COURT OF APPEALS
DECISION
DATED AND FILED

June 23, 2015

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2014AP2191-CR **Cir. Ct. No. 2012CF255**

STATE OF WISCONSIN **IN COURT OF APPEALS**
DISTRICT III

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

JOHN EDDIE LIZAN,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Eau Claire County: WILLIAM M. GABLER, SR., Judge. *Affirmed*.

Before Hoover, P.J., Stark and Hruz, JJ.

¶1 PER CURIAM. John Lizan appeals a judgment committing him to the custody of the Department of Health Services (DHS) for a period of fifteen years. The judgment was entered following a bifurcated bench trial, during which Lizan was found to have committed second-degree sexual assault but, by

stipulation of the parties, was found not guilty by reason of mental disease or defect (NGI). Lizan challenges the sufficiency of the evidence to support the guilt finding during the first phase of trial. We conclude the finding of guilt was supported by sufficient evidence in the record and reasonable inferences from that evidence.

¶2 Lizan was committed following the NGI finding and placed on conditional release. He was subsequently revoked based on his refusal to comply with the rules of his conditional release. Lizan argues the revocation procedures violated the due process and ex post facto provisions of the state and federal constitutions. We reject these arguments and affirm.

BACKGROUND

¶3 Lizan was charged on April 12, 2012, with one count of second-degree sexual assault, contrary to WIS. STAT. § 940.225(2)(c).[1] The charge was based on allegations that Lizan, while a patient in the behavioral unit at Sacred Heart Hospital in Eau Claire, had been found in a female patient's room with his hand placed down her pants.

¶4 The circuit court ordered a competency evaluation on May 9, 2012. On July 10, 2012, the circuit court entered an order of commitment, finding Lizan incompetent but likely to regain competency with appropriate medication and treatment. Lizan repeatedly failed to appear for admission at the treatment facility. The circuit court ultimately issued a bench warrant for his arrest.

[1] All references to the Wisconsin Statutes are to the 2013-14 version unless otherwise noted.

¶5 Lizan was eventually deemed competent to stand trial and entered dual pleas of not guilty and NGI. The court held a bifurcated bench trial. During the guilt phase, Lizan was found guilty of second-degree sexual assault. The parties then stipulated that Lizan was not guilty by reason of mental disease or defect. The court ordered Lizan committed to DHS for a period of fifteen years, commencing on January 6, 2014.

¶6 On January 8, 2014, the court entered an initial placement order that provided for Lizan's conditional release. The court recognized the need for treatment and authorized DHS to involuntarily administer psychotropic medications. The court also ordered that DHS prepare a conditional release plan and scheduled an approval hearing for the plan on February 10, 2014.

¶7 At the February 10, 2014 hearing, the court acknowledged it was the time and date set for approval of the conditional release plan. However, the court ultimately determined the focus of the hearing needed to change based on several notifications it had received in the preceding days. Specifically, the court received a revocation petition from Department of Corrections employee Julie Ridgway on February 7, 2014, alleging that Lizan failed to comply with several rules of conditional release. On the same day, the court received the proposed conditional release plan, as well as a status report and warrant alleging violations of the conditional release rules. Both of these documents were sent by Debra Lorasch-Gunderson of Lutheran Social Services, who was assigned as a forensic case manager to handle Lizan's conditional release.

¶8 Lizan's counsel indicated he was not prepared to proceed on the revocation petition and had only received the petition the day prior. Lizan

requested another hearing date to resolve the revocation issues, but the circuit court decided to proceed with the revocation hearing.

¶9 The State's first witness was Ridgway, who was assigned to Lizan's case following his conditional release. Ridgway first met with Lizan on January 10, 2014, in his home. Ridgway testified she presented Lizan with a DHS form outlining the rules of his conditional release. Lizan initially refused to sign the form, but ultimately relented after being told his obedience to the rules was required regardless of whether he agreed.

