COURT OF APPEALS
DECISION
DATED AND FILED

December 21, 2016

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2014AP2095 **Cir. Ct. No. 2014CV594**

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

STATE OF WISCONSIN EX REL. VINCENT MARTINEZ,

PETITIONER-APPELLANT,

V.

BRIAN HAYES,

RESPONDENT-RESPONDENT.

APPEAL from an order of the circuit court for Washington County: ANDREW T. GONRING, Judge. *Affirmed*.

Before Reilly, P.J., Gundrum and Hagedorn, JJ.

¶1 GUNDRUM, J. Vincent Martinez appeals pro se from an order dismissing his petition for a writ of habeas corpus following revocation of his extended supervision. Martinez asserts the attorney who represented him at his

extended supervision revocation hearing performed ineffectively.[1] We disagree and affirm.

Background

¶2 In August 2013, the department of corrections initiated proceedings to revoke Martinez's extended supervision related to a conviction for aggravated battery-intending substantial bodily harm. The department alleged eight violations of the conditions of his extended supervision: (1) pursuing a relationship with the female victim in this case (the victim) without prior approval of his agent, (2) failing to provide true and correct information to his agent about the relationship, (3) strangling the victim, and (4) beating her "to the point she received 11 stitches on her face," (5) consuming alcohol, (6) punching a male

[1] Martinez also complains the administrative law judge (ALJ) made multiple errors related to the revocation hearing. Hayes states in his response brief that "it is undisputed that those issues are cognizable through certiorari. As such, habeas relief is not available to Martinez on those claims." Martinez does not dispute this statement in his reply brief and, indeed, in that brief only discusses his claims of ineffective assistance of counsel. Furthermore, while he complains in his brief-in-chief of errors by the ALJ, his only claim of error by the circuit court is that the court erroneously "decid[ed] that habeas corpus was not the proper forum to pursue claims of ineffective assistance of counsel."

Martinez is correct to focus his appeal on his ineffective assistance of counsel claims, in that the writ of habeas corpus is "not available to the petitioner" unless three criteria are met, one of which is that the petitioner demonstrate "that there is no other adequate remedy available in the law." ***State ex rel. Krieger v. Borgen***, 2004 WI App 163, ¶5, 276 Wis. 2d 96, 687 N.W.2d 79; *see also* ***State ex rel. Vanderbeke v. Endicott***, 210 Wis. 2d 502, 522, 563 N.W.2d 883 (1997) (holding that except where certiorari is unavailable, "the 'right of review of a revocation hearing is by certiorari directed to the court of conviction' …. [H]owever … habeas rather than certiorari is the appropriate procedure for an allegation of ineffective assistance of counsel at a probation revocation proceeding when additional evidence is needed."). With regard to his nonineffective assistance of counsel claims, Martinez has made no effort to show "that there is no other adequate remedy available in the law," while Hayes concedes that habeas review is appropriate with regard to Martinez's ineffective assistance of counsel claims because there is no alternative way to review those claims. For these reasons, we review the circuit court's dismissal of Martinez's habeas petition only with regard to his ineffective assistance of counsel claims.

victim, (7) possessing a knife, and (8) calling the victim thirty times. A revocation hearing was held before an administrative law judge. Martinez stipulated to the fifth allegation, consuming alcohol. Nine exhibits were received into evidence without objection, including a Fond du Lac Police Department report (exhibit four), Martinez's written statement, dated August 5, 2013 (exhibit five), and the victim's written statement, dated August 8, 2013 (exhibit six). The following relevant testimony was presented at the hearing.

¶3 A City of Fond du Lac police officer testified that on August 4, 2013, she was dispatched to an apartment based upon "a female on the phone that was hysterical stating that her ex-boyfriend, Vincent Martinez, was attacking her friend and that there was a knife involved." When the officer spoke with the victim at the apartment, the victim

> was extremely upset. She was visibly crying at times. She was jumpy. She would run to the corner of the room whenever someone came into the door, another officer, to her apartment. She was extremely fearful, both in her actions and her words. She stated that she was afraid of Vincent. That Vincent had *attacked* her and attempted to kill her *at three separate occasions,* at least within the last year, *the most recent being about three weeks prior* to that. She stated that no paper that we could come up with, stating that he was to stay away from her, would work. That he would find her and kill her or her family. (Emphasis added.)

