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IN THE DISTRICT COURT OF APPEAL
OF FLORIDA
SECOND DISTRICT

CHRISTIAN JOVANNI AGOSTO,)
)
 Appellant,)
)
 v.)
)
 STATE OF FLORIDA,)
)
 Appellee.)
 _____)

Case No. 2D18-4318

Opinion filed March 20, 2020.

Appeal from the Circuit Court for
Hillsborough County; Christopher
C. Nash, Judge.

Howard L. Dimmig, II, Public
Defender, and Pamela H. Izakowitz,
Assistant Public Defender, Bartow,
for Appellant.

Ashley Moody, Attorney General,
Tallahassee, and Lara E. Breslow,
Assistant Attorney General, Tampa,
for Appellee.

ATKINSON, Judge.

Christian Jovanni Agosto appeals the judgment and sentence entered
against him for direct criminal contempt for failing to provide the passcode to his cell
phone. Because the lower court erred by relying upon testimony about events that it did

not observe which occurred outside the presence of the court, we accept the State's concession of error and vacate Agosto's conviction.¹

While monitoring the social media accounts of Agosto and several other individuals, the Tampa Police Department (TPD) uncovered videos, several of which allegedly depicted Agosto brandishing a firearm and flashing gang signs. While surveilling them, TPD conducted a traffic stop of a vehicle in which Agosto and the other suspects were travelling. After observing one of the passengers reach under the seat for a weapon, they searched the vehicle and recovered four pistols. They also conducted a search incident to Agosto's arrest and obtained a smartphone on his person.

All of the passengers were arrested and transported to the jail. Agosto was charged with possessing a firearm with a juvenile felony conviction and carrying a concealed firearm. A TPD detective sought a search warrant for Agosto's phone to locate evidence of those crimes and to uncover other gang-related activities and offenders. Police determined that the cell phone was passcode-protected.

After the trial court granted its motion to compel production of the passcode, the State asked the court to order Agosto to immediately turn the passcode over to TPD. Defense counsel indicated that Agosto did not remember the passcode to his phone and sought a short recess for Agosto to try to remember it, which the court granted.

¹Agosto also argues that the trial court abused its discretion by ordering him to produce his passcode in the first place. Because the order granting the State's motion to compel was rendered in an entirely separate case, our consideration of that issue is beyond the scope of this appeal.

Just prior to the direct contempt hearing, the court reiterated that it was ordering Agosto to produce his passcode and indicated that if Agosto refused to provide the passcode he would be in contempt and could be punished by up to five months and twenty-nine days in jail. Agosto protested: "Your Honor, I'm not refusing. I just don't remember the passcode, Your Honor." The court instructed Agosto to attempt to unlock the phone. He said that he could try. Agosto made three unsuccessful attempts to enter his passcode.

The court then appointed the public defender to represent Agosto and held a contempt hearing. The State called a detective who had attempted to obtain the passcode from Agosto on a prior occasion. The detective testified that after he received the search warrant shortly after Agosto's arrest he brought Agosto's cellphone to the jail. However, Agosto advised the detective that he would not give him the passcode. Then Agosto stood up and hit the emergency button, effectively ending the conversation with the detective. During the detective's visit to the jail, Agosto never attempted to enter the passcode, and he never told the detective that he could not remember it.

The defense called Agosto as a witness. He testified that he made three attempts to enter his passcode just before the hearing but was unable to remember the passcode. He admitted that he did not want to provide his passcode at the jail but reiterated that he was unable to remember the passcode prior to the hearing. He had been incarcerated from the time of his arrest on July 24, 2018, until the hearing on October 5, 2018.

The court made several findings "[b]ased on the circumstances of this case, the filing[s] of the case, the record, the testimony of [the detective], and the

testimony of the defendant." The court found that Agosto's testimony was not credible and that contrary to that testimony, he did have the ability to provide the passcode; that the defendant refused to provide the passcode in the court's presence; and that his refusal to provide the passcode had the effect of "hindering the administration of justice and lessening the authority of the court." After concluding that Agosto had committed direct criminal contempt, the trial court adjudicated him guilty and sentenced him to a period of five months and twenty-nine days in jail.

