IN THE COURT OF APPEALS OF TENNESSEE
MIDDLE SECTION, AT NASHVILLE

JERRY SCOTT WILSON,	§	
	§	
Respondent-Appellant,	§	
	§	
v.	§	Case No.: M2023-00232-COA-R3-CV
	§	
BRITTANY SHARAYAH LEHMANN,	§	Rutherford County Circuit Court
	§	Case No. 22-CV-712
	§	
Petitioner-Appellee.	§	

PRINCIPAL BRIEF OF APPELLANT JERRY SCOTT WILSON

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Date: June 1, 2023

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IV. STANDARDS OF REVIEW

1. When an action is tried by the court without a jury, this court reviews findings of fact "de novo upon the record with a presumption of correctness unless the evidence preponderates otherwise." *Rothbauer v. Sheltrown*, No. W2021-00607-COA-R3-JV, 2022 WL 713422, at *1 (Tenn. Ct. App. Mar. 10, 2022 (citing Tenn. R. App. P. 13(d)).

2. "[W]hen a defendant challenges the sufficiency of the [prosecution's] evidence, the reviewing courts must consider the sufficiency of the [prosecution's] evidence with regard to each element of the offense for which the defendant was convicted." *State v. Hawkins*, 406 S.W.3d 121, 131 (Tenn. 2013). "When an appellant challenges the sufficiency of the convicting evidence, the standard for review by an appellate court is '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.'" *State v. Jones*, No. W2018-01421-CCA-R3-CD, 2020 WL 974197, at *9 (Tenn. Crim. App. Feb. 27, 2020) (cleaned up).

3. "Determining whether an order is sufficiently free from ambiguity to be enforced in a contempt proceeding is a legal inquiry that is subject to de novo review." *Konvalinka v. Chattanooga-Hamilton County Hosp. Auth.*, 249 S.W.3d 346, 356 (Tenn. 2008).

4. "An issue regarding the sufficiency of notice provided regarding criminal contempt allegations presents a question of law, which we review de novo." *McClain v. McClain*, 539 S.W.3d 170, 187 (Tenn. Ct. App. 2017).

V. INTRODUCTION

"[A]ppellate courts are charged with a special responsibility to see that the contempt power is not abused." *See State v. Wood*, 91 S.W.3d 769, 776 (Tenn. Ct. App. 2002). This case—arising from a criminal contempt bench trial in which: (1) the assertedly violated orders were never admitted into evidence, (2) no evidence supporting any element of contempt was established as to either charged count, (3) no factual findings were made, and (4) no one involved in the case even understood that the proceeding was criminal until minutes before it began—demonstrates why.

Here, in every possible respect, the evidence admitted at trial could not sustain either one of the Appellant's convictions. A host of other errors require that the Appellant's convictions be vacated, too. Accordingly, the trial court's judgment should be reversed; the Appellant's convictions should be vacated; and the Appellee's contempt charges should be dismissed with prejudice.

VI. STATEMENT OF THE CASE

On April 19, 2022, Appellee Brittany Sharayah Lehmann petitioned for and was granted a temporary ex parte order of protection (the "April 19, 2022 Ex-Parte Order") against the Appellant, Dr. Jerry Scott Wilson.[1] Two days later, Dr. Wilson petitioned for and was granted his own ex parte order of protection against the Appellee.[2] The Parties'

[1] R. at 1–11.

[2] *See* R. at 95, ¶ 2. Dr. Wilson's Order of Protection against the Appellee was docketed under a separate case number—Rutherford County Chancery Court Case No. 22CV-728. *See id.*

ex parte petitions were initially set for hearing on May 2, 2022, but the Parties repeatedly reset the hearing by agreement.[3] The Parties also agreed that "[t]he *ex parte* Orders of Protection shall stay in effect for all parties pending said hearing."[4]

On August 1, 2022, based on an agreement reached by the Parties, the trial court entered an "order to continue ex parte order of protection" (the "August 1, 2022 Agreed Order").[5] The August 1, 2022 Agreed Order expressly modified the April 19, 2022 Ex-Parte Order by removing any restriction concerning the Parties' minor child.[6] It also provided that Dr. Wilson should have visitation with the Parties' minor child and delineated when and where their child would be exchanged for visitation purposes.[7] The August 1, 2022 Agreed Order further forbade the Parties from making "derogatory comments" about one another.[8]

On September 12, 2022, Dr. Wilson sent a text message[9] that the Appellee asserted violated the no-contact provision of the April 19, 2022 Ex-Parte Order. This communication formed the basis for Count #1 of the Appellee's criminal contempt claim, which came before the trial court for a bench trial on January 23, 2023.[10]

On September 14, 2022—during the court-ordered exchange

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[3] R. at 24; 26; 75.
[4] *See, e.g., id.* at 24; 26; 75.
[5] *Id.* at 34–35.
[6] *Id.* at 34.
[7] *Id.* at 34–35.
[8] *Id.* at 35.
[9] Trial Exhibit #1.
[10] *See* Tr. of Proceedings at 15:6-25.

preceding Dr. Wilson's visitation with the Parties' minor child—the Parties had a second, in-person communication. This communication formed the basis for Count #2 of the Appellee's criminal contempt claim, which was tried along with Count #1 on January 23, 2023.[11]

The trial court conducted a criminal contempt bench trial on Counts #1 and #2 of the Appellee's contempt claims on January 23, 2023.[12] A counter-contempt claim that Dr. Wilson filed was tried simultaneously, though Dr. Wilson ultimately withdrew it, and it is not at issue here.

Before the proof opened, Dr. Wilson's counsel explained that "I'm not here for a criminal proceeding"[13] and repeatedly expressed his "confusion" about "whether this is a criminal matter or not."[14] He was not the only one confused. For instance, before the contempt proceedings began, the trial judge candidly admitted on the record that he "[didn't] have a clue what the classification would be, what the penalty is[]" for a violation of T.C.A. § 36-3-611.[15] Nor did Appellee's counsel know.[16] Even the officer who arrested Dr. Wilson opined that the violations were "not really warrants" and that "there's not outstanding criminal warrants out there" despite Mr. Wilson having been arrested and required to make a bond on both violations.[17] Eventually, the trial court explained:

> I think I found the answer. Let me read 36-3-612, which is right after 611. 36-3-612(a): "A person arrested for the

[11] *See id.* at 16:11-17:13.
[12] *See generally* Tr. of Proceedings.
[13] *See id.* at 4:19.
[14] *See id.* at 35:10–12.
[15] *Id.* at 10:20-24.
[16] *Id.* at 10:23-11:2.
[17] *Id.* at 45:4–12. *See also* R. at 40–44.

> violation of an order of protection issued pursuant to this part or a restraining order, a court-approved consent agreement, shall be taken before a magistrate or the Court having jurisdiction in the cause without unnecessary delay to answer a charge of contempt for violation of the order of protection."
>
> So I think it's just simply treated as a contempt, which would just simply be a $50 fine or ten days if it were to be found. I'm just going through the possibilities. So that's what we'll do.[18]

Of Dr. Wilson's counter-contempt claim being tried simultaneously, the Court stated: "I don't think it's a criminal matter."[19] Dr. Wilson's counsel then explained that the attorneys for the Parties "were both confused about whether we were going to be told to go out of here and go to criminal court or something."[20] In response, the trial court stated that: "[a] violation of order of protection gets put on the docket" for criminal warrants and "that's why we're here[.]"[21]

Following this exchange, the matter proceeded against Dr. Wilson as a two-count criminal contempt bench trial. Three witnesses testified: the Appellee, Dr. Wilson, and Rutherford County Sheriff's Officer Riley Dunmeyer.[22] Only two exhibits were entered into evidence: (1) a text message dated September 12, 2022; and (2) video footage of the Parties' September 14, 2022 visitation exchange. Thus, neither order that Dr. Wilson was accused of violating was ever admitted.

After the close of proof, the trial court determined that Dr. Wilson

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[18] *See* Tr. of Proceedings at 11:9–21.
[19] *See id.* at 35:14–15.
[20] *See id.* at 37:16–18.
[21] *See id.* at 39:2–6.
[22] *See id.* at 12:14; *id.* at 41:20; *id.* at 50:16.

had committed "a technical violation" that was "not something that requires ten days in jail."[23] The trial court then entered a written order stating that Dr. Wilson "is found in contempt of two violations brought before this Court"[24] and ordered Dr. Wilson to "pay a fine of $10 for each violation[.]"[25] The trial court made no further findings of fact. Dr. Wilson timely appealed,[26] and this appeal followed.