¶4 About one and one-half weeks later, the officer spoke with the victim regarding the three prior attacks the victim had referenced on August 4, and the victim provided a release for her St. Agnes Hospital medical records. The officer testified she did not receive a paper copy of the victim's medical records but was "briefed" on the information in the records, including that the victim "had seen a doctor in the emergency room on June 24. During that contact she received eleven stitches to her face." At this point, Martinez's counsel objected. While

counsel acknowledged hearsay was permissible at revocation hearings, she objected to this testimony as "double hearsay," arguing that the officer was testifying as to "a document that she had no firsthand knowledge of" and "that kind of hearsay is not the type of hearsay that is allowed at a hearing like this." The court responded:

> [A]s you stated … hearsay evidence is admissible at Revocation hearings. Double hearsay is obviously not, generally speaking, considered the most reliable hearsay but I don't believe that there is a rule indicating that double hearsay is, per say, not allowed. I'm going to allow her to answer the question. At the time I'm issuing the decision, I will consider whether I think that the double hearsay testimony that I'm hearing does have a sufficient indicia of reliability.

The officer then testified that with the release, she was able to and did directly review the victim's medical records at the hospital, but the hospital was not able to release the records to the officer because release of the records had not yet received sufficient supervisor approval.

¶5 Regarding details of the records she reviewed related to the victim's June 24, 2014 visit to the emergency room, the officer testified:

> I believe the breakdown of the stitches were four stitches to the left eyebrow area. Just in her eyebrow line. Another four stitches below the left eye and three stitches to the right cheek bone. Within two or three days of going to the hospital for these injuries, [the victim] began getting nauseous and sick and went back into the emergency room and they discovered, through x-rays, orbital fractures to the left eye. Which is a break within the eye socket itself, on the left eye.

The officer testified that when she spoke with the victim on August 4, the officer observed "signs of where the stitches were and the scarring on her eyebrow beneath her left eye and on her right cheek bone." The injuries appeared

consistent with a statement the victim had made to the officer on August 4 that weeks earlier Martinez "had punched her repeatedly in the face and that's when she felt and saw blood dripping down from the area of her face where she received stitches." On cross-examination by Martinez's counsel, the officer acknowledged she was not present for any alleged conflict between Martinez and the victim, and that she never actually directly spoke with doctors or nurses regarding the victim.

¶6 Martinez's extended supervision agent testified that with regard to the first revocation allegation, pursuing a relationship without prior approval, she relied upon exhibit six,[2] which was a written statement of the victim, as proof of the allegation, adding that she also spoke with the victim directly, and the victim told her she was in a relationship with Martinez. With regard to the second allegation—failing to provide the agent with true and correct information—the supervisor testified that Martinez "denied ever being in a relationship throughout his period of supervision." With regard to the third and fourth allegations, respectively that Martinez strangled and beat the victim, the agent confirmed she was relying upon "the police report, the Officer's testimony that we just heard, and perhaps the written statement of [the victim]." For allegations six and seven, respectively punching a named male victim and possessing a knife, the supervisor was relying upon one of the police reports submitted into evidence in exhibit four; and for allegation eight, calling the victim thirty times, she was relying upon the police report as well as the victim's written statement.

¶7 On cross-examination, the agent acknowledged she was not present during any of the alleged conflict between Martinez and the victim, but stated the

[2] *See* infra, ¶20.

victim did sign a release for her and she "did read the doctor's reports [her]self." The agent testified that while she did not include the "doctor's reports" or signed release in the revocation packet, in the revocation summary section of the packet she

> did put that per [the hospital's] medical records: on that date that there was the finding that her left nasal bone was fractured and also that she received lacerations to her left eye brow dated 6/24; the lacerations to her left eye brow, left and right cheeks, all three required stitches. She also had contusions.