Florida Rule of Criminal Procedure 3.830 describes the authority for the punishment of direct criminal contempt: "A criminal contempt may be punished summarily if the court saw or heard the conduct constituting the contempt committed in the actual presence of the court." In a direct criminal contempt proceeding, the trial court cannot rely on evidence that he or she did not personally observe. See Plank v. State, 190 So. 3d 594, 601 (Fla. 2016) (explaining that misconduct does not qualify as direct criminal contempt "[i]f some essential elements of the offense are not personally observed by the judge, so that [the judge] must depend upon statements made by others for his knowledge about these essential elements" (quoting In re Oliver, 333 U.S. 257, 275–76 (1948))). Indirect criminal contempt requires, among other things, "an appropriate charging document, an answer, an order of arrest, the right to bail, an arraignment, and a hearing," none of which Agosto was provided. See Gidden v. State, 613 So. 2d 457, 460 (Fla. 1993); see also Fla. R. Crim P. 3.840 ("Indirect Criminal Contempt").

Here, while the conduct that is alleged to have constituted criminal contempt was observed by the court, the same cannot be said of all the evidence relied

upon to support each element of contempt. "Intent is an essential element of contempt, and to support a conviction for direct criminal contempt, the trial court must have knowledge of each element of the contempt." State v. Diaz de la Portilla, 177 So. 3d 965, 973 (Fla. 2015). This stands to reason—by definition, one can only be guilty of contempt for actions undertaken willfully. See, e.g., contempt, American Heritage Dictionary 396 (5th ed. 2011) ("Open disrespect or willful disobedience of the authority of a court of law or legislative body"). And failure to do something one would have done but for his inability to do so cannot be described as contemptuous. In other words, whether or not the defendant had the ability to remember his passcode was a fact issue, evidentiary support for which must be based on what the trial court observed in its presence. See Fla. R. Crim. P. 3.830 (authorizing punishment by direct criminal contempt "if the court saw or heard the conduct constituting the contempt committed in the actual presence of the court").

While Agosto's failure to comply with the court's directive to unlock the phone occurred in the presence of the trial court, the trial court relied on other evidence to reach its determination that such failure was in willful defiance of its order. In support of its conclusion that "the Defendant's claim that he is unable to remember his passcode" lacked credibility, it is apparent that the trial court relied upon the testimony describing his past behavior, including events that occurred at the jail prior to the hearing. In its order, the trial court explained that Agosto "used the passcode often and on a daily basis only [seventy-five] days prior to the hearing" and "never claimed prior to being ordered to produce the passcode" in court "that he could not remember it." Having relied on evidence outside its observation in order to assess the verity of

Agosto's professed inability to comply with the command to unlock his phone, the trial court cannot have concluded that the behavior it observed was contemptuous without resort to the procedures required for indirect criminal contempt. See Plank, 190 So. 3d at 607 ("Whenever a judge must . . . rely on additional evidence not directly observed by the trial judge, the proceeding is no longer direct criminal contempt but becomes indirect criminal contempt.").

This is not to say that that a trial court can never base a finding of direct criminal contempt on an assessment of witness credibility. Agosto and the State have suggested as much—misplacing reliance on case law governing "the power to punish perjury by direct criminal contempt." Emanuel v. State, 601 So. 2d 1273, 1274–75 (Fla. 4th DCA 1992) (emphasis added) (opining that "the mere fact that the court believes one witness over another is insufficient to establish judicial knowledge that a witness' testimony is false for the purpose of summarily adjudicating the witness in direct criminal contempt" (emphasis added)). In the case of perjury, the untruthful testimony is the contemptuous conduct. By contrast, it is conceivable that under appropriate circumstances a finding of contempt could hinge on a defendant's testimony about alleged contemptuous conduct, which testimony a trial court could disregard as incredible. Cf. Fla. R. Crim. P. 3.830 ("[T]he judge shall . . . inquire as to whether the defendant has any cause to show why he or she should not be adjudged guilty of contempt by the court and sentenced therefor. The defendant shall be given the opportunity to present evidence of excusing or mitigating circumstances.").

However, whether a finding of contempt could have been supported solely by the trial court's credibility determination that Agosto was lying about his inability to

unlock the phone—without the corroborating evidence of unobserved conduct such as his previous refusal to provide the passcode at the jail—is not a question before this court. To reach its finding of contempt, the trial court relied on evidence of conduct that occurred outside the presence of the court. Because that is not permissible in direct criminal contempt proceedings, we reverse and remand for the lower court to vacate Agosto's conviction for direct criminal contempt.

Reversed and remanded with directions.

SALARIO, J., Concurs.

KELLY, J., Concurs in result only.