VII. STATEMENT OF FACTS

A. The Underlying Order Allegedly Violated

On April 19, 2022, the Appellee petitioned for and received an ex-parte order of protection against Dr. Wilson.[27] As relevant to this appeal, the court's April 19, 2022 Ex-Parte Order stated as follows: "Do not contact the Petitioner and/or Petitioner's minor children protected by this order either directly or indirectly, by phone, email messages, mail or any other type of communication or contact."[28]

The court's April 19, 2022 Ex-Parte Order was modified by agreement of the Parties on August 1, 2022. The Parties' August 1, 2022 Agreed Order expressly altered the terms of the April 19, 2022 Ex-Parte Order by removing any restriction involving the Parties' minor child.[29] The August 1, 2022 Agreed Order also included handwritten instructions

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[23] *Id.* at 69:4–7.
[24] R. at 113.
[25] *Id.*
[26] *See* Notice of Appeal (Feb. 16, 2023).
[27] *Id.* at 9-11.
[28] *Id.* at 10.
[29] *Id.* at 34 ("the minor child shall be removed from this ex parte order of protection.").

that "Father shall have visitation" with the Parties' minor child on specified Wednesdays and Saturdays, with court-ordered "exchanges occurring @ childcare provider"[30] or at the "Rutherford County Sheriff Department"[31] depending on the day of the week. The August 1, 2022 Agreed Order added that "[n]either party shall make derogatory comments about the other parent & this shall apply to all 3rd party agents."[32]

Critically, the August 1, 2022 Agreed Order did *not* state how its court-ordered visitation and exchange arrangement should be reconciled with the no-contact provision of the earlier April 19, 2022 Ex-Parte Order. As noted above, the April 19, 2022 Ex-Parte Order provided that Dr. Wilson could not contact or communicate with the Appellee in any respect.[33] Because contact was necessary to facilitate the court-ordered exchanges that were now mandated by the August 1, 2022 Agreed Order, though, Dr. Wilson was reasonably confused about how, if at all, the April 19, 2022 Ex-Parte Order now applied.

For her part, the Appellee understood that the August 1, 2022 Agreed Order now permitted communication between the Parties as well, though she understood that authorization to be limited to communication about the Parties' daughter.[34] Thus, the Appellee admitted that she initiated "direct communication with" Dr. Wilson "about our daughter"

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[30] *Id.*
[31] *Id.* at 35.
[32] *Id.*
[33] *Id.* at 10.
[34] Tr. of Proceedings at 27:2–7; *id.* at 25:13–16.

following entry of the August 1, 2022 Agreed Order.[35] Further, because the Appellee later asserted that her second contempt charge was not based on the derogatory comments provision of the August 1, 2022 Agreed Order,[36] only the April 19, 2022 Ex-Parte Order should be at issue in this appeal.

B. Count #1 (September 12, 2022 Text Message)

On September 12, 2022, Dr. Wilson sent the Appellee a text message that the Appellee asserted violated the April 19, 2022 Ex-Parte Order. The Appellee specifically recounted to law enforcement "that Mr. Wilson is not to have contact with her and he sent her a text on 09.12.22 from his cell phone [number omitted] at 1546hrs and made a reference to an Xfinity cable account."[37] The Appellee had Dr. Wilson arrested as a result.[38]

The text message underlying the Appellee's charge was introduced at trial as Trial Exhibit #1. In full, it states: "Xfiniti [sic] is calling you now. Please answer. I'm here now. Didn't realize the account was apparently just in your name when I transferred."[39]

In his testimony at trial, Dr. Wilson explained the circumstances underlying this communication. He testified that he was "a physician specializing in psychiatry[,]" and that he uses the internet to provide "telehealth-type services" to his patients and had done so "for a number

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[35] *Id*. at 25:9–16.
[36] *See supra* at 35. *See also* Tr. of Proceedings at 64:25–65:15.
[37] R. at 42.
[38] *Id*. at 39–41.
[39] Trial Ex. #1.

of years."[40] He explained that he had used the Parties' previously-shared "Xfinity Internet service for the months of April, May, June, and July" and paid for the service himself.[41] He added that he moved from one residence to another afterward and needed to "transfer the Xfinity" to his new residence, so he went "to the Xfinity office" to do so.[42] All of this was happening by agreement of the Parties, too, as the Appellee herself had told Xfinity that "'[t]his needs to be transferred into [Dr. Wilson's] name and not be in my name[.]'"[43]

Once at the Xfinity office, Dr. Wilson was informed that the Appellee "would have to take care of some things with Xfinity" to enable Dr. Wilson's internet service to be transferred.[44] Dr. Wilson then returned to the Xfinity office the following Monday and was advised that Xfinity needed "a personal response contact" with the Appellee because "a fraud block had been initiated on [Dr. Wilson's] account."[45] As a result, to clear the fraud block, the Appellee would need "to be contacted" by Xfinity and provide "clearance."[46]

By this time, "it was nearly 4:00 p.m. on Monday."[47] Dr. Wilson also "had high-risk patients scheduled [for] telehealth the following morning[.]"[48]

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[40] Tr. of Proceedings at 50:21–51:1.
[41] *Id.* at 51:8–12.
[42] *Id.* at 51:13–25.
[43] *Id.* at 21:1–6.
[44] *Id.* at 52:11–14.
[45] *Id.* at 52:18–53:4.
[46] *Id.* at 53:3–10.
[47] *Id.* at 53:15–16.
[48] *Id.* at 53:16–17.

Xfinity's representative "attempted to contact" the Appellee,[49] but that effort apparently was not successful. Dr. Wilson "was concerned that perhaps [the Appellee did not answer because] it was showing up as an unknown number[.]"[50] Thus, without giving "much thought to any other avenues for trying to resolve [the situation] before the end of the workday,"[51] Dr. Wilson sent a text message to the Appellee stating: "Xfiniti [sic] is calling you now. Please answer. I'm here now. Didn't realize the account was apparently just in your name when I transferred."[52]

That was "the entirety of [Dr. Wilson's] communication with [the Appellee]" regarding the matter.[53] In sending this text message, Dr. Wilson was not trying "to threaten [the Appellee] or disparage her or inflame the situation in any way[.]"[54] Instead, he was trying to resolve a "significant issue in [his] practice" so he could treat his high-risk psychiatric patients the following morning.[55]

Notably, Dr. Wilson's effort to resolve the issue worked. As the Appellee testified at trial, "the Xfinity girl call[ed her]" her right after Dr. Wilson texted her, the Appellee answered the call, and the Appellee then spoke to Xfinity's representative on the phone[56] and resolved the issue.

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[49] *Id.* at 54:2–3.
[50] *Id.* at 54:3–4.
[51] *Id.* at 53:18–20.
[52] Trial Ex. #1.
[53] Tr. of Proceedings at 54:9–11.
[54] *Id.* at 53:24–54:2.
[55] *Id.* at 54:6–8.
[56] *Id.* at 15:6–18.