¶8 In closing argument, Martinez's counsel argued the department had not met its burden with regard to allegations one through four and six through eight, asserting, inter alia, that the medical reports "have not been verified as reliable." "We have an Officer reading from a report that was written by somebody else. That she never actually spoke to the staff or the doctors about." Counsel asked the ALJ to "find that evidence not reliable," adding:

> In addition, we have [the victim] herself, who was subpoenaed for today's hearing, who did not show up…. Had she been so fearful of Mr. Martinez, you'd believe that she would be somebody that would show up to testify to make sure that he stayed away from her and remains in custody.

Counsel asked that the ALJ

> find that the police report and the testimony by the Officer be found not reliable in this case…. [T]he Officer wasn't present for any of these allegations. She spoke with [the victim], she saw some reports, but again that hearsay, I don't believe, is reliable at this point given what the Officer testified to.

¶9 By written decision, the ALJ revoked Martinez's extended supervision, finding that all eight allegations had been proven. Hayes, the Administrator of the Division of Hearings and Appeals, sustained the ALJ's

decision. Martinez filed a petition for writ of habeas corpus in the circuit court. Hayes moved to dismiss the petition, the court granted Hayes' motion, and Martinez appeals.

Discussion

¶10 Martinez asserts his revocation attorney provided him ineffective assistance at his revocation hearing because she did not object: (1) to the "hearsay testimony" of the officer and the agent; (2) on due process grounds that Martinez was unable to "confront and cross-examine adverse witnesses"; and (3) to the ALJ's "failure to determine good cause" for the victim's and the male victim's "failure to appear and be subject to cross-examination." Martinez fails to persuade.

¶11 To succeed on an ineffective assistance of counsel claim, a defendant must show that counsel's performance was deficient and the deficiency prejudiced him/her. ***State v. Erickson***, 227 Wis. 2d 758, 768, 596 N.W.2d 749 (1999). The defendant bears the burden of proof on both prongs, ***State v. Smith***, 207 Wis. 2d 258, 273, 558 N.W.2d 379 (1997), and if he/she fails to prove one prong, we need not address the other, ***Strickland v. Washington***, 466 U.S. 668, 697 (1984). An evidentiary hearing on an ineffective assistance of counsel claim need not be held if a defendant presents only conclusory allegations or fails to allege a prima facie claim showing his counsel's performance was both deficient and prejudicial. ***State v. McDougle***, 2013 WI App 43, ¶¶12-13, 347 Wis. 2d 302, 830 N.W.2d 243.

¶12 To prove deficient performance, the defendant must show that counsel's failures were "outside the wide range of professionally competent assistance," ***Strickland***, 466 U.S. at 690, and were "errors so serious that counsel

was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment," ***State v. Maloney***, 2005 WI 74, ¶24, 281 Wis. 2d 595, 698 N.W.2d 583 (citation omitted). The defendant must overcome a strong presumption he/she received adequate assistance and counsel acted reasonably within professional norms. ***State v. Johnson***, 153 Wis. 2d 121, 127, 449 N.W.2d 845 (1990); *see also* ***State v. Domke***, 2011 WI 95, ¶36, 337 Wis. 2d 268, 805 N.W.2d 364; ***State v. Kimbrough***, 2001 WI App 138, ¶¶31-35, 246 Wis. 2d 648, 630 N.W.2d 752. We will only find counsel's performance deficient if the defendant proves counsel's challenged acts or omissions were objectively unreasonable under all the circumstances of the case. *See* ***Kimbrough***, 246 Wis. 2d 648, ¶35. "When evaluating counsel's performance, courts are to be 'highly deferential' and must avoid the 'distorting effects of hindsight.'" ***State v. Thiel***, 2003 WI 111, ¶19, 264 Wis. 2d 571, 665 N.W.2d 305 (citation omitted). "Counsel need not be perfect, indeed not even very good, to be constitutionally adequate." ***Id.*** (citation omitted).

¶13 To prove prejudice, the defendant must show "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." ***Strickland***, 466 U.S. at 694. "It is not sufficient for the defendant to show that his counsel's errors 'had some conceivable effect on the outcome of the proceeding,'" ***Domke***, 337 Wis. 2d 268, ¶54 (citations omitted); speculation about what the result of the proceeding might have been is insufficient, ***Erickson***, 227 Wis. 2d at 774. The defendant must demonstrate that an alleged error of counsel actually had some adverse effect. ***State v. Keeran***, 2004 WI App 4, ¶19, 268 Wis. 2d 761, 674 N.W.2d 570 (2003).