¶10 Ridgway further testified that during her second meeting with Lizan, Lizan's wife did most of the talking for him. As a result, during the next meeting on February 7, 2014, Ridgway requested that Lizan's wife remain behind while she interviewed Lizan in her office. Ridgway stated Lizan was "not happy about that" and answered each of her questions with the word "mute." Ridgway interpreted these statements to mean Lizan would not answer her questions, and she retrieved Lizan's wife from the waiting area. Even in his wife's presence, Lizan continued to give the same one-word answers to Ridgway's questions.

¶11 Ridgway testified that Lizan "came right out and said that … he's not on conditional release. He said he's not going to follow any rules of conditional release." Lizan told Ridgway he would tolerate only one visit a month, and only by her, and during that visit he would allow Ridgway to stay as long as she needed to talk about everything for that month. Lizan referred to Ridgway and Lorasch-Gunderson as "you people," and "said that he's not bound by this [the conditional release rules] and we have not proved that he committed this crime." Lizan also told Ridgway he would not follow through with any treatment arranged through the Jackson County community support program.

¶12 Ridgway stated that Lizan failed to complete two monthly offender report forms during their February 7, 2014 meeting. On the first form, Lizan wrote: "[M]ute. Let's meet in court Monday. Dot dot dot. Et cetera. I, John Lizan, will not live in fear from you people and your kind." On the second form, Lizan wrote: "[B]een profiled. All size fits all. Supervision. Stop accusing me and prove what your brain mouth spits out." Lizan also wrote "mute" in other areas on the second form.

¶13 The conditional release rules form Lizan signed was admitted into evidence at the revocation hearing. Ridgway testified Lizan violated rules three, five, eight, and nine as follows:

- Rule three required Lizan to cooperate fully with all court-ordered conditions of release. Ridgway testified Lizan violated rule three by indicating he would not follow through with treatment through the Jackson County community support program.
- Rule five required Lizan to cooperate fully with all treatment recommended by his mental health providers and agent. Ridgway testified Lizan also violated rule five by refusing treatment through the support program.
- Rule eight required Lizan to submit a written report monthly as directed by his agent. Ridgway testified Lizan violated rule eight by refusing to properly complete the monthly offender forms.
- Rule nine required Lizan to provide true and correct information orally and in writing in response to inquiries by the agent. Ridgway testified Lizan violated rule nine by responding to her questions with "mute."

Ridgway further testified that before filing the revocation petition, she made Lizan aware that he was violating certain rules by his continued refusal to cooperate, to which Lizan again responded with the word, "mute."

¶14 Lorasch-Gunderson testified she also witnessed Lizan violate the rules of his conditional release. Lizan refused to appropriately answer her and a doctor's questions regarding whether he was truly taking his medications. Lorasch-Gunderson stated Lizan was "more defiant" at each appointment, and most of the time he would have his wife answer for him.

¶15 Lizan also testified at the revocation hearing. He apologized to Ridgway and Lorasch-Gunderson and explained that he behaved as he did because "I was upset and my illness caused me to make a reaction that I regret." Lizan admitted telling Ridgway he would not cooperate while on conditional release, but said he "didn't mean to." Lizan testified he believed it was permissible to answer questions with "mute." He further testified he did fill out the offender forms "to some extent," but "was in a defensive mood," "didn't know what was going on," and "wasn't going to stay there all morning." Lizan stated he "disagree[d] with the treatment plan and I regret that now and I understood that I had a hearing coming up."

¶16 The circuit court recognized Lizan had been previously diagnosed with paranoid schizophrenia and had been hospitalized for an acute psychotic condition at the time of the underlying sexual assault. The court stated it was optimistic about Lizan's chances for successful rehabilitation following the NGI stipulation. However, the court concluded the State had proven by clear and convincing evidence that Lizan had violated the conditional release rules based on the instances of noncooperation disclosed during the hearing. Accordingly, the court revoked Lizan's conditional release and ordered him to be transported to the Mendota Mental Health Institute for evaluation.

DISCUSSION

¶17 In this appeal, Lizan challenges aspects of both the finding of guilt during the first phase of his trial and the revocation of his conditional release following the NGI stipulation. With respect to the former, Lizan argues the State presented insufficient evidence on two elements of the offense of second-degree sexual assault. As for the latter, Lizan argues his revocation violated the ex post facto and due process provisions of the United States and Wisconsin Constitutions.

