STATE OF WISCONSIN

C O U R T O F A P P E A L S

DISTRICT I

Case No. 2023AP1140

STATE OF WISCONSIN ex rel.
WISCONSIN DEPARTMENT
OF CORRECTIONS, DIVISION
OF COMMUNITY CORRECTIONS,

Petitioner-Respondent,

v.

BRIAN HAYES, ADMINISTRATOR,
DIVISION OF HEARINGS AND APPEALS,

Respondent-Appellant,

KEYO SELLERS,

Intervenor-Co-Appellant.

ON APPEAL FROM A FINAL ORDER OF THE
MILWAUKEE COUNTY CIRCUIT COURT,
THE HONORABLE THOMAS J. McADAMS, PRESIDING

BRIEF OF PETITIONER-RESPONDENT

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INTRODUCTION

This certiorari case involves a challenge by the Wisconsin Department of Corrections (DOC) to a decision made by Brian Hayes, Administrator of the Division of Hearings and Appeals (DHA). DHA reversed an administrative law judge's (ALJ) revocation of Keyo Sellers's probation after he had sexually assaulted a woman, K.A.B., and later trespassed on her property, all while on supervision.

As the circuit court held, DHA's decision ignored key pieces of evidence, resulting in reversible error. First, DHA ignored that DNA consistent with Sellers was found on K.A.B.'s pubic area shortly after she was assaulted. A crime-lab witness explained those DNA results at the revocation hearing. Second, DHA ignored security-camera videos that captured Sellers trespassing on K.A.B.'s porch one week after the assault. A witness at the revocation hearing testified that it was Sellers in the video.

K.A.B. was not called to testify to avoid retraumatizing her, but she would not have been able to identify her attacker, who had been masked, and the ALJ's decision did not solely rely on her hearsay statements to conclude that it was Sellers who assaulted K.A.B. and later trespassed on her porch.

On appeal, DHA reversed the ALJ's revocation decision because it concluded that there was no "good cause" shown for K.A.B.'s not testifying at the revocation hearing. While it is true that hearsay alone may not be the basis to revoke a supervisee's probation, that is not what happened in this case. DHA erred because the ALJ properly relied upon hearsay *and* non-hearsay evidence that proved Sellers's rules-of-supervision violations by a preponderance of the evidence. DHA simply ignored the key non-hearsay evidence.

As to "good cause," Sellers did not even raise the argument at the hearing that he and Hayes rely on here: that there needed to be "good cause" if the victim did not testify,

regardless of what the basis for the ALJ's decision was. Sellers forfeited that argument, but it is incorrect, in any event. Here, that standard does not apply because non-hearsay evidence in the record aside from K.A.B.'s account proved that Sellers assaulted her and trespassed on her property by a preponderance of the evidence. The case did not depend on the accuracy of K.A.B.'s account of the assault; to the contrary, K.A.B. could not necessarily identify her masked attacker. The rule against considering certain hearsay in a revocation proceeding was not implicated because of the basis for the ALJ's revocation decision.

The circuit court correctly granted DOC's request for a writ of certiorari and reversed DHA's decision. This Court should affirm the circuit court's final order.

ISSUE PRESENTED

Did DHA commit reversible error when it disregarded the non-hearsay DNA and security-camera evidence and reversed the ALJ's revocation of Sellers's probation?

The circuit court answered yes when it granted DOC's request for a writ of certiorari and reversed DHA's decision.

This Court should answer yes.

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

Oral argument is not requested or necessary. Publication is likely not warranted, as this case involves the application of established legal principles.

STATEMENT OF THE CASE

I. Factual background

A. Sellers was convicted of delivering narcotics as party to a crime, received an imposed-and-stayed sentence, and was placed on probation for three years.

On February 18, 2019, Sellers was convicted of one count of delivery of schedule I or II narcotics as party to a crime in Milwaukee County Case No. 17-CF-4997. (R. 7:51; 8:1.) The circuit court imposed and stayed a sentence of 30 months of initial confinement followed by 30 months of extended supervision. (R. 7:51.) Sellers was placed on probation for three years. (R. 7:51.)

On July 31, 2019, Sellers signed rules of supervision for his probation. (R. 8:16.) The rules required Sellers to "[a]void all conduct which is in violation of federal or state statute . . . or which is not in the best interest of the public welfare or [his] rehabilitation." (R. 8:15.)

B. Police received a report from K.A.B. of a home invasion, sexual assault, and theft; security cameras K.A.B. installed immediately after captured the same man trespassing on her porch, peeping into her window.

