UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

Nos. 0444 & 0836

September Term, 2015

KEARAY MILLER

v.

STATE OF MARYLAND

Wright,
Berger,
Reed,

JJ.

Opinion by Berger, J.

Filed: June 16, 2016

*This is an unreported opinion, and it may not be cited in any paper, brief, motion, or other document filed in this Court or any other Maryland Court as either precedent within the rule of *stare decisis* or as persuasive authority. Md. Rule 1-104.

In this appeal, we address the validity of a contempt order issued by the Circuit Court for Baltimore County imposing sanctions upon Kearay Miller ("Miller"), appellant, for disruptions to a sentencing hearing caused by his cell phone. On appeal, Miller raises two questions for our review,[1] which we have reordered and rephrased slightly as follows:

> 1. Whether the circuit court erred in holding Miller in direct criminal contempt when his cell phone rang during his brother's sentencing hearing.
>
> 2. Whether the Court of Special Appeals should reduce Miller's sentence for direct criminal contempt.

For the reasons set forth herein, we shall reverse the judgment of the Circuit Court for Baltimore County. Because we answer Miller's first question in the affirmative, we do not reach the second question presented by Miller.

FACTS AND PROCEEDINGS

On May 21, 2015, Miller was a spectator in the courtroom during the sentencing of his brother, Ukeenan Thomas ("Thomas") for convictions of robbery with a dangerous weapon, use of a handgun in a crime of violence, and conspiracy to commit robbery. At the sentencing hearing, just after the conclusion of the defense's argument in favor of

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[1] The issues, as presented by Miller, are:

> 1. Did the circuit court err in holding appellant in direct criminal contempt when his cell phone rang in court.
>
> 2. If it upholds appellant's contempt conviction, should this Court reduce appellant's sentence?

mitigation, Miller's cell phone rang in court. The transcript from Thomas's sentencing hearing reads as follows.

> [THE COURT]: I'll hear from the State and then I'll hear from the Defendant last. What would you like to tell me about [Thomas's] record? (LOUD RINGING OF PHONE)---Take him into custody.[2]

The transcript then continues:

> DEPUTY: Come on. Sir.
>
> [THE COURT]: And take his phone away from him.
>
> MR. MILLER: (inaudible).
>
> DEPUTY: Give me your phone.
>
> MR. MILLER: I didn't know my phone was on.
>
> DEPUTY: Stand up.
>
> DEPUTY #2: Stand up.
>
> [THOMAS]: (Inaudible).
>
> DEPUTY: Listen to the deputy.

[2] Miller hypothesizes that the judge's temperament was attributable to the fact that just prior to this exchange -- during the defense's argument in favor of mitigation -- the judge was engaged in a debate with Thomas's father as to whether Thomas's guilty verdict was influenced by racial prejudice, and whether Thomas's father sufficiently knows his son so as to offer meaningful mitigation. In this case, we hold that there was insufficient evidence to satisfy the *mens rea* requirement for direct criminal contempt. This is so regardless of the reason the trial judge was particularly sensitive to violations of his cell phone policy at this moment. Accordingly, the exchange between Thomas's father and the court is immaterial for our analysis.

> MR. MILLER: I didn't know it was on.
>
> DEPUTY #2: Turn around.
>
> MR. MILLER: I just, I just--
>
> [THE COURT]: Take him into custody.
>
> MR. MILLER: --(inaudible). I ain't,--
>
> DEPUTY: Let's go.
>
> MR. MILLER: --I ain't know it was on. . . . Oh, it ain't no, man. I ain't known the shit was on. (Inaudible) that. . . .
>
> [THE COURT]: Don't take him too far because you're gonna have a Contempt Hearing in a moment. (LOUD RINGING OF PHONE) -- All right. . . .

Thereafter, the court continued with Thomas's sentencing hearing. After the conclusion of the sentencing hearing, Miller was returned to court and the following colloquy ensued.

> THE COURT: Okay. Mr. Miller, you have been sitting here throughout the course of this trial. I have told everyone during the course of this trial that their telephones must be turned off. I told them that Tuesday, I told them that yesterday and I told them that today.
>
> You came back into this courtroom. You were fully aware of those instructions. Your phone went off during the Court proceedings. It disturbed the Court proceedings.
>
> I find you in direct criminal contempt of Court.
>
> What would you like to say before I impose disposition?

> MR. MILLER: It was a God honest mistake like. I would -- I'd a turned my phone off -- I turned it off the first time we came here. I had went out in the hallway and let my family know what was going on in Court, and I forgot it was on. It was just a mistake. That's all.
>
> THE COURT: Anything else?
>
> MR. MILLER: No.
>
> THE COURT: You are sentenced to the Baltimore County Bureau of Corrections for a period of five months. Take him away.