I. Sufficiency of the evidence

¶18 When a defendant challenges the sufficiency of the evidence supporting a conviction, this court "may not reverse … unless the evidence, viewed most favorably to the state and the conviction, is so insufficient in probative value and force that it can be said as a matter of law that no trier of fact, acting reasonably, could have found guilt beyond a reasonable doubt." ***State v. Poellinger***, 153 Wis. 2d 493, 501, 451 N.W.2d 752 (1990).

¶19 Facts may be established by reasonable inferences as well as direct evidence. ***Id.*** at 504 (citing ***Johnson v. State***, 55 Wis. 2d 144, 147, 197 N.W.2d 760 (1972)). The trier of fact may evaluate directly established facts in light of common knowledge and experience to draw rational and logical conclusions from that evidence. ***Belich v. Szymaszek***, 224 Wis. 2d 419, 425, 592 N.W.2d 254 (Ct. App. 1999). "In viewing evidence which could support contrary inferences, the trier of fact is free to choose among conflicting inferences of the evidence and may, *within the bounds of reason*, reject that inference which is consistent with the innocence of the accused." ***Poellinger***, 153 Wis. 2d at 506.

¶20 It is not this court's function to resolve conflicts in the testimony, weigh the evidence, or draw reasonable inferences from historical facts to ultimate facts; those duties belong to the trier of fact. ***Id.*** If there is any possibility that the trier of fact could have drawn the appropriate inferences from the evidence adduced at trial to find the requisite guilt, we will not overturn the verdict, even if we believe the trier of fact should not have found guilt based on the evidence. ***Id.*** at 507. When faced with a historical record that supports more than one inference, we must accept and follow the inference drawn by the trier of fact unless the evidence on which that inference is based is incredible as a matter of law. ***Id.*** at 506-07.

¶21 The crime of second-degree sexual assault is codified by WIS. STAT. § 940.225(2). Lizan was accused of violating paragraph (c), which states, as pertinent here, that it is a Class C felony for any person to have "sexual contact … with a person who suffers from a mental illness or deficiency which renders that person temporarily or permanently incapable of appraising the person's conduct, and the defendant knows of such condition." WIS. STAT. § 940.225(2)(c); *see also* ***State v. Smith***, 215 Wis. 2d 84, 92-93, 572 N.W.2d 496 (Ct. App. 1997) (reciting elements of offense).

¶22 Lizan stipulated that the victim suffered from a mental illness that rendered her temporarily or permanently incapable of appraising her conduct. However, he asserts there was insufficient evidence both that he had sexual contact with the victim, and that he knew of the victim's condition. We disagree, for the reasons stated below.

A. Sexual contact

¶23 At trial, the State presented the testimony of Brett Berg, a security officer at Sacred Heart Hospital. Berg testified he was present at the nurses' station on the fourth floor when he saw on one of the security monitors that two people were lying next to each other in bed in room 428, which was prohibited. Berg entered room 428 and saw that one patient was "draped over the top of another patient with … the one person having his hands down the pants of the other patient."

¶24 Berg further elaborated on the positions of the two patients when he discovered them. Berg stated the victim was on her back, with the perpetrator, identified as Lizan, lying next to her on his side. Lizan's hand was down the front of her pants, moving vertically in an "up and down fashion." Berg could see Lizan's hand was in the area of the victim's genitals.

¶25 Berg testified that upon seeing the situation, he loudly exclaimed, "What's going on?" Lizan pulled his hand out of the victim's pants, stood up and tried "to defend his actions," stating he was not guilty of touching the victim and did not know what he was doing because of his illness. Lizan then put his hands up, gesturing as if he were under arrest, and walked past Berg out of the room.

¶26 Berg followed Lizan to his room across the hall. According to Berg, Lizan again stated, "he didn't mean to touch her and it was his sickness." Berg testified that after Lizan said this, Lizan started to smile or smirk. Lizan asked his nurse if she was going to report him. The nurse testified Lizan appeared "nonchalant, blasé, like not concerned."

