, supra* at 763. Therefore, the error warrants reversal. *Id.*

Defendant further argues that the charge of violating the personal protection order should be dismissed *with* prejudice, because to dismiss without prejudice would subject him to another hearing on the same charges in violation of the constitutional protection against double jeopardy. US Const, Am V. Defendant cites no authority and provides no support for this position, and the failure to apply the correct standard is clearly a trial error. See *Burks v United States*, 437 US 1, 15-16; 98 S Ct 2141; 57 L Ed 2d 1 (1978).

Reversed and remanded for further proceedings in accordance with this opinion. We do not retain jurisdiction.

/s/ Peter D. O’Connell

/s/ Michael R. Smolenski

/s/ Michael J. Talbot