The trial judge later filed an Order and Sanctions for Direct Criminal Contempt of Court where he articulated that throughout Thomas's trial, Miller sat with Thomas's family and friends, and was knowledgeable of the fact that cell phones must be turned off in the courtroom. The trial judge noted that Miller's cell phone "rang very loudly" and disrupted the business of the court. Further, the trial judge rejected Miller's contention that his failure to silence his cell phone was a mistake. The trial judge commented that:

> Under the totality of the circumstances, including having witnessed Mr. Miller's demeanor during the course of Mr. Thomas' trial, which, among other things, included menacingly glaring at the victim of the armed robbery while he testified, the Court did not find Mr. Miller's explanation about his failure to silence his cellular telephone to be credible.

The day following the sentencing hearing, on May 22, 2015, the trial judge heard a motion to stay the five-month sentence pending appeal, which he denied. Miller then immediately filed a motion to us to stay the sentence pending appeal, which we granted. As a result, Miller has served a little more than 24 hours of the five months to which he was

sentenced. This timely appeal followed. We shall address additional facts as they are necessitated by the issued presented.

STANDARD OF REVIEW

> [W]hen an appellate court is called upon to determine whether sufficient evidence exists to sustain a criminal conviction, it is not the function or duty of the appellate court to undertake a review of the record that would amount to, in essence, a retrial of the case. Rather, we review the evidence in the light most favorable to the State, *Jackson v. Virginia*, 443 U.S. 307, 319, 99 S.Ct. 2781, 2789, 61 L. Ed. 2d 560, 573 (1979); *Branch v. State*, 305 Md. 177, 182-83, 502 A.2d 496, 498 (1986), giving due regard to the trial court's finding of facts, its resolution of conflicting evidence, and, significantly, its opportunity to observe and assess the credibility of witnesses. *See*, *e.g.*, *State v. Raines*, 326 Md. 582, 589, 606 A.2d 265, 268 (1992); Maryland Rule 8-131(c). Fundamentally, our concern is not with whether the trial court's verdict is in accord with what appears to us to be the weight of the evidence, *see Jackson*, 443 U.S. at 319, 99 S. Ct. at 2789, 61 L. Ed. 2d at 573; *Allison v. State*, 203 Md. 1, 5, 98 A.2d 273, 275 (1953), but rather is only with whether the verdicts were supported with sufficient evidence--that is, evidence that either showed directly, or circumstantially, or supported a rational inference of facts which could fairly convince a trier of fact of the defendant's guilt of the offenses charged beyond a reasonable doubt.
>
> In other words, when a sufficiency challenge is made, the reviewing court is not to "ask itself whether it believes that the evidence at the trial established guilt beyond a reasonable doubt"; rather, the duty of the appellate court is only to determine "whether, after viewing the evidence in the light most favorable to the prosecution, *any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *Jackson*, 443 U.S. at 318-19, 99 S. Ct. at 2789, 61 L. Ed. 2d at 573 (emphasis in original); *see also Oken*

> *v. State*, 327 Md. 628, 661, 612 A.2d 258, 274 (1992); Raines, 326 Md. at 588-89, 606 A.2d at 268.

State v. Albrecht, 336 Md. 475, 478-79 (1994) (footnote omitted).

DISCUSSION

Under Md. Rule 15-203(a):

> The court against which a direct civil or criminal contempt has been committed may impose sanctions on the person who committed it summarily if (1) the presiding judge has personally seen, heard, or otherwise directly perceived the conduct constituting the contempt and has personal knowledge of the identity of the person committing it, and (2) the contempt has interrupted the order of the court and interfered with the dignified conduct of the court's business. The court shall afford the alleged contemnor an opportunity, consistent with the circumstances then existing, to present exculpatory or mitigating information. If the court summarily finds and announces on the record that direct contempt has been committed, the court may defer imposition of sanctions until the conclusion of the proceeding during which the contempt was committed.

Md. Rule 15-203(a).