¶27 Lizan contends this evidence was insufficient to prove he had sexual contact with the victim. As pertinent here, "sexual contact" means the following:

> 1. Any of the following types of intentional touching, whether direct or through clothing, if that intentional touching is either … for the purpose of sexually humiliating the complainant or sexually arousing or gratifying the defendant …
>
> a. Intentional touching by the defendant, … by the use of any body part[,] … of the complainant's intimate parts.

WIS. STAT. § 940.225(5)(b)1. "Intimate parts" include the groin, vagina, and pubic mound. WIS. STAT. § 939.22.

¶28 Lizan's challenge to the sufficiency of the evidence supporting the sexual contact element is twofold. First, he asserts there was insufficient evidence that he touched the victim's "intimate parts." Second, he asserts there was insufficient evidence that any touching was made with a prohibited intent—i.e., for the purpose of sexual humiliation, arousal, or gratification.

1. Touching of intimate parts

¶29 Lizan acknowledges he was discovered with his hand inserted down the front of the victim's pants. However, he contends the State presented insufficient proof that he was touching a statutorily defined intimate area. Lizan highlights Berg's testimony that he could not see where, specifically, Lizan was touching the victim because of her clothing. Berg conceded on cross-examination that although Lizan's hand appeared to be in the victim's genital area, it was possible he was touching her thighs.

¶30 Given this, Lizan argues there is a "reasonable possibility that [he] touched her thigh." Even if that was a "reasonable possibility"—which, in any

event, is not the standard on appeal—it is certainly not the only inference the trier of fact could have drawn from the evidence. The trier of fact was free to reject that inference and accept one suggesting guilt. *See* ***Poellinger***, 153 Wis. 2d at 506. Based on the positions of Lizan and the victim, the placement of Lizan's hand near what Berg identified as the genital area, and Lizan's vertical hand movements, the trier of fact could quite reasonably infer that Lizan was touching the victim's groin, vagina, or pubic mound.

¶31 Lizan argues his hand motions "would be consistent with a person caressing the inner thigh of another person. It would not, however, be a likely motion for a person touching, penetrating or otherwise fondling the vagina of a woman lying on her back." Lizan provides no support for this statement in the record, and our own review of the record has revealed none. Further, the trial court, as the trier of fact, was free to evaluate the testimony in light of common knowledge and experience. *See* ***Belich***, 224 Wis. 2d at 425. The court could rationally conclude, based on the facts, that Lizan's hand movements were consistent with his touching of the victim's intimate areas.

2. Prohibited purpose

¶32 In a one-paragraph argument, Lizan claims the State failed to prove he acted with a prohibited purpose. Lizan emphasizes that Berg did not see him with an erection, and that no one heard Lizan make statements about his purpose for touching the victim. Accordingly, Lizan argues there was insufficient evidence that any touching was for the purpose of sexual humiliation, gratification, or arousal.

¶33 There is no requirement that the State submit proof of an erection or the defendant's statements to establish the requisite intent. Sexual gratification,

"like other forms of intent, may be inferred from the defendant's conduct and from the general circumstances of the case." ***State v. Drusch***, 139 Wis. 2d 312, 326, 407 N.W.2d 328 (Ct. App. 1987). Lizan and the victim were housed in rooms directly across the hall from one another. Lizan's nurse told him she would be busy with a new admission. Lizan was found by a security officer in the victim's room just a few minutes later, with his hand down the victim's pants in her genital area. Immediately after being discovered, Lizan began to profess his innocence, stating that he "didn't mean to do it," was not guilty of touching the victim, and did not know what he was doing because of his illness. Lizan then put up his hands and walked back to his room, where he again stated he did not mean to touch her and that it was his sickness. Lizan made these statements in his room while smiling or smirking, according to Berg.