¶14 Both deficient performance and prejudice present mixed questions of fact and law. ***State v. Jeannie M.P.***, 2005 WI App 183, ¶6, 286 Wis. 2d 721, 703 N.W.2d 694. We uphold factual findings unless they are clearly erroneous, ***Thiel***,

264 Wis. 2d 571, ¶21; however, whether counsel's performance is deficient or prejudicial is a question of law we determine de novo. ***Jeannie M.P.***, 286 Wis. 2d 721, ¶6.

¶15 Martinez fails to demonstrate prejudice—here, a reasonable probability the ALJ would have sustained the objections he claims counsel should have made as well as a reasonable probability sustaining those objections would have resulted in a different outcome. He does not explain to us, nor did he explain to the circuit court, how counsel's failure to object prejudiced him;[3] and his appeal is "doomed" on this basis alone. *See* ***Winnebago Cty. DHSS v. Diane M.***, No. 2003AP2660, unpublished slip op. at 9-10 (WI App Mar. 10, 2004) ("[Appellant] has failed to argue the prejudice prong of the ineffective assistance paradigm. That failure alone dooms her argument."); ***State v. Saunders***, 196 Wis. 2d 45, 52, 538 N.W.2d 546 (Ct. App. 1995) (where defendant fails to explain postconviction how it is his trial counsel's failure to make certain objections "harmed his case," the prejudice prong of Strickland cannot be satisfied); ***McDougle***, 347 Wis. 2d 302, ¶23 (holding that circuit court properly denied defendant's postconviction motion without a hearing where defendant failed to demonstrate that his counsel's failure to object to the admission of certain evidence at trial prejudiced him). While we recognize Martinez is pro se, it is nonetheless inappropriate for us to "abandon our neutrality to develop arguments" for him. ***Industrial Risk Insurers v. American Eng'g Testing, Inc.***, 2009 WI App 62, ¶25, 318 Wis. 2d 148, 769

[3] Indeed, his only statement on prejudice in his appellate briefs is his conclusory assertion that counsel's failure to object "unreasonably influenced the outcome of the revocation hearing."

N.W.2d 82; *see also* ***State v. Pettit***, 171 Wis. 2d 627, 647, 492 N.W.2d 633 (Ct. App. 1992) ("We cannot serve as both advocate and judge.").

¶16 Performing our own independent review of the record, however, we further conclude Martinez would be hard pressed to make a showing of prejudice. We note he stipulated to one violation of his conditions of extended supervision—consuming alcohol—and even a single violation provides a sufficient ground for revocation. *See* ***State ex rel. Warren v. Schwarz***, 211 Wis. 2d 710, 724, 566 N.W.2d 173 (Ct. App. 1997) ("Violation of a condition is both a necessary and a sufficient ground" for revoking supervision.) (quoting ***State ex rel. Plotkin v. DHSS***, 63 Wis. 2d 535, 544-45, 217 N.W.2d 641 (1974)). More significantly though, even if revocation counsel had objected as Martinez suggests she should have, such objections would not have aided his case.

¶17 As best we can deduce, Martinez complains that revocation counsel did not object, based on "hearsay" or lack of "reliability," to the use of police reports introduced or medical reports testified to at the revocation hearing. To begin, hearsay is admissible at a revocation hearing[4] and Martinez even acknowledges "the medical records were admissible." *See* ***State ex rel. Simpson v. Schwarz***, 2002 WI App 7, ¶30 n.6, 250 Wis. 2d 214, 640 N.W.2d 527 (2001). Furthermore, fairly early in the hearing, when the officer began to testify as to the victim's medical information on which the officer had been "briefed," counsel *did* object on the basis that such testimony was "double hearsay." Counsel articulated that the officer had "no firsthand knowledge of" the medical information, "that