Discovery would later reveal that this entire situation was of the Appellee's own dishonest making, too. In particular, when the Appellee went to transfer the Parties' internet into Dr. Wilson's name herself, she was given two options: either pay "a bunch of fees" or "say that there was fraud involved[.]"[57] Thus, even though the Appellee knew that there was *not* fraud involved, because the Appellee did not "want to pay the fees," she falsely reported that Dr. Wilson "was acting with fraud[,]" giving rise to an illegitimate fraud block that required the Appellee's clearance to resolve.[58]

Based on the foregoing facts, the Appellee had Dr. Wilson arrested and testified that she was "asking the Court to violate Mr. Wilson as a result of sending [her] this text message[.]"[59] Arguing in support of that asserted violation, the Appellee's counsel also maintained that a conviction for criminal contempt should issue because (she asserted) contempt is a strict liability offense for which intent does not matter.[60] In particular, the Appellee's counsel claimed that, "in a violation, it's a simple act. **It doesn't matter what your intent is.** He sent the text message. He testified to it, that he sent the Xfinity text message."[61]

C. Count #2 (September 14, 2022 Visitation Exchange)

On September 14, 2022—two days after the Xfinity situation—the Parties had an in-person communication during a court-ordered

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[57] *Id.* at 21:7–18.
[58] *Id.* at 21:19–22:1.
[59] *Id.* at 15:19–22.
[60] *Id.* at 65:5–6; *id.* at 65:19–22.
[61] *Id.* at 65:5–8 (emphasis added).

visitation exchange. The Parties met at the Rutherford County Sheriff's Department to exchange their daughter as provided by the August 1, 2022 Agreed Order.[62]

According to the Appellee, after the Parties exchanged their minor child, Dr. Wilson "came back to [her] window" and "started talking about the Xfinity."[63] As to that portion of her testimony, Dr. Wilson's testimony matched the Appellee's account. In particular, Dr. Wilson testified that he "was advising [the Appellee] that the matter had been handled so that [he] hopefully didn't have to worry about any other negative kind of insinuations or accusations about the account or fraud."[64]

The Parties disagree about what exactly Dr. Wilson said, though. It also was not clear from the Appellee's own testimony what, specifically, she was claiming that Dr. Wilson said verbatim. Her direct examination testimony on the matter was as follows:

> Q. Did he call you any names on that day?
>
> A. He just did his typical, "you're delusional". I didn't need to -- that he –
>
> Q. Take your time.
>
> A. "I wasn't trying to steal your cable" was how he started it or something along those lines.
>
> Q. Okay. And what did you do?
>
> A. I rolled up the window, and I drove away without saying anything. And I drove to Dunkin' Donuts, and I got an ice coffee. And then I went back to the sheriff's department and told them exactly what happened and

[62] R. at 34–35. *See also* Tr. of Proceedings at 16:16–17.
[63] Tr. of Proceedings at 16:16–22.
[64] *Id.* at 54:22–55:2.

that was it.

Q. And you're asking for the Court to find that a violation of the order of protection also; is that correct?

A. Yes.[65]

The Appellee did not attempt to establish through her testimony—or purport to know—either Dr. Wilson's mental state or whether he had willfully violated the August 1, 2022 Order. After going to Dunkin' Donuts and getting an iced coffee, though, the Appellee returned to the Sheriff's Department and had Dr. Wilson arrested.[66]

Dr. Wilson, for his part, testified that he said nothing threatening to the Appellee during this exchange, said nothing derogatory to her, did not curse, and said nothing disparaging.[67] He also specifically denied calling the Appellee "delusional[.]"[68] It is unclear from the Appellee's testimony whether she was recounting that as a quoted statement, though, particularly given her follow-up testimony during cross-examination, when the Appellee answered affirmatively that she "didn't actually hear him say 'delusional[.]'"[69] Officer Riley Dunmeyer's testimony brought no clarity to the matter, either, as he testified that he had not witnessed the interaction between the Parties, had not watched the video of the exchange (which lacked audio) prior to testifying,[70] and

[65] *Id.* at 16:23–17:13.
[66] *Id.* at 17:4–9.
[67] *Id.* at 55:20–56:2.
[68] *Id.* at 61:25–62:3.
[69] *Id.* at 27:13–15 (Q. "You didn't actually hear him say 'delusional' though?" A. "Yes.").
[70] *Id.* at 45:17–20.

had no personal knowledge of what was said between the Parties.[71]

As to his mental state: Dr. Wilson presented uncontradicted testimony that his "thought process" in approaching Ms. Lehmann's window to tell her that the Xfinity situation was resolved was that he "wanted to make sure the situation was resolved. [He] didn't have an attorney at that time. [He] was moving out of state to just kind of let matters play through the court, and [he] wanted to make sure that there wasn't anything outstanding that needed [to be] addressed."[72]

D. Trial Court Ruling

Following the close of proof, the Appellee's counsel repeatedly insisted that Dr. Wilson's intent had no bearing on whether Dr. Wilson should be convicted of criminal contempt. "To get the original order of protection, you have to have some amount of intent and some amount of harm. But in a violation, it's a simple act. It doesn't matter what your intent is[,]" she argued.[73] "[M]y client has lived through a lot in this, and it doesn't matter what his intent is[,]" she repeated.[74] Thus, the Appellee contended that Dr. Wilson "should serve ten days [in jail] for each one of those violations" regardless of his intent, and "[s]o I would ask Your Honor to have him serve ten days for each violation."[75]

Upon review, the trial court ruled that Dr. Wilson was guilty of "a technical violation" on both charges.[76] The trial court ruled that "it's not

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[71] *Id.* at 47:5–12.
[72] *Id.* at 55:14–19.
[73] *Id.* at 65:3–6.
[74] *Id.* at 65:18–20.
[75] *Id.* at 65:14–15; 65:23–24.
[76] *Id.* at 69:4.

something that requires ten days in jail[,]"[77] though. Thus, the trial court held that "I'm going to find that Mr. Wilson has violated this on the two occasions. I'm going to order a $10 fine on each one, with a $20 fine be paid to the chancery court clerk's office."[78] The trial court then entered a written order to that effect on January 23, 2023,[79] which states, verbatim, that:

> Respondent is guilty of contempt of the Court's Order in that: Respondent shall pay a fine of $10 for each violation to the Clerk of the Chancery Court for Rutherford County. Respondent is found in contempt of two violations brought before this Court.[80]

The trial court made no further factual findings, and this timely appeal followed.

VIII. ARGUMENT

A. THE APPELLEE FAILED TO SUSTAIN HER BURDEN OF PROOF AS TO ANY ELEMENT OF EITHER CHARGE.

"There are three essential elements to criminal contempt: '(1) a court order, (2) the defendant's violation of that order, and (3) proof that the defendant willfully violated that order.'" *Pruitt v. Pruitt*, 293 S.W.3d 537, 545 (Tenn. Ct. App. 2008) (quoting *Foster v. Foster*, No. M2006-01277-COA-R3-CV, 2007 WL 4530813, at *5 (Tenn. Ct. App. Dec. 20, 2007)). "In addition, the party moving for contempt must show the following four elements: (1) the order allegedly violated was lawful; (2)

[77] *Id.* at 69:6–7.
[78] *Id.* at 69:13–16.
[79] R. at 113–114.
[80] *Id.*

the order was clear and unambiguous; (3) the individual charged did in fact violate the order; and (4) the individual acted willfully in so violating the order." *Boren v. Wade*, No. W2022-00194-COA-R3-CV, 2023 WL 3000881, at *2 (Tenn. Ct. App. Apr. 19, 2023) (cleaned up).

When appellate courts review "a judgment of criminal contempt, [they] employ the four-element analysis set forth in *Konvalinka v. Chattanooga-Hamilton County Hosp. Auth.*, 249 S.W.3d 346 (Tenn.2008)[.]" *Furlong v. Furlong*, 370 S.W.3d 329, 336 (Tenn. Ct. App. 2011). Applying this analysis here, both of Mr. Wilson's convictions should be vacated and dismissed.

1. <u>The Appellee failed to introduce sufficient evidence of the trial court's orders.</u>

"A defendant accused of criminal contempt is presumed to be innocent." *Cottingham v. Cottingham*, 193 S.W.3d 531, 538 (Tenn. 2006) (citing *Shiflet v. State*, 217 Tenn. 690, 400 S.W.2d 542, 544 (1966)). As in all criminal cases, "[t]he prosecution bears the burden of proving guilt beyond a reasonable doubt." *Id.* That requirement—a constitutional one—also applies to "each element" of the charged offense. *Hobbs v. State*, 73 S.W.3d 155, 158 (Tenn. Crim. App. 2001) ("it is true that, constitutionally, a defendant's conviction must be based upon proof beyond a reasonable doubt of each element of the offense").