On September 15, 2021, police received a report of a stranger home invasion and sexual assault. The victim, K.A.B., reported that a man entered her home without her consent. (R. 7:16, 33–34 (K.A.B.'s Jan. 25, 2022, statement to DOC), 40 (probable cause statement and judicial determination).) While there, he sexually assaulted her and took $30 from her without her consent. (R. 7:16, 34–35, 40.)

K.A.B.'s January 25, 2022, statement to DOC provided a detailed account of the assault (R. 7:33–37), and was

consistent with the narrative account of the assault and trespass stated in a probable cause statement and judicial determination signed by a circuit court commissioner on December 30, 2021, finding probable cause to hold Sellers in jail custody (R. 7:40–42).

According to K.A.B.'s account, a man entered her house when she was asleep on the couch in her living room. (R. 7:33.) The man appeared suddenly and walked into the living room carrying a large knife. (R. 7:34.) He smelled strongly of cigarettes and alcohol and wore a red bandana that covered his nose and mouth. (R. 7:34.)

The man ordered K.A.B. upstairs, where he ordered her to remove her clothes. (R. 7:34.) He ordered her to lie on her stomach and then put his fingers inside her vagina, forcing them in and out, telling her he had been watching her for a year and going inside her house when she walked her dog. (R. 7:34.) He appeared to use his phone as a flashlight, told her to look into his phone's camera, and appeared to take a photo. (R. 7:35.)

After he was finished assaulting K.A.B., he picked up the knife and asked K.A.B. if she had any money. (R. 7:35.) She gave him $30 from her pants pocket. (R. 7:35.) He told her to wait until she heard him leave before calling the police. (R. 7:35.) K.A.B. went downstairs minutes later and called 911. (R. 7:35–36.)

Police arrived, interviewed her, and then took her to the hospital. (R. 7:36; 8:90.) K.A.B. consented to a sexual-assault examination, including samples from her vaginal area. (R. 7:46; 8:90, 110.)

Shortly after the assault, K.A.B. arranged to have a security system installed with cameras at every entrance to her home and glass-break sensors. (R. 7:36; 8:90.) Only a few days after the installation, during the early morning of September 22, that camera took two different videos,

four minutes apart, of a man standing on K.A.B.'s porch, peeping into her window. (R. 7:36; R. 7:1 (noting that DHA filed a CD labeled Exhibit #6 in the circuit court containing video files named "1246nCass_Video1.mp4" and "1246nCass_Video2.mp4"); R. 65–67 (granting a motion to supplement the record with the disc).) K.A.B. believed that the man in the videos was the same man who sexually assaulted her based upon his height, weight, build, approximate age, receding hairline, prominent forehead, and cigarette tucked behind his ear. (R. 7:37.)

C. Sellers was charged with second-degree sexual assault of K.A.B. and burglary and is awaiting trial after several delays.

On December 29, 2021, Sellers turned himself into custody at the Milwaukee Police Department. (R. 7:38–39.) Pursuant to a warrant, buccal swabs were taken from him for analysis at the Wisconsin State Crime Laboratories. (R. 7:43.) DNA material found on K.A.B.'s pubic area after her sexual-assault examination was consistent with Sellers's profile. (R. 7:48; 8:110, 114.)

On January 12, 2022, Sellers was charged in Milwaukee County Case No. 22-CF-0136 for his actions at K.A.B.'s residence with: (1) second-degree sexual assault/use of force, a class C felony, and (2) burglary-room within a building, etc., a class F felony. (R. 7:44–45.)

Per CCAP, Sellers's trial is set for November 6, 2023. It has been delayed: it had been set for May 9, September 6, and October 24, 2022, April 3 and July 24, 2023, before its current date of November 6. Per CCAP, on October 24, 2022, nine law enforcement officers who would testify were present in court. But the state could not proceed because of a trial that day in another court. On July 24, 2023, the court could not proceed due to a trial commencing that day in an unrelated case in the same branch.

II. Procedural history of the revocation

A. DOC initiated revocation proceedings based upon Sellers's assaulting K.A.B., taking her money, trespassing at her home, and lying to his probation agent.

In March 2022, DOC initiated revocation proceedings. (R. 7:16–17.) DOC alleged that Sellers violated his rules of supervision by (1) entering K.A.B.'s residence without her consent on September 15, 2021; (2) shoving his fingers into her vagina without her consent; (3) taking $30 from her without her consent; (4) trespassing at her home on September 22, 2021; and (5) providing false information to his agent on February 4, 2022. (R. 7:16.) Sellers contested the first four allegations and stipulated to the fifth. (R. 8:80–81.)