[4] In fact, a decision "based entirely on hearsay" "is sufficient to prove a probation violation so long as the hearsay is reliable." ***State ex rel. Simpson v. Schwarz***, 2002 WI App 7, ¶30 n.6, 250 Wis. 2d 214, 640 N.W.2d 527 (2001).

kind of hearsay is not the type of hearsay that is allowed at a hearing like this," and the ALJ should "not allow the Officer to testify to that kind of information." The ALJ overruled the objection as to the admissibility of the evidence, stating:

> [H]earsay evidence is admissible at Revocation hearings. Double hearsay is obviously not, generally speaking, considered the most reliable hearsay but I don't believe that there is a rule indicating that double hearsay is, per se, not allowed. I'm going to allow her to answer the question. At the time I'm issuing the decision, I will consider whether I think that the double hearsay testimony that I'm hearing does have a sufficient indicia of reliability.

The officer then testified that she actually viewed the medical records herself and testified as to what she viewed in those records. In light of the ALJ's response to counsel's "double hearsay" objection related to the officer's testimony about being "briefed" on the medical records, we see no reason to believe it is reasonably probable that had counsel subsequently objected to the officer's or agent's testimony as to directly reviewing the medical records, or objected to admission of the police reports, the ALJ would have sustained the objection and prevented admission of the evidence.[5]

¶18 The ALJ ultimately determined the officer was "credible and reliable." With regard to her testimony related to medical records she reviewed, the ALJ found that "[h]er testimony as to what she personally observed in the

[5] In light of the ALJ's response, we also conclude counsel was not deficient in failing to further object to the officer's, or subsequently to the agent's, testimony related to the information they personally observed in the victim's medical records. With the ALJ overruling as it did counsel's objection to the officer's testimony about being "briefed" on the medical records, reasonable counsel would not have believed she might succeed with an objection to testimony by the officer or agent based upon the records they directly reviewed themselves. Following the ALJ's response, counsel reasonably focused her arguments related to the medical records and police reports on challenging their reliability.

hospital medical records is reliable, and there is no rational reason to doubt the truthfulness of the medical record." The ALJ also considered the officer's testimony regarding verbal statements the victim made to the officer on August 4, and found the victim's statements were corroborated by the officer's "personal observation of scarring on [the victim's] face" and what the officer read in the victim's medical records.

¶19 As to the officer's police report related to the August 4 incident, included in exhibit four, the ALJ noted that the officer testified her report of the incident was "true and accurate." Among other information incriminating to Martinez, the report indicated: the officer arrived at the victim's apartment and made direct contact with the victim approximately one minute after being dispatched; the male victim reported that at the apartment complex Martinez accused the male victim of "being with" the victim, then attacked the male victim, and there was "mention of a knife"; both Martinez and the male victim had "facial injuries from the fight"; the victim stated she "was afraid to make a statement or file charges against [Martinez] as he ha[d] harmed her so many times in the past and attempted to kill her numerous times in the past year," and further stated Martinez had called her "around 30 times" and text messaged her numerous times throughout the day; "numerous scars over [the victim's] face and neck area" which the victim claimed were due to Martinez were "very obvious"; the victim was "incredibly jumpy and skittish even around" officers; and from the victim's reactions "[i]t was very obvious … [she] ha[d] been victimized by [Martinez] to the point where she is incredibly afraid of him and afraid of any consequences that may result from her turning him in to the police."

¶20 The ALJ also considered exhibit six, a written statement the victim provided to Martinez's extended supervision agent four days after the August 4

incident. In that statement, the victim indicates she started dating Martinez seven months earlier and the relationship became sexual within a few days; he first "became physical," by pushing her, after two months of dating; around the end of May 2013, she had a "black eye" because Martinez punched her and she had a "cat scan" at St. Agnes Hospital in relation to that incident; around July 1, 2013, Martinez accused her of having sexual relations with another man and then choked her until she "started to black out," repeatedly punched her, held a knife to her throat and "tr[ied] to kill" her, she "curled up in a ball in the kitchen corner," and Martinez initially refused to let her go to the hospital out of fear she would call the police. According to the statement, Martinez later walked the victim to the hospital and "stayed outside until [she] was done"; she "lied to [the] hospital about what happened" to her, telling hospital personnel she "fell"; and she received "11 stitches in 3 different spots." The statement further provides that on August 4, Martinez was knocking on her apartment door and texting her; she texted the male victim about it and he came to the apartment; the male victim and Martinez engaged in an altercation during which "a knife fell out of [Martinez's] pocket," which she recognized as a knife she had previously seen at Martinez's house.

