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NO. COA11-867
NORTH CAROLINA COURT OF APPEALS

Filed: 20 December 2011

IN RE: Forsyth County
No. 10 CRS 29905
TONY FERNANDO CAFOLLA,
Contemnor.

Appeal by contemnor from order entered 23 March 2011 by Judge Lindsay R. Davis, Jr., in Forsyth County Superior Court. Heard in the Court of Appeals 15 November 2011.

Attorney General Roy Cooper, by Assistant Attorney General LaShawn Piquant, for the State.

Law Offices of John R. Mills, NPC, by John R. Mills, for contemnor appellant.

McCULLOUGH, Judge.

Tony Fernando Cafolla ("contemnor") appeals from an order entered in superior court finding him in direct criminal contempt. We affirm.

I. Background

On 20 July 2010, contemnor and his father reported to the Winston-Salem Police Department that Krista Cafolla (the

"victim"), contemnor's sister, had been assaulted in an incident of domestic violence. Officer Kimberly Oakes ("Officer Oakes") responded to the call. When she arrived at the scene, the victim was present with contemnor and their father. Officer Oakes interviewed the victim and observed that the victim had a black eye, that one of her eyeballs was red, and that she had bruises up and down both of her arms. Contemnor was standing approximately 15 feet away while Officer Oakes interviewed the victim. Contemnor further informed Officer Oakes that he had witnessed the domestic violence incident. Accordingly, contemnor was advised that he would be a witness in court and that the State's case relied on his testimony.

The assault case was tried in Forsyth County District Court, Domestic Violence Session, before Judge George Bedsworth ("Judge Bedsworth") on 22 November 2010. At trial, the State presented the testimony of Officer Oakes, followed by contemnor. Upon taking the stand, Judge Bedsworth observed that contemnor appeared reluctant. Contemnor began his testimony by stating that he did not remember the events that had occurred regarding the assault on his sister. Judge Bedsworth then stopped contemnor's testimony and warned contemnor to be truthful. Specifically, Judge Bedsworth warned contemnor "that if

[contemnor] gave false testimony and if [Judge Bedsworth] found beyond a reasonable doubt that [contemnor] was testifying falsely, that [Judge Bedsworth] could hold [contemnor] in contempt and [contemnor] could be put in jail for up to 30 days." Contemnor indicated to Judge Bedsworth that he understood the warning. When permitted to continue his testimony, contemnor again claimed to not remember the events, but also stated that he did not observe any injuries on his sister on the date of the incident.

After contemnor completed his testimony, Judge Bedsworth made a finding beyond a reasonable doubt that contemnor had testified falsely during the trial and charged contemnor with direct criminal contempt. Judge Bedsworth then gave contemnor an opportunity to respond to the charge of contempt, to which contemnor stated that he had actually seen his sister's injuries on the date of the assault. Judge Bedsworth sentenced contemnor to 24 hours of confinement and entered the following order:

The court finds beyond a reasonable doubt that during the proceeding the above contemnor willfully behaved in a contemptuous manner, in that the above named contemnor did give false testimony which delayed the proceedings and wasted the court's time. The contemnor then confirmed that he knew what his sister looked like on the date in question, which he had just denied under oath. The court warned [the

contemnor] prior to his false testimony that he could be held in contempt and jailed if he gave false testimony. The undersigned gave a clear warning that the contemnor's conduct was improper. In addition, the contemnor was given summary notice of the charges and summary opportunity to respond.

Contemnor appealed to superior court.

On 15 March 2011, contemnor's appeal was heard in Forsyth County Superior Court before Judge Lindsay R. Davis, Jr. ("Judge Davis"). Judge Davis conducted a de novo hearing at which Officer Oakes and Judge Bedsworth testified to the events that occurred at the 22 November 2010 hearing. On 23 March 2011, Judge Davis entered an order containing specific findings of fact and concluding that contemnor was "in direct criminal contempt in violation of N.C.G.S. § 5A-11(a)(1) through (4), particularly (4)." Contemnor was sentenced to 12 hours' incarceration and ordered to pay a fine of \$100.00. Contemnor filed written notice of appeal to this Court on 23 March 2011 and a written objection to the superior court order on 7 April 2011.

II. Standard of Review

"[O]ur standard of review for contempt cases is 'whether there is competent evidence to support the trial court's findings of fact and whether the findings support the

conclusions of law and ensuing judgment.'" *State v. Phair*, 193 N.C. App. 591, 593, 668 S.E.2d 110, 111 (2008) (quoting *State v. Simon*, 185 N.C. App. 247, 250, 648 S.E.2d 853, 855 (2007)). Unchallenged findings of fact are presumed to be supported by competent evidence and are binding on appeal. *Tucker v. Tucker*, 197 N.C. App. 592, 594, 679 S.E.2d 141, 143 (2009). We review the conclusions of law in a contempt order de novo. *Id.*

III. Direct criminal contempt

On appeal, contemnor argues the superior court erred in admitting the statement contemnor made to Judge Bedsworth in response to the criminal contempt charges in district court. Contemnor argues both his right to counsel and his right to remain silent were violated by the State's use of this statement against him in the superior court proceeding.