> Direct contempts . . . may be summarily punished, meaning that ordinary due process rights may be "scaled back" in favor of "prompt and effective action necessary to address a disruption that threatens the proceedings." *Mitchell v. State*, 320 Md. 756, 762, 580 A.2d 196 (1990). Because of the deprivation of fundamental due process rights and criminal safeguards generally afforded a criminal defendant, however, the "power to immediately and summarily hold a person in contempt is awesome and abuses of it must be guarded against." *State v. Roll & Scholl*, 267 Md. 714, 732, 298 A.2d 867 (1973) (citing *Bloom v. Illinois*, 391 U.S. 194, 202, 88 S. Ct. 1477, 20 L. Ed. 2d 522 (1968)). For that reason, summary contempt proceedings should be the exceptional case, and "are only

> proper in cases where the action of the alleged contemnor poses an open, serious threat to orderly procedure that instant, and summary punishment, as distinguished from due and deliberate procedures, is necessary. In other words, direct contempt procedures are designed to fill the need for immediate vindication of the dignity of the court." *Roll & Scholl*, 267 Md. at 733, 298 A.2d 867 (citing *Harris v. United States*, 382 U.S. 162, 86 S. Ct. 352, 15 L. Ed. 2d 240 (1965); *Cooke v. United States*, 267 U.S. 517, 45 S. Ct. 390, 69 L. Ed. 767 (1925)). In *Johnson v. Mississippi*, 403 U.S. 212, 91 S. Ct. 1778, 29 L. Ed. 2d 423 (1971), the Supreme Court explained that summary proceedings are appropriate in cases where "instant action [is] necessary," and "where immediate corrective steps are needed to restore order and maintain the dignity and authority of the court."

Espinosa v. State, 198 Md. App. 354, 387 (2011). Indeed, "the limits of the power to punish for contempt are '[t]he least possible power adequate to the end proposed.'" *Roll & Scholl*, *supra*, 267 Md. at 734 (quoting *Harris*, *supra*, 382 U.S. at 165).

Critically, a defendant must satisfy a specific *mens rea* or intent requirement before he or she may be found guilty of direct criminal contempt. *Betz v. State*, 99 Md. App. 60, 66 (1994) ("Criminal contempt is not a strict liability offense; willfulness or intent is an essential element."). As we have previously observed:

> In order to find someone guilty of a direct criminal contempt, the behavior must be contemptuous on its face or it must be shown that the person possessed contumacious intent. *Cameron v. State*, 102 Md. App. 600, 608, 650 A.2d 1376 (1994). To evaluate the sufficiency of the evidence to find the requisite intent, we must review the case on both the law and the evidence. *Wilson v. State*, 319 Md. 530, 535, 573 A.2d 831 (1990). In making this inquiry, we will not set aside the trial court's findings of fact unless they are clearly erroneous. Maryland Rule 8-131(c). We must determine "whether the

> evidence shows directly or supports a rational inference of the facts to be proved, from which the trier of fact could fairly be convinced beyond a reasonable doubt of the defendant's guilt of the offense charged." *Wilson*, 319 Md. at 535-36, 573 A.2d 831.

Espinosa, *supra*, 198 Md. App. at 399. To be sure, the alleged contemptuous conduct must be "contemptuous on its face **or** it must be shown that the person possessed contumacious intent." *Id.* (emphasis added). The requirement that the conduct is either "contemptuous on its face or . . . that the person possessed contumacious intent," *id.*, is the reasons why, for example, the disruptive act of showing the middle finger to the trial judge is contempt, *see Mitchell v. State*, 320 Md. 756, 759-60 (1990), but a host of other acts -- such as sneezes, coughs, medical emergencies, et cetera -- disruptive as they may be, are not.

An act is contemptuous on its face when the intrinsic characteristics of the act, in and of themselves, are sufficiently "disruptive," "rebellious" "insubordinate," "willfully disobedient," or "openly disrespectful" that one can presume beyond a reasonable doubt that the actor harbored a contumacious intent. *Cameron v. State*, 102 Md. App. 600, 610 (1994); *see*, *e.g.*, *Smith v. State*, 382 Md. 329, 335-36 (2004) (calling the judge a "motherfucker," demanding fellatio, and accusing the judge of being a white supremacist); *Johnson v. State*, 100 Md. App. 553, 558 (1994) (articulating to the judge that one desires to murder the judge); *Mitchell*, *supra*, 320 Md. at 759-60 (showing one's middle finger to the judge).

In this case, we can say with confidence that the ringing of a cell phone is not contemptuous on its face. To be sure, the ringing of a cell phone has the potential to cause

significant disruptions to the court's business. That conduct alone, however, does not have intrinsically disrespectful characteristics which permit us to assume that anyone who possess a ringing cell phone in court intends to be "disruptive," "rebellious" "insubordinate," "willfully disobedient," or "openly disrespectful." *Cameron*, *supra*, 102 Md. App. at 610. Accordingly, Miller's conduct was not contemptuous on its face.