¶34 The trier of fact could reasonably infer from these circumstances that Lizan was attempting to commit an act for his own sexual gratification without being discovered. Indeed, Lizan's conduct under these circumstances "could not have [been] reasonably construed … as being undertaken for any purpose other than sexual gratification or arousal." *See* ***State v. Nye***, 105 Wis. 2d 63, 64, 312 N.W.2d 826 (1981). Lizan has presented no other reason why he would have crept into another patient's room and inserted his hand down her pants.

B. Lizan's knowledge of the victim's condition

¶35 Lizan next argues the State failed to prove he knew the victim suffered from a mental illness that rendered her temporarily or permanently incapable of appraising her conduct. Lizan first argues he was incapable of appreciating the victim's condition because of his own mental illness. Second, he

contends there was no evidence he had prior knowledge of the victim or her mental illness.

¶36 We are unpersuaded by Lizan's first argument. He cites nothing in the record to suggest that his mental illness rendered him incapable of comprehending the victim's condition. The trier of fact could reasonably infer from Lizan's statements and behavior after he was discovered that he appreciated the wrongfulness of his conduct in selecting an impaired victim. The trier of fact could also infer from Lizan's efforts to conceal his activity that the victim's vulnerability was known prior to the assault, and may have been a key factor in his selection of the victim.

¶37 Other facts support the inference that Lizan knew of the victim's impaired condition. Lizan's and the victim's rooms were in close proximity to one another in the hospital's behavioral unit. Further, evidence showed that after the sexual contact, the victim was groggy. She was unable to care for herself and repeatedly stated she did not know what was going on.

¶38 The fact finder could reasonably infer from these obvious signs of impairment and the victim's placement in the behavioral unit that Lizan knew the victim was suffering from a mental illness that impaired her ability to appraise her conduct. The fact finder could reasonably infer that the victim displayed the same obvious signs of impairment before and during the sexual assault that she did afterwards. We conclude there was sufficient evidence from which the trial court could reasonably infer Lizan's knowledge of the victim's condition.

II. Constitutional claims

¶39 Lizan argues that his constitutional rights have been infringed by the procedures surrounding his revocation in two ways. First, he asserts that the revocation of his conditional release constitutes an ex post facto violation, because the rules of conditional release he was found to have violated had not yet been approved by the court at the time of the violations. Second, he argues he was denied due process because he was denied a fair opportunity to be heard as a consequence of the court's decision to hold a revocation hearing at the time scheduled for a hearing to approve the proposed conditional release rules.

A. Ex post facto

¶40 We easily reject Lizan's ex post facto argument. "Although the Latin phrase '*ex post facto*' literally encompasses any law passed 'after the fact,' it has long been recognized … that the constitutional prohibition on *ex post facto* laws applies only to penal statutes which disadvantage the offender affected by them." ***Collins v. Youngblood***, 497 U.S. 37, 41 (1990).

¶41 Here, Lizan contends he was unconstitutionally "disadvantaged" by the revocation of his conditional release based on violations of his conditional release rules that occurred before the rules were judicially approved. In other words, Lizan contends he was punished for violating rules that were not actually in effect at the time of the relevant conduct.

¶42 To the contrary, the rules Lizan was found to have violated were conditional release rules imposed by DHS. A conditionally released person is subject both to "the conditions set by the court *and* to the rules of [DHS]." WIS. STAT. § 971.17 (emphasis added). Lizan's argument confuses these two, different

sets of rules. As a result, the fact that the rules being applied against him were not judicially approved is irrelevant, because judicial approval was not required for the DHS-issued rules Lizan was found to have violated.

B. Due process

¶43 Lizan also argues his due process rights were violated when the circuit court decided to hold the revocation hearing at the time scheduled for a hearing to approve the proposed conditional release plan. "'Procedural due process … requires that even though 'government action depriving a person of life, liberty, or property survives substantive due process scrutiny, it must still be implemented in a fair manner.'" ***State ex rel. Greer v. Wiedenhoeft***, 2014 WI 19, ¶62, 353 Wis. 2d 307, 845 N.W.2d 373 (quoting ***State v. Laxton***, 2002 WI 82, ¶10 n.8, 254 Wis. 2d 185, 647 N.W.2d 784), *reconsideration denied sub nom.* ***Greer v. Wiedenhoeft***, 2014 WI 50, 354 Wis. 2d 866, 848 N.W.2d 861.