B. An ALJ heard testimony and received evidence and issued a decision revoking Sellers's probation.

On March 29 and May 4, 2022, Sellers appeared with counsel before ALJ Martha Carlson at a revocation hearing. (R. 8:77, 124.) DOC appeared by probation agent Geraldine Kellen. (R. 8:77, 124.)

1. DOC presented witness testimony, documents, videos, and audio files to prove Sellers's rules violations.

In support of alleged rules violations 1 through 4, DOC presented the testimony of Michelle Burns, an analyst with the Wisconsin State Crime Laboratories who analyzed K.A.B.'s sexual assault kit and Sellers's buccal swabs; Agent Kellen; and Officer Michael Walker, who is assigned to the Sensitive Crimes Division at the Milwaukee Police Department and was involved in investigating K.A.B.'s assault and the trespass on her porch. (R. 8:86–137.)

Analyst Burns testified regarding the analysis she performed on K.A.B.'s sexual assault kit and Sellers's buccal swab. (R. 8:104–21.) She prepared a DNA report. (R. 8:105; 7:46–50 (report).) She testified that, based upon Y-STR DNA analysis she completed, a male DNA profile was developed from "the non-sperm fraction of the mons pubis swabs collected from the kit from [K.A.B.]." (R. 8:110.) "[T]he data that was returned was consistent with Mr. Sellers' profile." (R. 8:110.) On cross-examination, Analyst Burns confirmed that the "profile that [she] got as a result of the STR testing is consistent with Keyo Sellers." (R. 8:114.)

Analyst Burns explained that a profile match on a Y-STR DNA analysis would not necessarily exclude male individuals from the same genetic background, such as a father, son, full siblings, or even half siblings, if they share a father. (R. 8:110–11.) They would share the same Y-STR DNA profile. (R. 8:111.) Additionally, other unrelated males could share the same profile. Specifically, Analyst Burns testified that, as a "statistical estimate," "the DNA that [she] found that matches Mr. Sellers could also match one in every 278 African Americans." (R. 8:116.) Based upon census data, Sellers's counsel asked the ALJ to take judicial notice of the fact that there would be 289 African Americans in Milwaukee also who would match Sellers's DNA profile. (R. 8:116–17, 55 (data Sellers's counsel relied upon).)

Agent Kellen testified that she had supervised Sellers since October 2019. (R. 8:128.) She authored the revocation summary. (R. 8:128.) She viewed the surveillance videos from K.A.B.'s ADT security system and was "99%" certain that "it was Mr. Sellers [on the videos] based on his appearance, based on his walk, and based on the fact that [she] supervised him, you know, for almost 18 months." (R. 8:129.) Agent Kellen met with K.A.B. in person, took a written statement from her, and spoke to her a few times after that on the phone. (R. 8:130.)

Officer Walker investigated a porch-trespass complaint at K.A.B.'s residence one week after the assault. (R. 8:90.) He testified that, the day after the assault, K.A.B. had ADT security cameras installed around her house. (R. 8:90.) On September 22, 2021, K.A.B. reported to police that an unknown black male was prowling on her front porch. (R. 8:90–91.) Patrol officers obtained video footage from the security cameras and gave it to Officer Walker. (R. 8:91.) He spoke to K.A.B. and then gave the video footage to the Greenfield Police Department to run through facial-recognition software. (R. 8:91.) The software generated a report (that is not in the record), and three of Sellers's Milwaukee County Jail booking photos found in the software's database matched at 98.2%, 92.7%, and 85.5%, respectively, to video-still images from the security-camera footage of the man on K.A.B.'s porch. (R. 8:91–92.)

Officer Walker testified that he or his colleague showed the video-still images to K.A.B., and she believed that the man in the images was her assailant based upon their similar stature, height and weight, his walk, receding hairline, and the fact that the man in the video appeared to be unzipping his pants, which is consistent with what the assailant told K.A.B. about being outside her house masturbating. (R. 8:92–93.) Two of Officer Walker's colleagues at the police department interviewed Sellers's ex-wife, Jacquelyn Rule, and showed her the video stills. (R. 8:93–94.) Ms. Rule identified Sellers in the stills. (R. 8:94.) Officer Walker testified that K.A.B. was shown two photo line-ups that included photos of Sellers in them, but K.A.B. did not identify Sellers as her assailant from the photos. (R. 8:99.)