With this context in mind, criminal contempt charges—which result in criminal convictions and a cascade of collateral consequences when sustained[81]—are not a trivial matter. A prosecution seeking to

[81] The list of collateral consequences arising from a criminal conviction numbers in the tens of thousands. *See United States v. Nesbeth*, 188 F.

establish that a defendant is guilty of criminal contempt is accordingly subject to real evidentiary standards. Among those standards is the rule that evidence that is not admitted at trial cannot be used to support a conviction. Put another way, if a prosecutor fails to introduce evidence of an essential element of a charged offense, a court may not simply take notice of it to cure the defect and support the unproven element. *See, e.g., United States v. Kail*, No. 18-CR-00172-BLF-1, 2018 WL 6511154, at *1 (N.D. Cal. Dec. 11, 2018) ("A court may not take judicial notice of an element of an offense, since a criminal defendant is entitled to have a jury determine every element of the charged crime.") (citing *United States v. Gaudin*, 515 U.S. 506, 511 (1995)); *United States v. Burroughs*, 564 F.2d 1111, 1115 (4th Cir. 1977) ("we will not take judicial notice on appeal of an unproven essential element of a criminal offense."); *United States v. Paul*, 73 M.J. 274, 280 (C.A.A.F. 2014) (an appellate court "cannot take judicial notice of facts necessary to establish an element of the offense."). *Cf. United States v. Banyan*, 933 F.3d 548, 551 (6th Cir. 2019) ("the fraud must be perpetrated against a bank—which (as a matter of statutory definition) the mortgage companies obviously were not, because they were not federally insured. Nor did the government make any effort at

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Supp. 3d 179, 183 (E.D.N.Y. 2016) ("The study—which was conducted by the American Bar Association's Criminal Justice Section—has catalogued tens of thousands of statutes and regulations that impose collateral consequences at both the federal and state levels."). *See also* Proclamation of the Governor, Tenn., Jan. 29, 2021, https://tnsos.net/publications/proclamations/files/2033.pdf ("The Council of State Governments reports that the number of legal collateral consequences of a criminal conviction exceeds 44,000, with 954 consequences specific to Tennessee[.]").

trial to prove that the loans were funded by the mortgage companies' parent corporations, which were banks. The government now offers various theories to work around these deficiencies, but none has merit.").

That prohibition is dispositive here. Only two exhibits were admitted at Dr. Wilson's trial—a September 12, 2022 text message and a September 14, 2022 video recording of the Parties exchanging their minor child[82]—neither of which was an order that Dr. Wilson purportedly violated. Accordingly, neither exhibit enabled the Appellee to satisfy the first element of her criminal contempt claims: specifically, "a court order." *Pruitt*, 293 S.W.3d at 545 ("There are three essential elements to criminal contempt: '(1) a court order . . . .").

Nor do the specific terms of either of the orders underlying Dr. Wilson's contempt charges appear anywhere in the trial record. The trial court itself appears to have referenced the contents of the April 19, 2022 Ex-Parte Order during the Parties' closing argument,[83] though that discussion came after the close of proof and was not part of the evidence admitted at trial. Similarly, although there are references in the trial record to the existence of an order entered on August 1st,[84] the specific contents of that order—and what it does or does not prohibit—were not admitted through testimony or otherwise, either.

That failure is fatal. *See Bryant v. Bryant*, No. M2007-02386-COA-R3-CV, 2008 WL 4254364, at *3 (Tenn. Ct. App. Sept. 16, 2008)

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[82] *See* Trial Ex. #1; Trial Ex. #2.
[83] *See* Tr. of Proceedings at 67:7–16.
[84] *See id.* at 25:24–25:1; *id.* at 60:13 (referencing "the August 1st update.").

("Pursuant to Tenn. R. App. P. 13(c), this Court may only consider evidence that is considered by the trial court and set forth in the record, or evidence that was erroneously excluded at trial."). Nor is the fact that the Appellee failed to introduce competent proof of a threshold element of her charged offenses Dr. Wilson's fault. The Appellee does not appear to be the first litigant to have overlooked the requirement to introduce or otherwise substantiate the contents of an underlying order in a contempt case, either. *See, e.g., City of Cleveland v. Patterson*, 8th Dist. Cuyahoga No. 109274, 2020 WL 1951545, at *10, ¶ 10 (Apr. 23, 2020) ("Because the city failed to introduce a court order into evidence and the court did not take judicial notice of a court order, that element of criminal contempt was not supported by sufficient evidence."); *State v. Majerus*, 909 N.W.2d 228 (Iowa Ct. App. 2017) ("The district court dismissed the application because the prosecutor failed to offer into evidence the no-contact order. Specifically, the district court stated, '[T]he Court finds that there has not been evidence established beyond a reasonable doubt that the defendant violated the No-Contact Order, as alleged in the affidavit, because the Court has no idea what's in the No-Contact Order.'"); *United States v. Peguero*, 34 F.4th 143, 165 (2d Cir. 2022) ("at the October 8, 2020 revocation hearing, the district court orally announced its finding 'that the government failed to demonstrate by a preponderance of the evidence that Carlos Peguero committed [Specification 9]' as the government had 'fail[ed] to introduce the order of protection ... or present evidence that there was in fact an order of protection in effect on the date of the incident.'"). *Cf. In re Joshua M.,* No. E2021-01527-COA-R3-PT, 2022 WL 4666232, at *9 (Tenn. Ct. App. Oct. 3, 2022) ("the order was not

introduced into evidence. . . . Although the record indicates that the children were removed from Mother's custody by a court order, we cannot, without evidence indicating when that order was entered, conclude that Petitioners proved by clear and convincing evidence that the children had been removed from Mother's custody by a court order 'for a period of six (6) months.'").

Here, by failing either to introduce the underlying orders themselves or to establish their specific contents, the Appellee failed to prove the first contempt element—"a court order"—as to either charged offense. *Pruitt*, 293 S.W.3d at 545. As a result, both of Dr. Wilson's contempt convictions must be reversed. Additionally, because the evidence was insufficient to support Dr. Wilson's convictions and jeopardy attaches, the Appellee's charges must be dismissed with prejudice. *See Cottingham*, 193 S.W.3d at 539 ("we hold that the evidence is insufficient to support the convictions for criminal contempt. The constitutional provisions against double jeopardy require that the criminal contempt charges be dismissed.").

2. <u>The Appellee failed to prove that the "derogatory comments" provision of the August 1, 2022 Agreed Order was lawful.</u>

The Appellee's failure to introduce the August 1, 2022 Agreed Order into evidence—paired with her on-the-record position that Dr. Wilson should be convicted, as to both charges, for violating the April 19, 2022 Ex-Parte Order instead[85]—obviated the need for argument about whether the "derogatory comments" provision of the August 1, 2022

[85] *See supra* at 35. *See also* Tr. of Proceedings at 64:25–65:15.

Agreed Order was lawful. Out of an abundance of caution, though, and to prevent future waiver, Dr. Wilson preserves the argument that it was not. The provision is a viewpoint-based prior restraint of protected speech. *See, e.g., Shak v. Shak*, 484 Mass. 658, 661, 144 N.E.3d 274, 277 (2020) ("Nondisparagement orders are, by definition, a prior restraint on speech."). It is presumptively unconstitutional as a result, *see Bantam Books v. Sullivan*, 372 U.S. 58, 70 (1963), and doubly so because it restricts even *truthful* derogatory comments, *contra Smith v. Daily Mail Publ'g Co.,* 443 U.S. 97, 102 (1979) ("Our recent decisions demonstrate that state action to punish the publication of truthful information seldom can satisfy constitutional standards."). The "derogatory comments" provision of the August 1, 2022 Agreed Order also purports to apply to "3rd party agents" (R. at 35) who cannot lawfully be bound by it, rendering it infirm and unconstitutionally overbroad as well. *Cf. Smith v. Bayer Corp*., 564 U.S. 299, 308 (2011) (discussing the "discrete exceptions to the general rule against binding nonparties"). Thus, the "derogatory comments" provision of the August 1, 2022 Agreed Order is unlawful.

3. <u>The Appellee failed to prove that the relevant orders were clear, specific, and unambiguous.</u>

To sustain a conviction for criminal contempt, the order that a defendant is accused of violating must be "clear, specific, and unambiguous." *Konvalinka*, 249 S.W.3d at 355. Thus, "[v]ague or ambiguous orders that are susceptible to more than one reasonable interpretation cannot support a finding of civil [or criminal] contempt." *Beyer v. Beyer*, 428 S.W.3d 59, 78 (Tenn. Ct. App. 2013).

Given this context, a defendant may not be convicted of contempt

unless an order's terms "leave no reasonable basis for doubt regarding their meaning." *Id.* at 78. This standard is an "objective" one "that takes into account both the language of the order and the circumstances surrounding the issuance of the order, including the audience to whom the order is addressed." *Id.* Further, "[a]mbiguities in an order alleged to have been violated should be interpreted in favor of the person facing the contempt charge." *Id.* at 79 (collecting cases).

