

IN THE COURT OF APPEALS OF IOWA

No. 1-081 / 10-0675
Filed February 23, 2011

JACINDA BOHLEN,
Plaintiff-Appellant,

vs.

**IOWA DISTRICT COURT FOR
BREMER COUNTY,**

Certiorari to the Iowa District Court for Bremer County, Christopher C. Foy, Judge.

Mother filed a petition for writ of certiorari contending the district court should have held the father in contempt of the court's order regarding child support. **WRIT ANNULLED.**

Mark A. Milder of Mark Milder Law Firm, Waverly, for plaintiff.

Shane McGrane, Dumont, pro se.

Considered by Vogel, P.J., and Doyle and Tabor, JJ.

DOYLE, J.

After her application for contempt was denied by the district court, Jacinda Bohlen filed a petition for writ of certiorari contending the district court should have found the father of her child, Shane McGrane, in contempt of court for failure to pay child support. We annul the writ.

I. Background Facts and Proceedings.

Jacinda Bohlen and Shane McGrane were never married, but had one child together born in June 2008. In December 2008, Shane filed a petition to determine the respective rights and obligations of the parties regarding legal custody, physical care, visitation, and support of their child. After a hearing, a temporary order was entered in April 2009 directing Shane to pay Jacinda child support in the amount of \$236 per month while the action was pending. After a trial in January 2010, the court entered an order disposing of all issues raised by the petition. Shane was ordered to pay Jacinda child support of \$145 per month and medical support of \$28.02 per month, beginning January 1, 2010.

On February 3, 2010, Jacinda filed an application for order to show cause why Shane was not in violation child support provision. She stated that at the time of trial Shane was not employed, but drawing workers' compensation benefits. She claimed that shortly following the trial Shane began driving a truck as an independent contractor, but did not start wage withholding or make voluntary payments. As of the time of the filing of the application, Jacinda asserted Shane was over \$700 behind in child support payments and had made no payments for nearly three months.

Shane appeared at the hearing without counsel. Jacinda appeared with her attorney. Shane testified he received workers' compensation benefits until November 11, 2009, and until then, his support payments had been withheld from the compensation benefits. Since January 2010, Shane worked part-time as a contract truck driver. He was paid in cash and had not yet made any self-employment tax payments. He made "pretty much enough trips to actually get the house payment paid." He explained his house had gone into foreclosure after his workers' compensation benefits stopped.

At the time of the hearing, Shane was living with another woman. She did not contribute to the household expenses. One of Shane's sons, a full-time student, also lived in the home and made no contribution for expenses. Shane stated "[n]ow that I'm caught up with everything else, I told [Jacinda] that I would make an effort to get [the child support] caught up as soon as possible." He anticipated receiving an income tax refund that would go toward his child support obligation. Shane was confronted with a page from his MySpace account that had been printed off about a month before the hearing. His profile showed his occupation as a driver with an income of \$30,000 to \$45,000. Shane explained that his MySpace account had been open for several years and he had not bothered to update it. He said the information was not current.

The district court found Jacinda failed to carry her burden to prove beyond a reasonable doubt that Shane willfully and intentionally violated the terms of the support orders, specifically noting that Jacinda presented no evidence to establish Shane's failure to pay was willful or intentional. The court concluded:

Shane was current on his child support payments up until the time his [workers'] compensation benefits ended. While Shane has not made any child support or medical support payments since then, his financial condition has been precarious. Shane credibly testified that he intended to bring his support payments current as quickly as his finances permit. If Shane fails to follow through on this promise, Jacinda may have a basis to pursue sanctions for contempt in the future. However, given the record made at the hearing, the Court cannot conclude beyond a reasonable doubt that the failure of Shane to pay his support obligations to this point was willful or intentional.

The court denied the application. Jacinda then filed a petition for writ of certiorari claiming there was proof beyond a reasonable doubt that Shane was in contempt of court for failing to pay his child support obligation and the district court erred in failing to so find.

II. Scope and Standards of Review.

“A writ of certiorari lies where a lower board, tribunal, or court has exceeded its jurisdiction or otherwise has acted illegally.” *State Public Defender v. Iowa Dist. Ct.*, 633 N.W.2d 280, 282 (Iowa 2001).

On writ of certiorari, this court's review is at law, and “we may examine only the jurisdiction of the district court and the legality of its actions.” *Christensen v. Iowa Dist. Ct.*, 578 N.W.2d 675, 678 (Iowa 1998). The district court acts illegally when the court's factual findings lack substantial evidentiary support. *Id.* Since proof beyond a reasonable doubt must be established for a finding of contempt, substantial evidence to support such a finding is “such evidence as could convince a rational trier of fact that the alleged contemnor is guilty of contempt beyond a reasonable doubt.” *In re Marriage of Jacobo*, 526 N.W.2d 859, 866 (Iowa 1995) (quoting *Ervin v. Iowa Dist. Ct.*, 495 N.W.2d 742, 744–45 (Iowa 1993)). We review the district court's conclusions of law for errors at law. *State v. Lipcamon*, 483 N.W.2d 605, 606–07 (Iowa 1992).

