2015 IL App (2d) 131318-U
No. 2-13-1318
Order filed March 20, 2015

IN THE

APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the Circuit Court of Lake County.
Plaintiff-Appellee,	)	
v.	)	No. 13-CM-2174
ESTEL REED,	)	Honorable Helen S. Rozenberg,
Defendant-Appellant.	)	Judge, Presiding.

JUSTICE HUDSON delivered the judgment of the court.
Justices Hutchinson and Birkett concurred in the judgment.

ORDER

¶ 1 *Held*: (1) The State proved defendant guilty beyond a reasonable doubt of public indecency: although defendant was showering in a stall, his sexual intent could be inferred from his persistent attempts to direct his exposure toward another person; his apparent arousal; his following the victim from one adjacent shower stall to another adjacent shower stall and his intent to be seen could be inferred from his attempts to make the partition transparent; (2) any error in the trial court's admission of hearsay was harmless, as other evidence sufficiently established defendant's age; (3) as the evidence that counsel allegedly should have introduced was not of record (defendant could not introduce it in his appendix), we could not say that counsel was ineffective for failing to introduce it.

¶ 2 Defendant, Estel Reed, appeals from his conviction of public indecency (lewd exposure) (720 ILCS 5/11-30(a)(2) (West 2012)). He asserts (1) that the evidence was insufficient to

sustain the conviction, (2) that the court improperly admitted hearsay evidence as to his age, and (3) that counsel was ineffective because he failed to investigate or present impeachment and exculpatory testimony. We hold that the evidence of defendant's guilt was sufficient to sustain his conviction. We further hold that any error in improperly admitting hearsay evidence was harmless. Finally, we note that defendant's ineffective-assistance claim is based on nonrecord document and so is fatally defective. We therefore affirm defendant's conviction.

¶ 3 I. BACKGROUND

¶ 4 Defendant was charged by information with the offense of which he was convicted and one count of disorderly conduct (720 ILCS 5/26-1(a)(1) (West 2012)). The two counts were based on the same conduct. Defendant had a bench trial.

¶ 5 The State's first witness was John Oei, the general manager of Lifetime Fitness in Vernon Hills. Oei gave a description of the facility. The men's locker room had a hot tub that a person would pass on the way to the showers or steam room and was near those areas. The hot tub had a half-wall around it, but, within the locker-room area, was essentially out in the open, and was clothing optional. The locker room had "approximately 17" shower stalls on either side of a walkway. Those stalls had tile walls to about waist height, and then frosted glass dividers above. The stall fronts were swinging doors of frosted glass. When wet, the glass became more transparent, but not completely transparent.

¶ 6 On May 7, 2013, someone came to Oei saying that there had been an incident in the men's locker room. Because of what Oei heard, he spoke to defendant. Oei told defendant that another patron had said that "some kind of inappropriate action [had been] going on in the shower next to [the patron]." Oei described this action as "an inappropriate touching of himself

*** as well as following this member from one shower to another when the member was trying to leave." Defendant denied any such actions multiple times.

¶ 7 The State asked Oei how old he was; Oei said that he was 40. The State then asked whether Oei had an opinion as to whether defendant was older than that. Oei said that he had just been told defendant's age, but thought that defendant looked older than 40.

¶ 8 David Peterson, the next witness, was a Lifetime Fitness employee. At the time of the incident, he was a "team member," but had since become "[s]upervisor of facility operations." On May 7, 2013, he was working a 6 a.m.-to-2 p.m. shift. Around 10 or 11 a.m., he was "filling shower amenities." Brandon Norton, a fellow employee who worked at the front desk, came out of a shower, and Peterson went in to fill the dispensers. Norton, whose emotional affect Peterson thought was "[c]oncerned and like distraught, paranoid," told Peterson that the "guy next to [him]" was "creeping [him] out." Norton pointed to a specific shower stall as where the "guy" was. Peterson looked toward the door that Norton had pointed out and saw that defendant had opened the door a crack and was "peeking out of the door."

¶ 9 Peterson then saw Norton go to use a different shower stall across the aisle in the shower area, entering it and leaving his towel on a rack outside. Not long after, defendant went across and into a shower next to the one Norton had entered. Peterson then went into the shower that defendant had vacated to fill the dispensers, all of which were at least partially full.