Officer Walker testified also about the investigation his colleagues did. He testified that Detective Ka Yeng Kue interviewed K.A.B. the night she was assaulted. (R. 8:87.) Officer Walker testified that K.A.B. reported to police that around 2:30 a.m. on September 15, 2021, she was sexually

assaulted by a man who broke into her home, took $30 from her, and then fled the scene. (R. 8:88.) K.A.B. phoned the police, who arrived shortly thereafter. (R. 8:88–89.) She described the assailant as a black male, late thirties or early forties, receding hairline, 180 to 200 pounds, smelling strongly of cigarettes and alcohol, wearing a white tank top, black pants, and with a red handkerchief covering the lower half of his face. (R. 8:89.)

K.A.B. did not testify at the hearing. Agent Kellen testified that DOC did not subpoena her to testify because "she told the police and she's told [Agent Kellen] she can't 100% ID her assailant," so Agent Kellen "didn't feel it was necessary to have her come in and provide testimony and go through the trauma of her assault to only say that she believes that Mr. Sellers could be the assailant, but she doesn't know 100%." (R. 8:130.) Instead of testifying, K.A.B.'s January 25, 2022, written statement to Agent Kellen was part of the record. (R. 7:33–37; 8:80 (the statement is part of revocation-hearing Ex. 1, DOC's revocation packet).) In the statement, K.A.B. recounted the events of September 15, 21, and 22, 2021. (R. 7:33–37.)

Sellers provided statements to DOC on January 12 and March 4, 2022, that are in the record. (R. 7:28–32; 8:80.) He denied ever being on K.A.B.'s property, stated that he was not the person in the security-camera video from K.A.B.'s porch, and denied sexually assaulting anyone. (R. 7:31.) He also stated that "[t]he police will not find any DNA of mine at this crime scene." (R. 7:31.)

Lastly, DOC filed the security-camera video from K.A.B.'s porch showing Sellers trespassing and audio files of calls that Sellers made to his girlfriend while he was in jail custody on a probation hold. (R. 8:58 ("Exhibit 6 from the revocation hearing is a DVD that contains six audio or video files."); R. 7:1; 65–67 (granting a motion to supplement the record with the disc DOC filed in the revocation proceedings).)

2. The ALJ revoked Sellers's probation based upon the five rules violations that she found had occurred.

On May 9, 2022, ALJ Carlson issued a decision revoking Sellers's probation in Milwaukee County Case No. 17-CF-4997. (R. 8:61–66.) ALJ Carlson held that "[t]he credible testimony of Analyst Burns confirms that a DNA profile consistent with Mr. Sellers was recovered from K.A.B. There is no credible explanation for why Mr. Sellers' DNA would be on K.A.B. but for the assault." (R. 8:65.) She also found that "Mr. Sellers can be seen on surveillance video trespassing onto K.A.B.'s porch and looking into her windows without permission on a later date after the sexual assault occurred. K.A.B. reported that she believed the individual seen on the surveillance video was the same individual who assaulted her based on his physical appearance and mannerisms." (R. 8:65.) ALJ Carlson concluded that "allegations 1 – 4 have been established by a preponderance of the evidence." (R. 8:65.) Based upon Sellers's stipulation, ALJ Carlson also found he committed rule violation 5. (R. 8:65.) ALJ Carlson determined that revocation was appropriate under *State ex rel. Plotkin v. DHSS*, 63 Wis. 2d 535, 217 N.W.2d 641 (1974). (R. 8:65.)

C. Sellers appealed the revocation, and DHA reversed because K.A.B. did not testify.

Sellers appealed ALJ Carlson's decision to DHA. (R. 8:69–71.) On June 17, 2022, DHA issued a decision reversing ALJ Carlson's revocation decision. (R. 8:72–74.) DHA's decision is on review in this appeal.

DHA reasoned that "K.A.B.'s account of the events is critical to the DOC's allegations" and that "the ALJ relied on the hearsay statements of K.A.B." (R. 8:72.) DHA held that "none of K.A.B.'s hearsay statements were admissible under the rules of evidence" and that "there was no good cause

shown to deny Sellers the due process right to confront this adverse witness." (R. 8:72.) DHA held that ALJ Carlson erred when she "relied on K.A.B.'s hearsay statements without making a good cause finding to justify the denial of confrontation." (R. 8:73.) DHA concluded that this violated Sellers's due process rights; therefore, alleged rules violations 1 through 4 "were not proven," and the ALJ's findings were reversed. (R. 8:73.)