¶21 The ALJ also considered exhibit five, a written statement Martinez provided his agent the day after the August 4 incident. In that statement, Martinez states he was "pretty drunk" on August 4; "got ambushed" but does not remember what happened or who "ambushed" him; that the person who "ambushed" him was the "one that had the knife"; Martinez was "just friends" with and would "hang out" with the victim, but there had been no sexual contact between the two; and he never "hit, punched, [or] choked" the victim, but about a month earlier, the victim had told him she "fell down her stairs" and "had to go to the hospital for stitches on her eye." The ALJ found Martinez's statement to be

incredible, i.e., unbelievable, noting it was "not corroborated by any other evidence on record."

¶22 As the ALJ and administrator both noted in their written decisions, the hearsay evidence related to Martinez's abuse of the victim, including statements by the victim and medical reports detailing the specific injuries she sustained, was corroborated by the officer's testimony at the revocation hearing as to the officer's personal observance on August 4 of injury/scarring to the victim's face. The officer's testimony as to the victim's demeanor on August 4—being "extremely upset," "visibly crying at times," "jumpy," and "extremely fearful, both in her actions and her words," and "run[ning] to the corner of the room whenever someone came into … her apartment"—further corroborates the hearsay evidence in the medical records, police report, and the victim's statement, as does the officer's testimony that she received a medical release from the victim in order to gain access to the victim's medical records.[6]

¶23 Martinez also appears to complain that his counsel was ineffective for not objecting to the officer's testimony related to the medical records because a copy of the records was not provided to either the ALJ or to Martinez. Martinez argues he could have used the records at the hearing to contradict the victim's written statement that he caused her injuries because the records indicate that at the time the victim sought medical treatment on June 24, 2013, for the injuries to her face, the victim "[d]enied any domestic violence" and told medical personnel

[6] We also point out that had Martinez's counsel made further hearsay objections related to the admissibility of the medical records testimony, the ALJ may well have overruled them on the additional basis that the testimony provided detail that could be considered as satisfying a health care records exception for hearsay or "having comparable circumstantial guarantees of trustworthiness." WIS. STAT. § 908.03(4), (6m), (24).

the injuries had been caused by her falling down stairs. He adds that the records also would have shown that when the victim sought medical treatment at the same hospital three weeks earlier for a "bruise on her left eye" she told medical personnel it was the result of being hit in the face with a softball.

¶24 The officer testified that she personally observed the scarring to the victim's face, which scarring was consistent with the victim's medical records and allegations of Martinez abusing her weeks earlier. The officer further testified that when she spoke with the victim at her apartment on August 4, 2013, the victim

> was extremely upset. She was visibly crying at times. She was jumpy. She would run to the corner of the room whenever someone came into the door, another officer, to her apartment. She was extremely fearful, both in her actions and her words. She stated that she was afraid of [Martinez]. That [Martinez] had attacked her and attempted to kill her at three separate occasions, at least within the last year, the most recent being about three weeks prior to that. She stated that no paper that we could come up with, stating that he was to stay away from her, would work. That he would find her and kill her or her family.

Much of this testimony was the officer's first-hand observation of the victim. And as to the statements by the victim, even if counsel had objected, it is not reasonably probable the ALJ would have precluded them because the ALJ had no hesitations about admitting other hearsay evidence at the hearing and the statements also appear to satisfy the excited utterance exception to the hearsay rule.[7] While Martinez argues that the medical records "should have been turned over to disprove any claims that [the victim] was physically assaulted," we

[7] WISCONSIN STAT. § 908.03(2) provides that a statement is not excluded by the hearsay rule if it relates "to a startling event or condition" and is "made while the declarant was under the stress of excitement caused by the event or condition."

seriously doubt that had the medical records themselves been admitted to show the victim's stated cause of injuries, the ALJ would have believed stairs and a softball were the actual causes. We conclude it is not reasonably probable the outcome of the revocation proceeding would have been any different if counsel had objected to the "hearsay testimony" of the officer and agent.