¶ 10 Not long after going into the new shower stall, Norton came out again, even more upset than he had been before, and asked Peterson to radio "Pete." Peterson radioed his "boss" and his "supervisor." Several managerial employees arrived, including Oei. Peterson saw defendant leave the second shower stall and go to either the hot tub or the steam room.

¶ 11 Norton was the State's final witness. He testified that he planned his working day so that he could take a shower first thing upon arriving at work. On May 7, he arrived a little early and decided to use the hot tub. When he first went into the hot tub, he was the only one using it. Four or five minutes later, defendant arrived and got in too. Both were in the tub nude. Defendant sat across from Norton in the "shorter depth area." It was a "bit uncomfortable just to—I mean men that close to each other in a hot tub, it was a little uncomfortable." Norton got out after two or three minutes, went to the main locker area to get some water to drink, spent a few minutes watching television, and then returned to the shower area.

¶ 12 In the shower area, Norton noticed that the door of one stall was slightly open and that defendant was inside. The doors did not stay shut very well, so he was not surprised to see it a little open. He went into a stall adjacent to the one that defendant was using and started to take a shower. When asked to describe the characteristics of the frosted-glass partition, he estimated that the glass was "60 to 70 percent" more transparent when wet than dry. Wiping the glass when it was wet would make it a little more transparent still.

¶ 13 Because the "silhouette" of the person he saw in the adjacent stall matched Norton's "original viewing of [defendant] in the hot tub," Norton knew that that person was the same person he had seen in the hot tub. The person was large: tall and heavy but not fat. As defendant had entered the hot-tub area, Norton had noticed that defendant had a distinctive pattern of back hair—Norton could not remember exactly what it was when he testified, but he remembered being struck by it. "[P]utting two and two together," Norton "remembered that [defendant] was in the shower next to [Norton] as [he] was going into [the] shower."

¶ 14 When Norton started to take his shower, he noticed that water from the next shower was spraying onto the frosted glass of the partition, something that did not usually happen—the

showerheads were set up so that they would not usually hit the glass, but they could be pointed to do that. He also noticed that defendant was wiping his arm against the glass.

> "After noticing the arm, it took me a couple of seconds to *** think what was going on here, where I happened to look down and witnessed what appeared to be his hand moving back and forth on his penis, the penis area. It wasn't a quick—just as he was rinsing and washing, it was going on for a few moments."

His view was not entirely clear, but he could see defendant's face in general outline and he could see what his actions were. Asked if defendant's penis was erect, he said:

> "I could see a slight outline of it. I could not tell if it was fully erect, but it was motioning, it was gripped in his hand. I could clearly see that through the shower glass."

Asked how long this went on, Norton said that he was not sure. He said that he was initially shocked and just stood in place for "a couple seconds." He then decided to change showers.

¶ 15 Norton left the shower stall he was in and started to cross the walkway to another one. He encountered Peterson and said, "[T]here's a creep in the shower next to me jerking off while watching me shower." Norton tried to finish his shower, but "[a] few moments into [his] shower, [he] heard a slight moan coming from behind [him]." The glass partition was already partly wet, apparently from a previous user. He believed that he recognized defendant's outline. Nothing happened equivalent to the arm wiping the glass or the spraying of water on the glass. However, he did see "a hand motion on his penis."

> "It wasn't as clear as the first time. As I said, the glass wasn't being wiped down, but I could see the motion in the exact same region on the same body that I saw in the first shower."

As soon as he saw this, he shut the water off without even rinsing off all the soap. He put his towel on and "grabbed" Peterson, telling him to call the manager and the assistant manager. The managers arrived, and he started telling them what he had seen. As he was talking, a person with "the same body composition, same back hair pattern, same body description" that he had seen in the hot tub and in less detail in the first shower walked past him headed toward the steam room. That person put on black shorts before he entered the steam room.

¶ 16 After he initially spoke to the managers, one of them suggested that he should finish his shower in one stall that had opaque sides. He did so, but before he completely finished his shower he noticed the door being "bumped, or began to be pushed in." He saw "a large male silhouette outside the door with black shorts on." That person then suddenly crossed the walkway to a shower on the other side. The shower door prevented him from seeing any real detail. After the incident, he was extremely upset and found himself crying when he spoke to the manager.

¶ 17 Norton first observed defendant at some time around 11 a.m. This was a slow time for the club. He was not sure how many people were in the locker room as a whole, but in the shower area the only patrons he saw were defendant and "a younger kid," whom he had occasionally seen before.