Reis v. Iowa Dist. Ct., 787 N.W.2d 61, 66 (Iowa 2010).

III. Finding of Contempt.

Our code provides:

If a person against whom a temporary order or final decree has been entered willfully disobeys the order or decree, the person may be cited and punished by the court for contempt and be committed to the county jail for a period of time not to exceed thirty days for each offense.

Iowa Code § 598.23(1) (2009). A person may only be punished for contempt if their disobedience of the court order is established by proof beyond a reasonable doubt. *Jacobo*, 526 N.W.2d at 866; *Phillips v. Iowa Dist. Ct.*, 380 N.W.2d 706, 709 (Iowa 1986). Jacinda carries the burden of proving Shane had a duty to obey a court order and failed to perform that duty. *Jacobo*, 526 N.W.2d at 866; *Gizmo v. Iowa Dist. Ct.*, 561 N.W.2d 833, 835 (Iowa Ct. App. 1997). Thereafter, the burden shifts to Shane to submit evidence that he did not willfully violate the order. *Id.* However, the burden of persuasion to prove beyond a reasonable doubt that Shane willfully violated the order remains on Jacinda's shoulders. *Id.*

A finding of willful disobedience

requires evidence of conduct that is intentional and deliberate with a bad or evil purpose, or wanton and in disregard of the rights of others, or contrary to a known duty, or unauthorized, coupled with an unconcern whether the contemner had the right or not.

Christensen, 578 N.W.2d at 678 (citations omitted). Contempt is established if the applicant proves some of the disobedience of the order was willful. *Ervin*, 495 N.W.2d at 744; *Gizmo*, 561 N.W.2d at 835. Available defenses to refute a claim of contempt are indefiniteness or uncertainty of the order, or the person was not willfully disobeying the order. *Bevens v. Kilburg*, 326 N.W.2d 902, 904

(Iowa 1982). Lack of willfulness may be shown by the contemner's inability to perform the act required. See *Christensen*, 578 N.W.2d at 678.

Shane's noncompliance with the court's support order is not in dispute, but the district court found Shane's excuse for nonpayment to be convincing and credible. "Our task is not to weigh the evidence or the credibility of the witnesses. Rather, our task is to determine whether substantial evidence supports the district court's findings *according to those witnesses whom the court believed.*" *Tim O'Neill Chevrolet, Inc. v. Forristall*, 551 N.W.2d 611, 614 (Iowa 1996) (emphasis added); see also *Estate of Hagedorn ex rel. Hagedorn v. Peterson*, 690 N.W.2d 84, 88 (Iowa 2004) ("Although the plaintiffs contend the defendant's experts were not credible, the credibility of witnesses is peculiarly the responsibility of the fact finder to assess."). "On appeal in a law action we are bound by such factual findings on the credibility of witnesses." *Van Sloun v. Agans Bros., Inc.*, 778 N.W.2d 174, 182 (Iowa 2010) (citation omitted). This is because the trial court, as the original trier of fact, is in a "markedly better position to judge the credibility" of the witnesses than our court on appeal. *Id.*; see also *In re Marriage of Vrban*, 359 N.W.2d 420, 423 (Iowa 1984) ("A trial court deciding dissolution cases 'is greatly helped in making a wise decision about the parties by listening to them and watching them in person.' In contrast, appellate courts must rely on the printed record in evaluating the evidence. We are denied the impression created by the demeanor of each and every witness as the testimony is presented." (internal citations omitted)). A witness's facial expressions, vocal intonation, eye movement, gestures, posture, body language, and courtroom conduct, both on and off the stand, are not reflected in the

transcript. Hidden attitudes, feelings, and opinions may be detected from this “nonverbal leakage.” See Thomas Sannito & Peter J. McGovern, *Courtroom Psychology for Trial Lawyers* 1 (1985). Thus, the district court judge is in the best position to assess witnesses’ interest in the trial, their motive, candor, bias, and prejudice. In light of the foregoing, we find no reason to disturb the district court’s specific credibility findings.

The district court found it to be no surprise that Shane fell behind in his support payments, as well as his house payment and other living expenses, when he had no income in November and December 2009 after his workers’ compensation benefits ended. The court noted Shane’s income from his trucking business is considerably less than the compensation benefits he had been receiving. We find substantial evidence supports the district court’s findings. The record made at the hearing did not establish beyond a reasonable doubt that Shane’s failure to pay his support obligation was willful or intentional. Accordingly, we annul the writ.

WRIT ANNULLED.