Here, the underlying orders—had they been admitted into evidence—provided a reasonable basis for doubting their meaning. Certainly, they gave rise to reasonable ambiguity that both Parties' testimony evidenced in spades. "[T]he circumstances surrounding" the issuance of the orders explain why. *Id.*

As to Count #1—arising from the April 19, 2022 Ex-Parte Order—the order provided as follows: "Do not contact the Petitioner and/or Petitioner's minor children protected by this order either directly or indirectly, by phone, email messages, mail or any other type of communication or contact."[86] By itself, this mandate would be simple enough. But Dr. Wilson was not charged with violating the April 19, 2022 Ex-Parte Order in a vacuum. Instead, he was charged with violating the April 19, 2022 Ex-Parte Order *after it was modified* by the terms of the August 1, 2022 Agreed Order.

This context matters, because the August 1, 2022 Agreed Order explicitly altered the April 19, 2022 Ex-Parte Order.[87] The August 1,

[86] R. at 10.

[87] *See, e.g.,* R. at 34 ("The minor child shall be removed from this Ex Parte Order of Protection.").

2022 Agreed Order also ordered a new visitation and exchange arrangement that necessarily *required* regular contact between the Parties,[88] which the earlier April 19, 2022 Ex-Parte Order categorically prohibited. That is why the Appellee herself understood that communication between the Parties—at least as it related to their daughter—was now permitted following entry of the August 1, 2022 Agreed Order, and it is why the Appellee admitted initiating "direct communication with" Dr. Wilson "about [their] daughter" following that order's entry.[89] Thus, for example, after the August 1, 2022 Agreed Order was entered, the Appellee contacted Dr. Wilson (indirectly) to let him know she was running late[90] and apologized to him (directly) for her tardiness when the Parties exchanged their daughter on September 14, 2022—all of which the Appellee was apparently instructed by her counsel that she was allowed to do.[91]

The August 1, 2022 Agreed Order does not actually state that communication between the Parties about their daughter was now permitted, though. Instead, the Appellee simply *assumed* that the August 1, 2022 Agreed Order superseded the non-contact provisions of the Parties' earlier ex-parte orders on that point, presumably because it would not have been possible to comply with the August 1, 2022 Agreed Order's visitation and exchange provisions without such contact.

Dr. Wilson, for his part, was entitled to assume the same. And

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[88] *See id.* at 34–35.
[89] Tr. of Proceedings at 25:9–16. *See also id.* at 26:20–27:7.
[90] Tr. at 58:16–17.
[91] Tr. at 15:23–25.

although the Appellee's assumption was narrower than Dr. Wilson's—as noted, the Appellee assumed that only communication "about our daughter" was now permitted[92]—the August 1, 2022 Agreed Order does not contain that qualification. Instead, it mandates a visitation and exchange schedule that cannot be reconciled with the April 19, 2022 Ex-Parte Order's non-contact provision without providing any guidance about how the conflict between the two orders should be resolved. Certainly, the August 1, 2022 Agreed Order is not clear, specific, and unambiguous as to the scope of communication that was allowed after its entry.

With this context in mind, the dispositive consistency between the Parties' competing interpretations is that *nobody* believed that the Parties could not have contact or communicate with one another after August 1, 2022. And because a "reasonable interpretation" of the August 1, 2022 Agreed Order—or, at minimum, a reasonable ambiguity inherent in it—supports the conclusion that it superseded the April 19, 2022 Ex-Parte Order's non-contact provision, Dr. Wilson's first contempt conviction cannot be sustained. *Beyer*, 428 S.W.3d at 79 ("[a]mbiguities in an order alleged to have been violated should be interpreted in favor of the person facing the contempt charge."). Count #1—concerning Dr. Wilson's transmission of an innocuous, good-faith text message about his efforts to have his internet service transferred—must be dismissed as a result.

As to Count #2—arising from the Parties' in-person communication

[92] Tr. of Proceedings at 25:9–16. *See also id.* at 26:20–27:7.

on September 14, 2022—the same reasoning precludes Dr. Wilson's conviction. Even if what constitutes a "derogatory comment" was objectively clear, specific, and unambiguous, by the end of Dr. Wilson's trial, the Appellee was no longer even maintaining the position that Dr. Wilson should be found in contempt because he made a derogatory comment. Instead, her counsel closed by arguing that "it doesn't matter" if the statement he made was derogatory because Dr. Wilson "admitted on the stand that he was talking about Xfinity again," which the Appellee asserted was forbidden by the April 19, 2022 Ex-Parte Order's non-contact provision.[93] Because—for the reasons detailed above—the continued validity of the April 19, 2022 Ex-Parte Order's non-contact provision was ambiguous, uncertain, and disputed by all involved following entry of the August 1, 2022 Agreed Order, though, Dr. Wilson's second contempt conviction cannot be sustained, either.

Separately, to the extent that the Appellee attempts to return to her original horse on appeal (specifically, that Dr. Wilson violated the derogatory comments provision of the August 1, 2022 Agreed Order), there is yet another problem: what constitutes a "derogatory comment" is similarly ambiguous. "[M]odern definitions" of the term "derogatory" carry multiple meanings, "including 'expressive of a low opinion,' 'disparaging,' or 'detracting from the character or standing of something.'" *Grimmett v. Freeman*, 59 F.4th 689, 693 (4th Cir. 2023) (citing Derogatory, Merriam-Webster Dictionary, https://www.merriam-webster.com/dictionary/derogatory). At least one District Attorney has

[93] Tr. of Proceedings at 64:25–65:15.

also asserted—unsuccessfully—that the term "refers exclusively to factually false statements." *Id.* To prevent First Amendment problems—which are probably insurmountable here—and avoid being invalidated as an impermissibly overbroad prior restraint of true and constitutionally protected speech, the term must arguably be construed in a way that is limited to false statements of fact that are defamatory, too. *Cf. Frogge v. Joseph*, No. M2020-01422-COA-R3-CV, 2022 WL 2197509, at *14 (Tenn. Ct. App. June 20, 2022) (affirming summary judgment of First Amendment violation and unconstitutional overbreadth under circumstances when a governmental provision "broadly prohibit[ted] 'any disparaging *or* defamatory comments,' (emphasis added), and with the definition of 'defamatory' not being limited to false statements, it effectively prohibits even truthful statements about Dr. Joseph if they tend to harm his reputation by subjecting him to 'public contempt, disgrace, or ridicule' or 'adversely' affect[ed] his business.").

For all of these reasons, the Appellee failed to prove that the relevant orders were clear, specific, and unambiguous. Both of Dr. Wilson's convictions must be vacated—and his charges dismissed—as a result.

4. <u>The Appellee failed to prove that Dr. Wilson actually violated the trial court's orders.</u>

To sustain a conviction for criminal contempt, a prosecutor must prove that a defendant "actually violated the order" underlying a contempt charge. *See Konvalinka*, 249 S.W.3d at 356. *See also Pruitt*, 293 S.W.3d at 545 ("There are three essential elements to criminal contempt: '(1) a court order, **(2) the defendant's violation of that**

order, and (3) proof that the defendant willfully violated that order.'") (emphasis added). This inquiry is a factual one. Thus, on appeal, the question is whether the evidentiary record can support a factual finding of guilt beyond a reasonable doubt. *See id.* ("When the sufficiency of the evidence in a criminal contempt case is raised in an appeal, this court must review the record to determine if the evidence in the record supports the finding of fact of guilt beyond a reasonable doubt, and 'if the evidence is insufficient to support the findings by the trier of fact of guilt beyond a reasonable doubt' we are to set aside the finding of guilt.") (quoting Tenn. R. App. P. 13(e)).

Here, as to both charged violations, the evidence is insufficient to prove an actual violation. Three reasons support this conclusion.

i. The August 1, 2022 Agreed Order superseded the non-contact provision of the April 19, 2022 Ex-Parte Order.

The August 1, 2022 Agreed Order—which necessarily required and affirmatively ordered regular contact between the Parties—was incompatible with the non-contact provision of the April 19, 2022 Ex-Parte Order. Thus, as a matter of law, the August 1, 2022 Agreed Order superseded the non-contact provision of the April 19, 2022 Ex-Parte Order. Two canons of construction compel this result.

The first is the recency canon, which instructs that "'a more recent enactment will take precedence over a prior one to the extent of any inconsistency between the two.'" *Falls v. Goins*, No. M2020-01510-COA-R3-CV, 2021 WL 6052583, at *2 (Tenn. Ct. App. Dec. 21, 2021), *appeal granted* (June 9, 2022) (quoting *Moorcroft v. Stuart*, No. M2013-02295-COA-R3-CV, 2015 WL 413094, at *10 (Tenn. Ct. App. Jan. 30, 2015)).