¶ 18 The State asked Norton whether he regularly used Lifetime Fitness's computerized member records. Norton responded that he used the records "[e]very day, [his] whole shift." Defendant objected that this line of questioning was irrelevant. The State asked for leeway to show the relevance, saying that it was working to show that defendant was more than 17 years old, an element of public indecency. It said that it intended to treat the membership records as business records, so they were admissible as a hearsay exception. Defendant responded that "his

birthday would best be proved by looking at his information" and that he was "not sure how a second and third hand hearsay record would be used to prove the age of the defendant *** when there are infinitely better methods to do so." The court allowed the questioning, saying that the objection would go only to the weight given to the testimony. Questioning proceeded, and after the incident, he went to start his shift at the front desk. Because the incident was bothering him, he decided to try to identify defendant by name in the records. He found defendant's photograph among those who had recently checked in. Norton recalled that the record gave defendant's age as 49. Defendant's only objection to this testimony was the one quoted.

¶ 19 Defendant moved for a directed finding. The court denied the motion.

¶ 20 Defendant testified as the only defense witness. He said that, on May 7, he arrived at Lifetime Fitness, paid his monthly dues, and went to the men's locker room. He undressed, put on a towel, and went to the hot tub. After a little while in the tub, he got out, got his shaving kit and a toothbrush and toothpaste, and went into a shower. He rinsed himself off with hot water, brushed his teeth, put his shorts on, and walked to the steam room. When he came out of the steam room, he got his soap and shampoo and went into a shower where he shampooed his hair, washed his body, and came out. As he was getting dressed to leave, he noticed the manager looking at him. As he was leaving, the manager approached him to say that there was a problem. The manager told him what the accusation was and said that if he did not admit it they would have to bring in the police. Defendant told them that calling the police was acceptable.

¶ 21 In response to his lawyer's question, defendant denied masturbating in the shower or making a sexual advance to anyone in the locker room.

¶ 22 On cross-examination, he said that his date of birth was August 26, 1964. He agreed that Norton was in the hot tub at the same time he was. He could not see through the frosted-glass

shower partition and thus did not know if anyone was in the adjacent shower the first time he was in one. He spent five or six minutes in the steam room and then went to take a second shower. At that point, the shower area was busy, with 10 or 15 patrons in the area. When he got into a shower the second time he again "c[ould]n't see through the privacy wall, so [he] wasn't sure if anyone was next to [him]."

¶ 23 The court stated that it credited Norton's account of defendant's conduct. Because his conduct was visible to another, it was public. The court also noted that Norton was alarmed and disturbed. It therefore found defendant guilty on both counts.

¶ 24 Defendant moved for a new trial on the grounds that the State's evidence was insufficient to support a conviction and that the court erred in admitting the double hearsay of the record of defendant's age. The court denied the motion. The court sentenced him to 24 months' supervision with special conditions on the public indecency count. Defendant moved for reconsideration of the sentence; the court reduced certain costs. Defendant immediately filed a notice of appeal.

¶ 25 II. ANALYSIS

¶ 26 On appeal, defendant first asserts that the evidence of his guilt was insufficient. He argues that the evidence of lewd conduct was insufficient because Norton could not see exactly what was happening in defendant's shower stall. He further argues that defendant could not reasonably have expected his conduct to be viewed by others; he argues that the entire purpose of a shower stall is to provide privacy. Further, he claims that there was no evidence that defendant's conduct was to arouse or satisfy sexual desire.

¶ 27 Defendant next asserts that the court should not have permitted Norton to testify to his recollection of the club records' listing of defendant's age. He asserts that the State did not

successfully establish the elements of the necessary hearsay exceptions and that, without the testimony, the State would have failed to show that defendant was over the age of 17, an element of the offense.

¶ 28 Finally, he asserts that counsel was ineffective for failing to investigate or present impeachment and exculpatory testimony. He bases this claim on nonrecord facts, as set out in his affidavit, found in the appendix to his brief.

¶ 29 The State responds, arguing that: (1) the evidence was sufficient; (2) Lifetime Fitness's records were admissible under the hearsay exception for business records; (3) any error in admitting the records was harmless because there was otherwise proof of defendant's age; and (4) defendant's claim of ineffective assistance of counsel fails because it depends entirely on nonrecord matters.