Alternatively, the *mens rea* component of direct criminal contempt can be satisfied when the disruptive act is not "contemptuous on its face," but there is sufficient evidence to suggest that the alleged contemnor subjectively "possessed contumacious intent." *Espinosa*, *supra*, 198 Md. App. at 399. "'Contumacious conduct' is defined as '[w]ilfully stubborn **and** disobedient conduct.'" *Cameron*, *supra*, 102 Md. App. at 610 (emphasis added) (quoting *Black's Law Dictionary* 298 (5th ed. 1979)). In the present case, the evidence relied upon to support the trial judge's finding of direct criminal contempt is insufficient to support a finding that Miller acted with contumacious intent.

In his contempt order, the trial judge found that: 1) Miller was aware that cell phones must be turned off in the courtroom; 2) Miller's cell phone went off in the courtroom and disrupted the proceedings; and 3) Miller's excuse that the incident was a "God honest mistake" was incredible. To be sure, Miller's conduct satisfies the elements of direct criminal contempt articulated in Md. Rule 15-203(a), as it was both disruptive and directly

observed by the trial judge. The facts in this record, however, are insufficient to establish that Miller's intent was contumacious beyond a reasonable doubt.[3]

The State contends that the *mens rea* requirement was satisfied because the trial judge found Miller's excuse that the disruption was inadvertent incredible. In support, the State cites *Hayette v. State*, 199 Md. 140, 145 (1953) for the proposition that "reason[s] for disbelieving evidence denying scienter may also justifying finding scienter." In *Hayette*, an appellant challenged the sufficiency of the evidence sustaining his conviction because an accusing witness's testimony was contradictory. *Id.* at 144-45. The Court of Appeals rejected the appellant's argument, and further commented in dicta that "[**o]rdinarily disbelieving evidence is not the same thing as finding evidence to the contrary**. But on questions of scienter[,] reason for disbelieving evidence denying scienter may also justify finding scienter." *Id.* (emphasis added). In essence, the State contends that Miller's intent can be inferred because "[t]he [defendant] doth protest too much." William Shakespeare, *Hamlet*, Act III, Scene II.

In this case, the affirmative finding that Miller's explanation was incredible is insufficient to support a finding by way of negative inference that Miller was "[w]ilfully stubborn and disobedient." *Cameron*, *supra*, 102 Md. App. at 610. At most, the finding

[3] We emphasize that our standard of appellate review is whether the trial judge was clearly erroneous in finding that Miller possessed a contumacious intent beyond a reasonable doubt based on the facts available to him. The relevant inquiry is not whether we are satisfied beyond a reasonable doubt that Miller harbored such an intent.

that Miller's disruption was not a "God honest mistake" was sufficient to permit the court to infer that Miller willfully declined to silence his phone and thus was disobedient. It is a *non sequitur*, however, to take the additional logical step and assume that Miller's incredibility also makes him stubborn. Indeed, the finding that Miller **did not** mistakenly neglect to silence his phone does set forth affirmative evidence as to **why he did** have his phone on.

There is, perhaps, a host of reasons why Miller may have had his phone on without harboring a contumacious intent. Of course, the possibility also exists that Miller refused to silence his phone in bald defiance of the court, and that he desired for his phone to ring so as to derail the proceedings. If the trial judge had found the latter, we would defer to those findings so long as they were not clearly erroneous. Such is not the case here. Rather, the trial judge made no findings as to what Miller intended when he entered the courtroom in violation of the judge's cell phone policy. Further, our review of the record yields no evidence as to what Miller intended when he violated the court's cell phone policy. In the absence of any findings or evidence indicating whether Miller possessed a contumacious intent, the evidence was insufficient to sustain a conviction for direct criminal contempt.

Miller further contends that failing to silence one's cell phone is insufficient to satisfy the *actus reus* requirement of direct criminal contempt. We note that "all electronic devices inside a courtroom shall remain off," and the violation of this rule is punishable by the court's contempt power. Md. Rule 16-110(b)(2)(E)(i), (c)(2). In this case, however, we

need not interpret this rule or address whether a ringing cell phone is sufficient to satisfy the *actus reus* requirement of this offense. Rather, we only hold here that the evidence in this case was insufficient to permit a finding that Miller harbored the requisite intent to be convicted of direct criminal contempt. Moreover, both parties agree that this Court has the discretion to alter Miller's sentence for direct criminal contempt. Having held that there is insufficient evidence to sustain Miller's conviction, the question as to the appropriateness of his sentence is moot.

In this case, we only hold that the evidence in this case was insufficient to support a finding that Miller acted with the requisite intent so as to be held in direct criminal contempt of court. We, therefore, hold that the trial court erred in finding Miller to be in direct criminal contempt of court. Accordingly, we reverse the judgment of the circuit court and vacate Miller's conviction for direct criminal contempt.

JUDGMENT OF THE CIRCUIT COURT FOR BALTIMORE COUNTY REVERSED. COSTS TO BE PAID BY BALTIMORE COUNTY.