STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED February 6, 2014
v	No. 310359 Genesee Circuit Court
ANTHONY LUBKIN, Defendant-Appellant.	LC No. 11-028110-FC

Before: SERVITTO, P.J., and MURRAY and BOONSTRA, JJ.

PER CURIAM.

Defendant appeals as of right from a judgment of criminal contempt. He was sentenced to 30 days in jail and fined $250. For the reasons set forth below, we vacate the trial court's judgment of contempt.

This case arises from an incident that occurred on April 12, 2012, at a restaurant near the 7th Circuit Court building in Genesee County. On that date, Brian MacMillan, who works for the Genesee Circuit Court as Judge Archie Hayman's judicial advisory assistant, escorted a jury impaneled in a murder trial to the restaurant for lunch. As the first few jurors began to sit down at the table, MacMillan heard a man's voice say the word "guilty." MacMillan quickly turned around and saw defendant, an attorney not associated with the trial, sitting at a table with a woman. MacMillan testified that "nobody else could have said that except [defendant]." MacMillan testified that he told defendant, "please, sir, do not talk to the jury" to which defendant responded, "What, I can't say the word guilty? What if I say the word innocent?" Defendant and his female companion then joined other lunch companions and engaged in conversation during which MacMillan could hear legal terms such as "guilty," "not-guilty," and "innocent" being used. There were no more incidents during lunch or thereafter. Judge Hayman was advised at what had occurred and, after holding a criminal contempt hearing, found that defendant "willfully and deliberately made a statement before this jury that could interfere with the functioning of the Court." He therefore found defendant guilty of criminal contempt.

On appeal, defendant argues that the trial court abused its discretion in finding him in criminal contempt. We agree.

"The issuance of an order of contempt rests in the sound discretion of the trial court and is reviewed only for an abuse of discretion." *In re Contempt of Henry*, 282 Mich App 656, 671; 765 NW2d 44 (2009). A trial court has not abused its discretion when its decision is within the

range of principled outcomes. *Id*. We review the trial court's findings in a contempt proceeding for clear error, which exists when "this Court is left with the definite and firm conviction that a mistake was made." *Id* at 669.

"Contempt of court is a wilful [sic] act, omission, or statement that tends to impair the authority or impede the functioning of a court." *In re Contempt of Robertson*, 209 Mich App 433, 436; 531 NW2d 763 (1995); see also *In re Contempt of Auto Club Ins Ass'n*, 243 Mich App 697, 708; 624 NW2d 443 (2000). The primary purpose of a court's contempt power "is to preserve the effectiveness and sustain the power of the courts." *Auto Club Ins*, 243 Mich App at 708. This power should be applied "judiciously and only when the contempt is clearly and unequivocally shown." *Id*.

An act of contempt can be direct or indirect. *Auto Club Ins*, 243 Mich App at 712. Direct contempt occurs in the court's presence and the court can impose sanctions immediately; no hearing is required because the judge has personal knowledge of all necessary facts. *Id*. Indirect contempt occurs outside of the court's presence, so the court must hold a hearing and follow the procedures of MCR 3.606, according the contemnor "some measure of due process" before imposing sanctions. *Id*. MCL 600.1711(2) further provides:

> When any contempt is committed other than in the immediate view and presence of the court, the court may punish it by fine or imprisonment, or both, after proof of the facts charged has been made by affidavit or other method and opportunity has been given to defend.

Criminal contempt must be proven beyond a reasonable doubt. *DeGeorge v Warheit*, 276 Mich App 587, 592; 741 NW2d 384 (2007).

The alleged contempt in this case was indirect because it is undisputed that it occurred outside the presence of the trial judge. According to the judgment of contempt, the trial court found defendant guilty of "wilfully [sic] interfering with an impaneled jury." Indeed, "[a]n essential element of the crime of criminal contempt is that the defendant acted culpably, in 'wilful [sic] disregard or disobedience of the authority or orders of the court.'" *People v Kurz*, 35 Mich App 643, 652; 192 NW2d 594 (1971), quoting *People v Matish*, 384 Mich 568, 572; 184 NW2d 915 (1971). "When utilized in a criminal context, the term 'willfully' has been variously defined in the caselaw as meaning and embodying evil intent, guilty knowledge, or a bad purpose, and it indicates a purpose and knowledge to do wrong." *People v Waterstone*, 296 Mich App 121, 138; 818 NW2d 432 (2012) (citations omitted).

The prosecution failed to prove beyond a reasonable doubt that defendant acted willfully. First, there was no evidence that defendant had any connection to the Jones murder case on which the jury was sitting. There was no reason for defendant to interfere with the jury, which weighs against a finding that defendant had an "evil intent," or purposefully tried to interfere with the jury. See *Waterstone*, 296 Mich App at 138. The court concluded that defendant acted willfully because he is a "smart aleck," but none of the evidence indicated that defendant, a long-time attorney, would attempt to influence a jury merely to amuse himself. There was no evidence that defendant knew a jury would be entering the restaurant; defendant's companions at the restaurant all testified that they had plans to meet at the restaurant on April 12, 2012. And,

there was no evidence to indicate that defendant knew the jury was sitting on a criminal trial, although the trial court suggested that defendant should have known based upon the number of jurors there were.

Most importantly, Brian MacMillan did not see defendant when he allegedly said, "guilty." MacMillan did not know if defendant was engaged in conversation, but did testify that defendant was sitting with a woman. When MacMillan turned around, defendant was looking at the jurors as they seated themselves. However, there was a clock and television on the wall behind the jury's tables and to look at the television, one would have to look in the direction of where the jurors were sitting. Lydia Simon, who was sitting with defendant when he made the alleged remarks, testified that defendant frequently looked at the television as they sat there; CNN was on. She also testified that during her conversation with defendant, who is her attorney, she asked him a legal question about a personal matter, and his answer to her question involved the statement, "She's guilty, absolutely!" MacMillan testified that the volume of defendant's voice when he said "guilty," and the volume of his voice when he was speaking with his dining companions was the same.

Furthermore, this Court is not convinced that defendant's conduct in the instant case, even if he did intentionally say the word "guilty," in the presence of jurors, rises to the level of criminal contempt. As defendant argues in his appellate brief, there are First Amendment concerns with finding an individual in criminal contempt for making a comment in a public area. "Every citizen lawfully present in a public place has the right to engage in expressive activity and such activity may generally not be restricted on the basis of its content, but may be restricted if the manner of expression is basically incompatible with the normal activity of the particular place at the particular time." *In re Contempt of Dudzinski*, 257 Mich App 96, 100; 667 NW2d 68 (2003), citing *Grayned v City of Rockford*, 408 US 104, 115-116; 92 S Ct 2294; 33 L Ed 2d 222 (1972). Nonetheless, we need not address this issue, as we conclude that the court abused its discretion in finding that defendant willfully interfered with an impaneled jury. We also conclude it is unnecessary to decide the other issues defendant raises on appeal.

We vacate the judgment of contempt, including defendant's sentence and fine, and remand for any necessary proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ Deborah A. Servitto
/s/ Christopher M. Murray
/s/ Mark T. Boonstra