¶ 30 We begin by addressing the sufficiency of the evidence.

> "When presented with a challenge to the sufficiency of the evidence, it is not the function of [the reviewing] court to retry the defendant. [Rather,] 'the relevant question 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.' " (Emphasis in original.) *People v. Collins*, 106 Ill. 2d 237, 261 (1985) (quoting *Jackson v. Virginia*, 443 U.S. 307, 319 (1979)).

In a bench trial, it is for the trial court, as the trier of fact, to determine the credibility of the witnesses, to weigh the evidence and draw reasonable inferences therefrom, and to resolve any conflicts in the evidence. *People v. Siguenza-Brito*, 235 Ill. 2d 213, 228 (2009). Therefore, we will not substitute our judgment for that of the trier of fact on issues regarding the weight of the evidence or the credibility of the witnesses. *People v. Jackson*, 232 Ill. 2d 246, 280 (2009). Nor

will we reverse a conviction simply because the evidence is contradictory or because the defendant claims that a witness was not credible. *Siguenza-Brito,* 235 Ill. 2d at 228. Indeed, a reviewing court will not disturb a guilty finding unless the evidence is so unbelievable, improbable, or unsatisfactory that it raises a reasonable doubt as to the defendant's guilt. *Jackson,* 232 Ill. 2d at 281.

¶ 31 The Criminal Code of 2012 (Code) sets out the offense of public indecency (lewd exposure) as follows:

> "(a) Any person of the age of 17 years and upwards who performs any of the following acts in a public place commits a public indecency:
>
> ***
>
> (2) A lewd exposure of the body done with intent to arouse or to satisfy the sexual desire of the person. ***
>
> (b) 'Public place' for purposes of this Section means any place where the conduct may reasonably be expected to be viewed by others." 720 ILCS 5/11-30(a)(2), (b) (West 2012).

The elements at issue here are (1) "intent to arouse or to satisfy the sexual desire of the person" (intent) and (2) "public place." 720 ILCS 5/11-30(a)(2), (b) (West 2012). We consider each in order.

¶ 32 "The intent to arouse or satisfy sexual desires can be established by circumstantial evidence, and the trier of fact may infer a defendant's intent from his conduct." *People v. Burton,* 399 Ill. App. 3d 809, 81 (2010). Defendant argues that, because what Norton observed was consistent with ordinary washing behavior, the evidence of intent is insufficient. (This could equally be framed as questioning the sufficiency of the evidence of lewdness, but so equally

could our discussion.) Defendant's argument fails to address the evidence that tends to show that his behavior was *directed toward* Norton. Because the behavior was directed toward Norton, the court could infer that it was done with intent to arouse or to satisfy sexual desire.

¶ 33 Several of the observations to which Norton and Peterson testified show that defendant's behavior was directed toward Norton. First, Norton noticed that the spray from defendant's shower was directed more toward the frosted glass separating the two showers than would be expected with the showerhead in the normal position. That might, taken alone, have been an accident, but it did have the effect of making the partition less opaque. However, Norton *also* described defendant wiping the partition with his arm so as to make it even less opaque. From those two observations, we can arrive at a natural inference that defendant was either trying to cause Norton to see into his stall or himself trying to see into Norton's stall. Moreover, both Norton and Peterson described defendant changing shower stalls in a way that kept him adjacent to Norton after Norton moved to a stall away from defendant. Finally, Norton reported hearing two moans after defendant entered the second shower stall next to him. That is direct evidence of sexual arousal, which, inferentially, arose from defendant's behavior toward Norton.

¶ 34 These pieces of evidence are inconsistent with defendant's having merely been trying to take a shower. To be sure, there might have been alternative explanations for some of these pieces of evidence. For instance, if the showerhead in defendant's first stall had been malfunctioning, this might explain both the water spraying on the partition and defendant's changing stalls. However, it does not explain defendant's arm wiping the partition, nor is it a good explanation for how defendant ended up for a second time in a stall adjacent to Norton's. The latter is especially clear given the testimony of Norton and Peterson that the shower area was not busy at the time.