Here, there is no doubt that, at the time of the alleged September 2022 violations, the August 1, 2022 Agreed Order was the "more recent enactment[.]" Thus, "to the extent of any inconsistency between the two" orders—orders which, as noted above, were incompatible as to the legality of contact between the Parties—the August 1, 2022 Agreed Order "t[ook] precedence." *See id. Cf. Nay v. Res. Consultants, Inc.*, No. M1996-00016-WC-R3-CV, 2000 WL 4255, at *6 (Tenn. Workers Comp. Panel Jan. 5, 2000) ("Where two statutes are in conflict and it is impossible to reconcile those statutes, the law provides that the earlier of the two acts is repealed to the extent that it is inconsistent with the more recent enactment.") (citing *Brewer v. Lincoln Brass Works, Inc.*, 991 S.W.2d 226, 229 (Tenn. 1999) and *Steinhouse v. Neal*, 723 S.W.2d 625, 627 (Tenn. 1987)).

The second controlling canon is the general-specific canon, which provides that a specific provision "will ordinarily trump [an] earlier, more general one." *J.E.M. Ag Supply, Inc. v. Pioneer Hi-Bred Int'l, Inc.*, 534 U.S. 124, 156 (2001) (citing *United States v. Estate of Romani*, 523 U.S. 517, 530–533 (1998)). As canons of construction go, the rule that a more specific provision controls is "elementary." *Metro. Det. Area Hosp. Servs. v. United States*, 634 F.2d 330, 334 (6th Cir. 1980) ("It is an elementary rule of statutory construction that a specific provision controls when the same subject matter is addressed by a more general provision.") (citing *Bulova Watch Co. v. United States*, 365 U.S. 753, 758 (1961)).

Here, the general-specific canon similarly counsels that the

"derogatory comments" provision of the August 1, 2022 Agreed Order[94] superseded the blanket prohibition against any contact or communication set forth in the April 19, 2022 Ex-Parte Order. The August 1, 2022 Agreed Order's provision was specific as to what comments were prohibited,[95] while the April 19, 2022 Ex-Parte Order generally prohibited "any . . . type of communication or contact."[96] Thus, the August 1, 2022 Agreed Order controlled when it came to determining what contact between the Parties was now permitted.

Taking these two considerations into account, Dr. Wilson is entitled to have his convictions vacated because, as a matter of law, he was *correct* in assuming that the August 1, 2022 Agreed Order had superseded the non-contact provision of the April 19, 2022 Ex-Parte Order. As such, he could not have violated the April 19, 2022 Ex-Parte Order either by sending a non-derogatory text message about Xfinity on September 12, 2022 or by "talking about Xfinity again" on September 14, 2022.[97] And because the Appellee argued, based on the April 19, 2022 Ex-Parte Order's non-contact provision, that "it doesn't matter" if the statement Dr. Wilson made on September 14, 2022 was derogatory or not,[98] any claim to the contrary on appeal should be deemed abandoned. *Cf. Par. &*

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[94] R. at 35 ("Neither party shall make derogatory comments about the other parent and this shall apply to all 3rd party agents.").
[95] *Id.*
[96] R. at 10 ("Do not contact the Petitioner and/or Petitioner's minor children protected by this order either directly or indirectly, by phone, email messages, mail or any other type of communication or contact.").
[97] Tr. of Proceedings at 64:25–65:15.
[98] *Id.* at 64:25–65:22.

Par. Min. Co. v. Serodino, Inc., 52 Tenn. App. 196, 233, 372 S.W.2d 433, 449 (1963) ("it seems to us that [he] cannot 'change horses in the middle of the stream.' He made no such defense in the lower Court[.]").

ii. The proof did not demonstrate that Dr. Wilson made a derogatory statement.

The proof also did not demonstrate, beyond a reasonable doubt, that Dr. Wilson actually made any derogatory statement. Count #1 was not premised upon any theory that Dr. Wilson's text message was derogatory, so that conviction cannot be sustained on the ground that it was derogatory. As to Count #2, Dr. Wilson specifically denied calling the Appellee "delusional[.]"[99] Further, although it is not entirely clear that this is what she meant, the Appellee's literal testimony on cross-examination was to agree that she "didn't actually hear [Dr. Wilson] say 'delusional[.]'"[100] This admission should be considered dispositive, given that the only remaining witness who testified disavowed having any personal knowledge of the matter.

Even if the Appellee's admission on cross-examination does not control, though, the Appellee's testimony about the Parties' September 14, 2022 interaction was incredible. For one thing, the Appellee had falsely reported fraud related to the Parties' Xfinity account just days beforehand, so her dishonesty was evident.[101] For another, although the Appellee told law enforcement that she was "anxious and fearful"

[99] *Id.* at 61:25–62:3.
[100] *Id.* at 27:13–15 (Q. "You didn't actually hear him say 'delusional' though?" A. "Yes.").
[101] *Id.* at 21:19–22:1.

following the Parties' September 14, 2022 interaction (which took place at the Sheriff's Department), the Appellee's admitted actions demonstrated otherwise. In particular, rather than being anxious or fearful about what Dr. Wilson said, the Appellee admitted that she *left* the safety of Sheriff's Department, "drove to Dunkin' Donuts" to get "an ice coffee," and then "went back" to the Sheriff's Department to get Dr. Wilson arrested afterward.[102]

Given this context, to the extent that the Appellee's testimony can be read as claiming that Dr. Wilson called her delusional, the Appellee's testimony may be disregarded as incredible. The evidence was thus insufficient to sustain a criminal contempt conviction for Count #2 based on the derogatory comments provision of the August 1, 2022 Order, and Dr. Wilson's conviction arising from the September 14, 2022 interaction should be invalidated accordingly. *See Pruitt*, 293 S.W.3d at 545 ("When the sufficiency of the evidence in a criminal contempt case is raised in an appeal, this court must review the record to determine if the evidence in the record supports the finding of fact of guilt beyond a reasonable doubt, and 'if the evidence is insufficient to support the findings by the trier of fact of guilt beyond a reasonable doubt' we are to set aside the finding of guilt.") (quoting Tenn. R. App. P. 13(e)).

iii. <u>The Appellee failed to prove that calling someone "delusional" is necessarily "derogatory."</u>

Even assuming, for the sake of argument, both that the Appellee had introduced sufficient evidence to prove that Dr. Wilson called her

[102] *Id.* at 17:5–9.

"delusional" and a universal understanding of the term "derogatory[,]" the Appellee also failed to prove that calling someone "delusional" necessarily qualified. As an adjective, the word "delusional" need not actually convey anything disparaging. To the contrary, it can convey—and often does convey—mere unrealistic aspirations, such as delusions of grandeur. *See, e.g.*, *Delusional*, DICTIONARY.COM, https://www.dictionary.com/browse/delusional (last visited May 17, 2023) (defining "delusional" as "having false or unrealistic beliefs or opinions[,]" and offering "Senators who think they will get agreement on a comprehensive tax bill are delusional" as an example); *Delusion*, MERRIAM-WEBSTER, https://www.merriam-webster.com/dictionary/delusional (last visited May 17, 2023) (defining "delusion" as "something that is falsely or delusively believed or propagated[,]" and offering "under the delusion that they will finish on schedule" and "delusions of grandeur" as examples).

Under the circumstances, the context in which the Appellant supposedly described the Appellee as "delusional" is unclear. It certainly cannot be gleaned from the Appellee's answer that Dr. Wilson "just did his typical, 'you're delusional'. I didn't need to -- that he –", which is unintelligible and was promptly followed by a claim that Dr. Wilson said "something along those lines."[103] The Appellee also admitted that she "rolled up the window" and "drove away" before Dr. Wilson finished what he was saying, meaning that she could not have heard what Dr. Wilson

[103] Tr. of Proceedings at 16:23–17:3.

was saying in its complete and intended context.[104] The Appellee fell short of proving, beyond a reasonable doubt, that Dr. Wilson actually violated the derogatory comments provision of the August 1, 2022 Agreed Order as a result.