We first address the appealability of contemnor's issue. During the superior court contempt hearing, the State called Officer Oakes as the first witness to present evidence. During her direct examination, the following exchange occurred:

[By the State] Q. . . . Do you recall anything else that may have occurred as it related to Mr. Cafolla in court that day?

A. Yes. After the Judge had said something to him about being truthful, he actually admitted to being untruthful, not telling the truth during his testimony.

Q. He admitted to being untruthful?

A. Yes, he did.

Subsequently, on cross-examination, the following exchange occurred between defense counsel and Officer Oakes:

Q. Officer, do you remember Mr. Cafolla's exact words when you say that he admitted on the stand to being untruthful?

A. Not his exact words. I just remember him admitting it, to being untruthful.

Q. Did he say, "I was untruthful"?

A. I don't remember the exact words, but I know he admitted to it.

Q. Okay.

Notably, not only did contemnor fail to object to Officer Oakes' direct testimony regarding contemnor's admission, but contemnor thereafter again elicited the testimony regarding contemnor's admission on cross-examination. "Statements elicited by a defendant on cross-examination are, even if error, invited error, by which a defendant cannot be prejudiced as a matter of law." *State v. Gopal*, 186 N.C. App. 308, 319, 651 S.E.2d 279, 287 (2007), *aff'd*, 362 N.C. 342, 661 S.E.2d 732 (2008).

Following Officer Oakes' testimony, the State called Judge Bedsworth as a witness. Judge Bedsworth testified that contemnor had testified in district court that either he did not remember

the events concerning the alleged domestic violence incident involving his sister or he did not see any injuries on his sister on the date of the alleged incident. Thereafter, the following exchange occurred during the State's direct examination of Judge Bedsworth:

Q. Anything else you recall from his testimony?

A. No. Just that after he stepped down, I made a finding beyond a reasonable doubt that he had in fact testified falsely. And I gave him an opportunity to say anything, and during that exchange he confirmed that he had in fact seen his sister and what she looked like.

Contemnor then objected to Judge Bedsworth's testimony regarding what contemnor had admitted.

Despite contemnor's objection to Judge Bedsworth's testimony regarding what contemnor had admitted, contemnor did not object to Officer Oakes' prior testimony that contemnor had admitted to being untruthful. The substance of the unobjected-to testimony of Officer Oakes and the later objected-to testimony of Judge Bedsworth is of the same legal significance. The testimony supports the trial court's finding of fact that contemnor willfully gave false testimony. Because contemnor invited the substance of that testimony, *i.e.*, that contemnor

admitted to being untruthful, he cannot now complain of its admission on appeal.

Even had contemnor properly objected to the admission of the testimony regarding his statement in district court, the evidence did not violate any rights of contemnor. Despite contemnor's attempt to confuse the issues, contemnor essentially argues the superior court erred in admitting his "uncounseled exchange with the District Court" as evidence against him because his statements were made in violation of his constitutional rights to counsel and to remain silent. In his brief, contemnor argues that once the district court found him in contempt beyond a reasonable doubt, contemnor was entitled to "the same trial rights as any criminal defendant" and that contemnor should have been so informed of his rights. However, our Supreme Court has expressly held that "[s]ummary punishment for direct contempt committed in the presence of the court does not contemplate a trial at which the person charged with contempt is represented by counsel." *In re Williams*, 269 N.C. 68, 76, 152 S.E.2d 317, 323 (1967). Thus, there is no requirement in law that contemnor be represented by counsel during summary contempt proceedings in district court. As such,

his statement did not violate such a right, and therefore cannot be inadmissible on that basis.

Regarding contemnor's argument that his right to remain silent was violated by the superior court's admission of his district court statement, our Supreme Court has noted "there must be *compelled* testimonial self-incrimination before the [F]ifth [A]mendment protections are triggered." *Lowder v. All Star Mills, Inc.*, 301 N.C. 561, 584-85, 273 S.E.2d 247, 261 (1981) (emphasis added). Here, contemnor was in no way compelled by the district court to make a statement. Rather, pursuant to statutory procedure, Judge Bedsworth simply "gave [contemnor] an opportunity to say anything," to which contemnor voluntarily responded. Contemnor's Fifth Amendment rights were in no way implicated by Judge Bedsworth's question, and the admission of contemnor's statement likewise did not implicate his right against self-incrimination. There is no *Miranda* warning requirement for a witness who is not in custody during summary contempt proceedings.

We hold the superior court's findings of fact, particularly that contemnor "willfully provided false testimony at the trial before Judge Bedsworth," are supported by competent evidence, including contemnor's voluntary statement to Judge Bedsworth

during the summary contempt proceeding in district court. The superior court's conclusion of law that contemnor was therefore "in direct criminal contempt" is likewise supported by the findings of fact that contemnor testified during the trial that he either did not remember the alleged domestic violence or that he did not see any injuries on his sister on the date of the alleged incident and later voluntarily admitted to Judge Bedsworth, in the presence of Officer Oakes, that he had actually observed his sister's physical condition on that date, and therefore had been untruthful on the stand. The superior court's order finding contemnor to be in direct criminal contempt is therefore affirmed.

Affirmed.

Judges McGEE and STEELMAN concur.

Report per Rule 30(e).