DHA's decision did not address Analyst Burns's testimony, the DNA evidence, the surveillance video from K.A.B.'s porch, or Agent Kellen's testimony identifying Sellers in the video. (R. 8:72–74.) DHA concluded that revocation and confinement were not necessary under *Plotkin* in light of Sellers's stipulated rule violation 5. (R. 8:74.)

D. The circuit court granted DOC's request for certiorari, reversed DHA's decision, and stayed its final order pending appeal.

On August 1, 2023, DOC filed a summons and complaint requesting that the circuit court issue a writ of certiorari and reverse DHA's decision. (R. 2.) Sellers intervened in the case and was appointed counsel. (R. 14; 22; 23.) After DHA answered the complaint (R. 24), the parties briefed the merits (R. 25; 29; 30; 31).

On May 1, 2023, the circuit court entered a written decision granting DOC's request for a writ of certiorari and reversing DHA's decision. (R. 36:42.) The court concluded that DHA's decision was "based on an incorrect view of the law," thereby failing the second prong of the applicable standard for certiorari. (R. 36:39.) It concluded that DHA's decision also failed the third and fourth prongs of the test. (R. 36:40.)

First, the court explained that DHA's decision was "legally flawed in that it seems to require K.A.B. to testify." (R. 36:25.) Consent was part of whether DOC established rules of supervision violations, and the court held that

"[n]on-consent can be proven in more than one way and it can be proven circumstantially based on the totality of the evidence," which "is what happened here." (R. 36:25.) The court pointed to the criminal jury instructions for second-degree sexual assault and circumstantial evidence in support of its conclusions about the validity of the use of circumstantial proof of non-consent in Sellers's case. (R. 36:23–25.)

Second, the court held that "there was substantial additional evidence before the ALJ to support a circumstantial finding of non-consent and identification [of Sellers]." (R. 36:25–26.) The court relied upon a summation of facts in DOC's opening brief to explain the reasons why the evidence allows a finding of non-consent. (R. 36:26–28.) The summation focused on the testimony from Agent Kellen, Analyst Burns, and Officer Walker, which established the rules-of-supervision violations. (R. 36:26–28.)

Third, the court held that "[a]n ALJ can permissibly rely on hearsay and non-hearsay" (R. 36:28), and "there were reasons supporting 'good cause'" for K.A.B. not testifying (R. 36:34 (citation omitted)). Specifically, the court explained that K.A.B. "could not identify the assailant because the assailant wore a mask when he sexually assaulted [her]." (R. 36:34.) "It would have been a useless gesture to call her as a witness **not to identify** Mr. Sellers." (R. 36:34.) In other words, confrontation of K.A.B. at cross-examination would have been "futile, and a waste of time." (R. 36:34.) The court also explained that it was "a reasonable decision" to not have K.A.B. "relive her victimization" under the circumstances. (R. 36:34.) The court found that the ALJ gave "clear" reasoning for her decision about K.A.B. not testifying, and "simply chose to rely on the DNA evidence." (R. 36:35, 36.) While the ALJ did not expressly make a "good cause" finding, the reasoning to find "good cause" for K.A.B. not testifying "is found in the record." (R. 36:36.) Ultimately, "[a] revocation

hearing is clearly not a criminal trial, and a requirement was imposed here [by DHA] that does not exist even at a criminal trial where the burden of proof is much higher." (R. 36:36–37.)

DHA and Sellers filed motions requesting that the circuit court stay its decision pending appeal, and DOC filed a brief in opposition. (R. 40–43; 45.) The court held a motion hearing and entered an order granting a stay of its final order pending appeal. (R. 39; 46.)

On May 18, 2023, the circuit court entered a final order granting DOC's request for a writ of certiorari and reversing DHA's decision. (R. 47.) The final order remains stayed.

DHA and Sellers appealed. (R. 50; 54.)

STANDARD OF REVIEW

"In deciding an appeal from a circuit court's order affirming or reversing an administrative agency's decision, we review the decision of the agency, not that of the circuit court." *Min. Point Unified Sch. Dist. v. WERC*, 2002 WI App 48, ¶ 12, 251 Wis. 2d 325, 641 N.W.2d 701.