¶25 Martinez also asserts his counsel should have objected on procedural due process grounds to Martinez's inability to confront and cross-examine the victim and the male victim and the ALJ's failure to find "good cause" for their lack of appearance. *See* ***Simpson***, 250 Wis. 2d 214, ¶12 (quoting ***Morrissey v. Brewer***, 408 U.S. 471, 489 (1972) (holding that at a revocation hearing, a probationer or parolee has "the right to confront and cross-examine adverse witnesses (unless the hearing examiner finds good cause for not allowing confrontation)")).

¶26 With regard to the male victim, we point out that the ALJ's four-page decision makes only a one-sentence reference, based upon the officer's report, to any statement by him. The ALJ noted that the male victim told the officer "that he came over to [the victim's] apartment because she asked him to come because she was scared of her ex-boyfriend Mr. Martinez and that Mr. Martinez attacked and punched him in the hallway of the apartment building." This statement was corroborative of, and indeed largely cumulative to, a verbal statement the victim provided the officer on August 4, as recorded in the officer's report, and the victim's August 8 written statement, both of which indicate she asked the male victim to come over to her apartment because she was afraid of Martinez and that Martinez and the male victim were fighting. The only addition of consequence from the male victim's statement is that Martinez clearly was the aggressor and "attacked" the male victim, which addition is consistent with the

victim's seemingly excited ("hysterical") utterance to dispatch on August 4 that "her ex-boyfriend, Vincent Martinez, was attacking her friend and that there was a knife involved." In any event, there is no basis for us to conclude that had the ALJ not considered the statement by the male victim Martinez would not have been revoked. As noted, the ALJ deemed "incredible" Martinez's written statement in which he asserted that the male victim was the aggressor in the fight. Even more significantly, Martinez's violent abuse of the victim clearly appeared to weigh most heavily in the ALJ's revocation and reconfinement decision, as the bulk of the ALJ's decision focuses on Martinez's harm to and terrorizing of her.

¶27 On the question of good cause for the victim's lack of appearance at the revocation hearing, ***Simpson*** teaches that an ALJ may implicitly find good cause by finding that the evidence at issue is reliable. ***Id.***, ¶22 n.5. The court added that the good cause requirement is "always" satisfied "when the evidence offered in lieu of an adverse witness's live testimony would be admissible" under one of the Wisconsin Rules of Evidence, such as WIS. STAT. § 908.03(24), which permits the admission of a hearsay statement if it has "circumstantial guarantees of trustworthiness" comparable to the other hearsay exceptions in § 908.03. ***Simpson***, 250 Wis. 2d 214, ¶30. Here, the ALJ determined that the officer's "personal observation of scarring on [the victim's] face and what [the officer] read in the hospital medical records corroborated [the victim's] hearsay statements to the police officer and agent" about Martinez attacking her. As well, the ALJ found believable the officer's corroborative testimony of observing the victim's extreme fear of Martinez on August 4. The ALJ satisfied the good cause requirement by implicitly finding the evidence against Martinez to be reliable and trustworthy. Furthermore, we do not believe there is a reasonable probability that had counsel objected to the victim's lack of appearance, the ALJ would not have

explicitly stated a finding of good cause based upon the reliability of the evidence, as well as the additional fact the agent had subpoenaed the victim to provide testimony at the hearing and expected her to appear; she just did not do so.

¶28 Martinez fails to demonstrate a reasonable probability the result of his revocation hearing would have been any different had his revocation counsel acted in the manner he claims she should have. As a result, he has failed to demonstrate he was prejudiced by counsel's performance. On the record before the circuit court and us, there is no basis other than speculation for concluding Martinez was prejudiced by his counsel's failure to make the objections he claims she should have made, and speculation will not sustain an ineffective assistance of counsel claim. *See* ***State v. O'Brien***, 214 Wis. 2d 328, 349-50, 572 N.W.2d 870 (Ct. App. 1997).

By the Court.—Order affirmed.

Not recommended for publication in the official reports.