* * *

For all of these reasons, the Appellee failed to introduce evidence sufficient to prove that Dr. Wilson "actually violated the order" that she charged him with violating. *See Konvalinka*, 249 S.W.3d at 356. His convictions should be vacated and dismissed accordingly.

5. <u>The Appellee failed to prove that the alleged violations were "willful."</u>

A criminal contempt conviction cannot be sustained absent "proof that the defendant willfully violated [an] order.'" *Pruitt*, 293 S.W.3d at 545. In the criminal contempt context, "[w]illfulness has two elements: (1) intentional conduct; and (2) a culpable state of mind." *See Saleh v. Pratt*, No. E2021-00965-COA-R3-CV, 2022 WL 1564170, at *4 (Tenn. Ct. App. May 17, 2022) (citing *State v. Beeler*, 387 S.W.3d 511, 523 (Tenn. 2012)). Thus, sufficient proof that an act was undertaken both intentionally *and* "for a bad purpose" is an essential requirement, and proof of both components of willfulness is necessary to sustain a conviction. *See Konvalinka*, 249 S.W.3d at 357.

With this standard in mind, opposing parties in contempt cases commonly engage in extensive argument about whether sufficient proof was introduced to show that a defendant acted "voluntarily and

[104] *Id.* at 17:4–7.

intentionally and with the specific intent to do something the law forbids." *See State v. Braden*, 867 S.W.2d 750, 761 (Tenn. Crim. App. 1993). No such argument took place here, though. Nor was there conflicting proof introduced on the matter at trial. Instead, Dr. Wilson's good-faith explanations for his conduct[105] and his testimony that he did not understand it to violate any order[106] went unrebutted. There was also a reason why.

The reason was that the Appellee grossly misunderstood what a conviction for criminal contempt requires. Her counsel insisted—repeatedly—that criminal contempt is a strict liability offense for which intent does not "matter." *See* Tr. at 65:5–6 ("in a violation, it's a simple act. It doesn't matter what your intent is."); *id.* at 65:19–22 ("it doesn't matter what his intent is. It matters that he violated it, that he contacted her, that he talked to her when he wasn't supposed to."). That position was spectacularly wrong, though. *See, e.g., Pruitt*, 293 S.W.3d at 545 ("Having determined that Wife proved the first two elements of criminal contempt, we must now determine whether Husband's violation of the order was willful, which must be proven beyond a reasonable doubt."). The Appellee's failure to introduce any proof that Dr. Wilson acted with a bad purpose is also dispositive of this appeal. *See, e.g., Miller v. Miller*, No. 2014-00281-COA-R3-CV, 2015 WL 113338, at *10 (Tenn. Ct. App. Jan. 7, 2015) ("In this case, there is no dispute that Mother violated the order of the Davidson County Circuit Court. . . . The evidence adduced at

[105] Tr. of Proceedings at 50:21–55:19.
[106] *Id.* 53:21-54:11; *id.* at 55:11–56:2.

trial, however, does not support the conclusion that Mother acted with a bad purpose.").

Although the burden of proof was not Dr. Wilson's, the evidence admitted at trial also demonstrated that he did *not* act "voluntarily and intentionally and with the specific intent to do something the law forbids." *Braden*, 867 S.W.2d at 761. To the contrary, as to intentionality, the evidence demonstrated that Mr. Wilson did everything he could to *avoid* acting contemptuously—including contacting his own counsel (and the Appellee's counsel while he was representing himself *pro se*) to obtain clarity regarding his obligations under the trial court's orders.[107] Thus, the evidence demonstrated that Dr. Wilson sought to *comply* with the orders at issue, rather than attempting to violate them. Proving an intentional violation under circumstances when the trial court's underlying orders were unclear and conflicted with each other also would have been a tall task had any effort to establish this element been attempted.

Separately, as to whether Dr. Wilson acted with a culpable state of mind: the charged September 12, 2022 violation arose from a communication designed to enable Dr. Wilson to address an emerging crisis that risked preventing him from being able to treat his high-risk psychiatry patients. That fact was undisputed, and it should go without saying that such a motive does not constitute a "bad purpose." *See Konvalinka*, 249 S.W.3d at 357. That Dr. Wilson was involuntarily pressed into that emerging crisis due to the Appellee's false report of

[107] Tr. of Proceedings at 60:7–13.

fraud was undisputed, too.[108]

Similarly, as to the September 14, 2022 communication (which followed the Xfinity situation by two days), Dr. Wilson testified that he "was advising [the Appellee] that the matter had been handled so that [he] hopefully didn't have to worry about any other negative kind of insinuations or accusations about the account or fraud."[109] He added that he "wanted to make sure the situation was resolved. [He] didn't have an attorney at that time. [He] was moving out of state to just kind of let matters play through the court, and [he] wanted to make sure that there wasn't anything outstanding that needed [to be] addressed."[110] The Appellee did not rebut and was hardly in a position to rebut this testimony, either, having admitted that she rolled up her window and drove away before allowing Dr. Wilson to finish speaking.[111] Accordingly, Dr. Wilson's testimony was uncontradicted.

Regardless of whether Dr. Wilson's testimony is credited, though, there simply is not proof in the record sufficient to prove a willful violation—as to either intentionality or culpability—beyond a reasonable doubt as to either charge. The Appellee did not attempt to introduce evidence of Dr. Wilson's mental state, and her counsel repeatedly disavowed any obligation to do so. *See* Tr. of Proceedings at 65:5–6 ("in a violation, it's a simple act. It doesn't matter what your intent is."); *id.* at 65:19–22 ("it doesn't matter what his intent is. It matters that he

[108] *Id.* at 20:18–23:1.
[109] *Id.* at 54:22–55:2.
[110] *Id.* at 55:14–19.
[111] *Id.* at 17:2–9; *id.* at 27:13–17.

violated it, that he contacted her, that he talked to her when he wasn't supposed to."). The Appellee herself also agreed that she was prosecuting Dr. Wilson based on a "little simplistic factual statement"—rather than prosecuting him for bad-faith conduct that was "threatening," "harassing," or "confrontational[.]"[112] The proof similarly established that Dr. Wilson's statement on September 14, 2022 was so benign that the Appellee herself did not "realize" that it may have violated the August 1, 2022 order until after she left the Sheriff's Department and went to Dunkin' Donuts to buy an iced coffee.[113] Both of Dr. Wilson's contempt convictions must be dismissed for insufficient proof of a willful violation as a result.

B. NOTICE DEFECTS PRECLUDE DR. WILSON'S CONVICTIONS.

Except in cases of summary disposition, Tenn. R. Crim. P. 42(b) instructs that "[a] criminal contempt shall be initiated on notice[.]" *Id.* The contents of the required notice are specified by Tenn. R. Crim. P. 42(b).

Because adequate notice is a due process requirement, material notice defects—particularly those that "confuse civil and criminal contempt"—require that a criminal contempt conviction be vacated. *See McClain*, 539 S.W.3d at 221. As this Court has explained:

> Sufficient notice meeting the requirements of due process must be given as a prerequisite to a court's authority to punish a party for criminal contempt committed outside the presence of the court. *Storey v. Storey*, 835 S.W.2d 593, 599–600 (Tenn.Ct.App.1992). Under Tenn. R.Crim. P. 42(b), a

[112] *Id.* at 29:4–8.
[113] *Id.* at 44:8–13.

> person facing a criminal contempt charge must "be given explicit notice that they are charged with criminal contempt and must also be informed of the facts giving rise to the charge." *Long v. McAllister–Long*, 221 S.W.3d 1, 13 (Tenn.Ct.App.2006) (citation omitted). "Essential facts are those which, at a minimum, (1) allow the accused to glean that he or she is being charged with a crime, rather than being sued by an individual, (2) enable the accused to understand that the object of the charge is punishment—not merely to secure compliance with a previously existing order, and (3) sufficiently aid the accused to determine the nature of the accusation, which encompasses the requirement that the underlying court order allegedly violated by the accused is itself clear and unambiguous." *Id.* at 13–14.

McLean v. McLean, No. E2008-02796-COA-R3-CV, 2010 WL 2160752, at *5 (Tenn. Ct. App. May 28, 2010).