¶44 "To meet minimum due process at mental recommitment proceedings pursuant to sec. 971.17(3), Stats., a person is entitled to the same procedural rules or steps that are required or fashioned in probation or parole revocation proceedings." ***State v. Jefferson***, 163 Wis. 2d 332, 337, 471 N.W.2d 274 (Ct. App. 1991). Those procedural requirements are: (1) written notice of the claimed probation violations; (2) disclosure to the probationer of the evidence against him or her; (3) the opportunity to be heard in person and to present witnesses and documentary evidence; (4) the right to confront and cross-examine adverse witnesses; (5) a neutral and detached hearing body; and (6) a written statement by the fact finder as to the evidence relied on and reasons for revocation. ***Wiedenhoeft***, 353 Wis. 2d 307, ¶63.

¶45 Here, Lizan's argument implicates only the third requirement, regarding the opportunity to be heard and present evidence.[2] He argues he was effectively deprived of these rights because his attorney received the petition for revocation only one day prior to the hearing, such that he and his attorney could not properly prepare to address the factual allegations supporting the petition in such a short time. Further, Lizan argues he was entitled to, but did not have, the conditional release rules imposed by the DHS for reference prior to the hearing.[3]

¶46 The State responds that any due process violation attributable to the timing of the hearing was harmless error. Constitutional error does not automatically require reversal; most constitutional errors can be harmless. ***State v. Harvey***, 2002 WI 94, ¶37, 254 Wis. 2d 442, 647 N.W.2d 189 (citing ***Neder v. United States***, 527 U.S. 1, 8 (1999)). "'[I]f the defendant had counsel and was tried by an impartial adjudicator, there is a strong presumption that any other [constitutional] errors that may have occurred are subject to harmless-error analysis.'" ***Neder***, 527 U.S. at 8 (quoting ***Rose v. Clark***, 478 U.S. 570, 579 (1986)).

¶47 Harmless error requires an evaluation of the nature of the error and the harm it is alleged to have caused. ***State v. Weed***, 2003 WI 85, ¶¶29-30, 263 Wis. 2d 434, 666 N.W.2d 485. In the procedural due process context, the question

[2] Lizan mentions in passing that the circuit court failed to provide a written decision, but he takes the position "that the court's oral ruling provided the necessary guidance normally supplied in writing."

[3] We note that, at the hearing, Lizan did indicate he received the rules on the Friday prior to the hearing, which was held on Monday, February 10, 2014. Further, the evidence establishes that Lizan was aware of the DHS-imposed conditional release rules in January 2014, as he read and signed the rules form at that time.

is whether the lack of timely notice rendered the defendant unable to prepare an adequate defense. *See* ***State v. Burris***, 2002 WI App 262, ¶12, 258 Wis. 2d 454, 654 N.W.2d 866, *aff'd*, 2004 WI 91, 273 Wis. 2d 294, 682 N.W.2d 812.

¶48 Here, Lizan does not indicate, in any way, how the professed lack of timely notice impaired his ability to present an adequate defense to the DOC's revocation petition. Based on our review of the record, it is apparent Lizan's counsel engaged in significant cross-examination of the State's two witnesses. Lizan also testified in his own defense, during which he effectively admitted to many of the alleged rule violations. Lizan repeatedly acknowledged that the rules upset him, and he expressed remorse at "carry[ing] on that way."

¶49 We agree with the State when it writes, "Lizan does not suggest that there were any additional questions his attorney could have asked, or any additional testimony he could have given, if he and his attorney would have had more time to prepare." In all, Lizan "does not point to anything he would have done differently to prepare if only he had been given more time." *See* ***Burris***, 258 Wis. 2d 454, ¶13. Rather, his argument is supported only by general statements, which are insufficient. *See* ***State v. Pettit***, 171 Wis. 2d 627, 646, 492 N.W.2d 633 (Ct. App. 1992). Under these circumstances, we conclude any due process error was harmless.

By the Court.—Judgment affirmed.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)5.