¶ 35 Defendant next argues that the shower stalls were not, as the Code phrases it, a "place where the conduct may reasonably be expected to be viewed by others." 720 ILCS 5/11-30(b) (West 2012). The parties dispute whether a scienter requirement exists as to the public nature of a place. For the sake of argument, we read a scienter requirement into the provision and accept that the public-place requirement should be read as, "a place where *the defendant* would reasonably expect others to view him or her." Defendant argues that the entire purpose of the partitioned shower stalls was to create privacy and that the stalls were therefore not public. What this argument ignores is that that privacy could be defeated with water and wiping as Norton described. Evidence consistent with accidental defeating of the opacity would likely not provide the necessary proof of scienter. However, given the evidence of defendant's actively defeating the opacity—wiping the partition and possibly pointing the shower head at it—an acceptable inference exists that Norton could see defendant because defendant intended either that result or to see Norton.

¶ 36 We now turn to defendant's assertion that the court should not have admitted Norton's testimony on the Lifetime Fitness records' contents. We accept for the purpose of analysis that Norton's testimony was inadmissible. Norton's testimony was at least double hearsay (hearsay on hearsay). The records were hearsay for defendant's (or his driver's license's) statement of his age. Norton's testimony was hearsay for the contents of the records. Double hearsay is admissible only when both parts come under exceptions to the rule excluding hearsay. Ill. R. Evid. 805 (eff. Jan. 1, 2011). Here, although the State makes a plausible argument that Lifetime Fitness's records fall within the business-records exception to the prohibition on hearsay (Ill. R. Evid. 803(6) (eff. Apr. 26, 2012)), it has not explained why Norton's testimony concerning the

contents of those records was admissible. However, any error in admitting that testimony was certainly harmless.

¶ 37 An error is harmless when "it appears beyond a reasonable doubt that the error at issue did not contribute to the verdict obtained at trial." *In re Brandon P.*, 2014 IL 116653, ¶ 50. In conducting a harmless-error analysis, the reviewing court may "(1) focus on the error to determine whether it might have contributed to the conviction; (2) examine the other properly admitted evidence to determine whether it overwhelmingly supports the conviction; or (3) determine whether the improperly admitted evidence is merely cumulative or duplicates properly admitted evidence." *In re Rolandis G.*, 232 Ill. 2d 13, 43 (2008).

¶ 38 Here, by the end of the trial, overwhelming evidence of defendant's age was in place by way of defendant's own testimony. Defendant argues, however, that the court should have granted his motion for a finding of not guilty at the close of the State's case-in-chief. A motion for such a finding of not guilty in a bench trial serves the same purpose as a motion for a directed verdict in a jury trial: it tests the sufficiency of the evidence against the sufficiency standard of *Collins* as quoted at the start of our analysis. *People v. Connolly*, 322 Ill. App. 3d 905, 915 (2001). Such a motion "asks whether the State's evidence *could support* a verdict of guilty beyond a reasonable doubt, not whether the evidence *does in fact* support that verdict." (Emphases in original.) *Connolly*, 322 Ill. App. 3d at 915. For that reason, the trial court must consider the evidence in the light most favorable to the State. *Connolly*, 322 Ill. App. 3d at 915. Here, along with Norton's testimony about the records, it also had Oei's testimony that defendant looked older than 40. Given that the indecent-exposure law requires only that the defendant be older than 17, evidence that defendant here looked older than 40 was evidence that could support

a judgment in favor of the State. Defendant is thus incorrect that the court erred in denying his motion for a finding of not guilty.

¶ 39 Finally, we turn to defendant's claim that trial counsel was ineffective. We reject this claim because defendant supports it with nonrecord evidence only. We do not consider evidence from outside the record, such as evidence presented in an appendix to a brief. *People v. Wright*, 2013 IL App (1st) 103232, ¶ 38. Without that nonrecord evidence, defendant cannot satisfy either of the two prongs of an ineffective-assistance-of-counsel claim. To succeed on a claim of ineffective assistance of counsel, a defendant must show both (1) that counsel's performance was objectively unreasonable; and (2) that it is reasonably probable that, but for counsel's unprofessional errors, the result of the proceeding would have been different. *Strickland v. Washington*, 466 U.S. 668, 688, 694 (1984). Defendant's claim is based on an asserted failure by counsel to seek out certain impeachment and exculpatory evidence. Without an acceptable record of that evidence, we cannot hold either that counsel's performance was objectively unreasonable or that the evidence had a reasonable probability of resulting in a different outcome.

¶ 40 III. CONCLUSION

¶ 41 For the reasons stated, we affirm defendant's conviction.

¶ 42 Affirmed.