Here, although Dr. Wilson was arrested, the judicial proceeding that resulted from those arrests was plagued by notice defects so severe that even his own attorney—who had not prepared for a criminal proceeding—did not realize that the charges were criminal until minutes before Dr. Wilson's trial began. As his counsel explained just before trial, he was "not here for a criminal proceeding[,]" and the Appellee's counsel was not, either.[114] Dr. Wilson's trial counsel also repeatedly expressed his "confusion" about "whether this is a criminal matter or not."[115]

The Appellee's counsel similarly stated that the proceeding arose from "an odd procedure that [she hadn't] seen before."[116] She added that there was not a warrant in criminal court, and that the case would not

[114] Tr. of Proceedings at 4:19–20.
[115] *See id.* at 35:10–12.
[116] *Id.* at 4:23–24.

be tried by the district attorney.[117] The trial court, for its part, stated that it had "never had one of those"[118]—a new experience shared by the Parties' attorneys.[119] Counsel for both Parties questioned whether this was a criminal warrant that should be heard in criminal court, too, but the trial court suggested that the charges would not be heard in criminal court because they lacked a criminal court docket number.[120]

Before Dr. Wilson's trial, the trial court judge also candidly admitted that he "[didn't] have a clue what the classification would be, what the penalty is[]" for a violation of T.C.A. § 36-3-611.[121] Nor did Appellee's counsel know.[122] Even the officer who arrested Dr. Wilson opined that the violations were "not really warrants[,]" and that "there's not outstanding criminal warrants out there" despite Dr. Wilson being arrested and being required to make a bond on both violations.[123] Eventually reading on to T.C.A. § 36-3-612, though, the trial court determined that: "I think it's just simply treated as a [criminal] contempt, which would just simply be a $50 fine or ten days if it were to be found. I'm just going through the possibilities. So that's what we'll do."[124]

Based on this record, it is not plausible that Dr. Wilson could have "clearly understood" that he was a criminal defendant being prosecuted

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[117] *Id.* at 5:10–14.
[118] *Id.* at 5:17.
[119] *Id.* at 5:18–20.
[120] *Id.* at 6:7–9.
[121] *Id.* at 10:20–24.
[122] *Id.* at 10:23–11:1.
[123] *Id.* at 45:4–12. See also R. at 40–44.
[124] Tr. of Proceedings at 11:18–21.

for two criminal charges for which he faced the possibility of incarceration. *Cf. McLean*, 2010 WL 2160752, at *6 ("Upon our review of this record, we find that it raises serious doubts concerning whether Mother clearly understood that the petitions exposed her to incarceration. . . . Accordingly, we vacate Mother's punishment for criminal contempt."). His own attorney did not understand that. Nor is there any indication that Dr. Wilson was ever advised of his rights as a criminal defendant at any point—including his right to have his innocence presumed, his right to have guilt proven as to each element beyond a reasonable doubt, and his right not to testify against himself. Both of Dr. Wilson's convictions should be vacated as a result. *See id.*

C. THE TRIAL COURT FAILED TO MAKE REQUIRED FACTUAL FINDINGS.

"Rule 52.01 of the Tennessee Rules of Civil Procedure requires that trial courts make findings of fact and conclusions of law to support their rulings following bench trials." *Mawn v. Tarquinio*, No. M2019-00933-COA-R3-CV, 2020 WL 1491368, at *2 (Tenn. Ct. App. Mar. 27, 2020) (citing Tenn. R. Civ. P. 52.01 ("In all actions tried upon the facts without a jury, the court shall find the facts specially and shall state separately its conclusions or law and direct the entry of the appropriate judgment.")). Construing this rule, this Court has explained that:

> [T]he requirement of making findings of fact and conclusions of law is "not a mere technicality." *Paul v. Watson*, No. W2011-00687-COA-R3-CV, 2012 WL 344705, at *5 (Tenn. Ct. App. Feb. 2, 2012) (quoting *In re K.H.*, No. W2008-01144-COA-R3-PT, 2009 WL 1362314, at *8 (Tenn. Ct. App. May 15, 2009)). In addition, "[s]imply stating the trial court's decision, without more, does not fulfill this mandate." *Barnes v. Barnes*, No. M2011-01824-COA-R3-CV, 2012 WL 5266382, at *8

> (Tenn. Ct. App. Oct. 24, 2012). If a trial court fails to make findings of fact and conclusions of law, this Court is "left to wonder on what basis the court reached its ultimate decision." *Paul*, 2012 WL 344705, at *5 (quoting *In re K.H.*, No. W2008-01144-COA-R3-PT, 2009 WL 1362314, at *8 (Tenn. Ct. App. May 15, 2009)).

Hall v. Humphrey, No. E2022-00405-COA-R3-CV, 2023 WL 2657542, at *10 (Tenn. Ct. App. Mar. 28, 2023).

The three purposes underlying Rule 52.01—facilitating appellate review, defining precisely what is being decided, and evoking careful consideration of a trial judge—are well established. *See Lovlace v. Copley*, 418 S.W.3d 1, 34–35 (Tenn. 2013). While "[n]o bright-line test exists to determine whether factual findings are sufficient," "the findings of fact must include as many facts as necessary to express how the trial court reached its ultimate conclusion on each factual issue." *Mawn*, 2020 WL 1491368, at *2 (citing *Lovlace*, 418 S.W.3d at 35; 9C Charles A. Wright et al., *Federal Practice and Procedure* § 2571, at 328 (3d ed. 2005)).

Rule 52.01's requirements apply to criminal contempt cases. *See id.* at *13 (holding, in criminal contempt case, that, "[a]ny new order issued by the trial court shall fully comply with Rule 52.01 of the Tennessee Rules of Civil Procedure."). *See also Eleiwa v. Abutaa*, No. W2019-00954-COA-R3-CV, 2020 WL 882141, at *3 (Tenn. Ct. App. Feb. 24, 2020) (holding, in criminal contempt case, that "[b]ecause the trial court failed to comply with Rule 52.01, we vacate the trial court's order and remand the matter for the trial court to establish findings of fact and conclusions of law in compliance with Tennessee Rule of Civil Procedure

52.01."). Here, the fact that the trial court's contempt order does not comply with Tenn. R. Civ. P. 52.01 is also beyond serious dispute.[125] The order makes no factual findings, no credibility determinations, and fails to identify what evidence, if any, supports its ruling.[126] Nor did the trial court's order make any findings about willfulness—either with respect to intentionality or a bad purpose—as to either count.[127]

Indeed, the trial court failed to meet the expectations of even the standard form order on which its order was entered. That form included a check-box (which the trial court checked) finding that: "Respondent is guilty of contempt of the Court's Order in that: . . ."[128] That particular sentence of the form order ends with a colon and is followed by a space for the trial court to explain the basis for its contempt finding.[129] Rather than doing so, though, the trial court just recited its punishment and its determination that Dr. Wilson "is found in contempt of two violations brought before this court" without including any findings of fact—or even specifying which order Dr. Wilson was found to have violated.[130] That falls well short of Tenn. R. Civ. P. 52.01's requirements. Thus, at minimum, the trial court's order must be vacated and remanded. *See Barnes*, 2012 WL 5266382, at *8 ("[s]imply stating the trial court's decision, without more, does not fulfill this mandate.").

Remanding for further findings is not always necessary when a trial

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[125] R. at 113–114.
[126] *Id.*
[127] *Id.*
[128] *Id.*
[129] *Id.*
[130] *Id.*

court has not complied with Rule 52.01, though (and here, it is not even a permitted remedy, given that jeopardy attached and the Appellee's proof could not sustain any element of either charge). Instead, using Tenn. R. App. P. 36(a), an appellate court may "provide the relief on the law and the facts that this proceeding requires[,]" "vacate the trial court's judgment finding" a defendant in contempt, and "dismiss the [Appellee's] allegations of contempt." *See Lovlace*, 418 S.W.3d at 37. That is the appropriate remedy here, given both the frivolity and extreme pettiness of this contempt proceeding and the Appellee's failure even to *attempt* to introduce evidence sufficient to satisfy any element of her criminal charges. The trial court's judgment should be reversed with instructions to dismiss the Appellee's contempt charges with prejudice as a result. *See id.*

IX. CONCLUSION

For the foregoing reasons, both of Dr. Wilson's convictions should be vacated and dismissed.

Respectfully submitted,

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CERTIFICATE OF ELECTRONIC FILING COMPLIANCE

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CERTIFICATE OF SERVICE

I hereby certify that on this 1st day of June, 2023, a copy of the foregoing was served via the Court's electronic filing system, via email, and/or via USPS mail, postage prepaid, to the following parties:

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