"[P]robation revocation is the product of an administrative, civil proceeding." *State ex rel. Cramer v. Wis. Ct. of Appeals*, 2000 WI 86, ¶ 28, 236 Wis. 2d 473, 613 N.W.2d 591. "Appeal of such a decision is accomplished by a writ of certiorari to the circuit court . . . and is not a de novo review." *State ex rel. Washington v. Schwarz*, 2000 WI App 235, ¶ 16, 239 Wis. 2d 443, 620 N.W.2d 414. "On review to this court, we apply the same standard of review as the circuit court." *Id.*

Certiorari review of a revocation decision addresses: (1) "[w]hether [DHA] kept within its discretion;" (2) "whether [DHA] acted according to law;" (3) "whether [DHA's] action was arbitrary, oppressive, or unreasonable and represented its will and not its judgment;" and (4) "whether the evidence

was such that [DHA] might reasonably make the order or determination in question." *Id.* (citation omitted).

ARGUMENT

I. DHA's committed reversible error when it reversed the ALJ's revocation of Sellers's probation.

A. The evidentiary burden for revocation is low and, if substantial evidence supported the revocation decision, it must be upheld.

At a revocation hearing, DOC has the burden of proving a violation of the rules of supervision by a preponderance of the evidence. Wis. Admin. Code HA § 2.05(6)(f); *Washington*, 239 Wis. 2d 443, ¶ 17. The ALJ "may accept hearsay evidence," and "[t]he rules of evidence other than ch. 905, Stats., with respect to privileges do not apply except that unduly repetitious or irrelevant questions may be excluded." Wis. Admin. Code HA § 2.05(6)(d), (e).

In considering the sufficiency of the evidence at the revocation hearing, this Court's "inquiry on [certiorari] review is limited to whether there is substantial evidence to support [DHA's] decision." *State ex rel. Thompson v. Riveland*, 109 Wis. 2d 580, 585–86, 326 N.W.2d 768 (1982); *Washington*, 239 Wis. 2d 443, ¶ 17 ("When the sufficiency of the evidence is challenged, we are limited to the question of whether there is substantial evidence to support the department's decision."). "Substantial evidence is evidence that is relevant, credible, probative, and of a quantum upon which a reasonable fact finder could base a conclusion." *Von Arx v. Schwarz*, 185 Wis. 2d 645, 656, 517 N.W.2d 540 (Ct. App. 1994) (citation omitted). The question under the "substantial evidence test" is "whether reasonable minds could arrive at the same conclusion [that DHA] reached." *State ex rel. Ortega v. McCaughtry*, 221 Wis. 2d 376, 386, 585 N.W.2d 640 (Ct. App. 1998). "Substantial evidence" is a "low burden of

proof." *Washington*, 239 Wis. 2d 443, ¶ 17 (quoting *State ex rel. Eckmann v. DHSS*, 114 Wis. 2d 35, 43, 337 N.W.2d 840 (Ct. App. 1983)).

"The rule that uncorroborated hearsay alone does not constitute substantial evidence allows an agency to utilize hearsay evidence while not nullifying the relaxed rules of evidence in administrative hearings." *Gehin v. Wis. Grp. Ins. Bd.*, 2005 WI 16, ¶ 56, 278 Wis. 2d 111, 692 N.W.2d 572. "The rule prohibits an administrative agency from relying *solely* on uncorroborated hearsay in reaching its decision." *Id. Gehin* requires that an administrative agency cannot rely solely upon uncorroborated written hearsay when that hearsay is otherwise controverted by in-person testimony. *See id.* ¶ 4.

B. DHA erred when it reversed the ALJ's revocation decision by ignoring key evidence that DOC submitted establishing that Sellers committed rules violations 1 through 4.

DHA erred when it reversed the ALJ's revocation decision by ignoring the key evidence that showed that Sellers committed rules violations 1 through 4 by breaking into K.A.B.'s home, sexually assaulting her, taking her money, and later trespassing on her porch. DHA wrongly focused on K.A.B.'s statements and ignored the probative non-hearsay evidence DOC presented and upon which the ALJ relied.

1. DHA ignored the DNA evidence and analyst's testimony establishing that Sellers assaulted K.A.B.

On the question of whether Sellers assaulted K.A.B., DHA's decision ignored credible testimony and non-hearsay evidence establishing that Sellers assaulted her.

First, DHA ignored credible testimony from Analyst Burns explaining that a specimen containing DNA consistent

with Sellers was retrieved from K.A.B.'s pubic area shortly after the assault. DHA's decision did not *mention*, let alone address, this probative evidence. Specifically, Analyst Burns testified that a sample taken from K.A.B.'s pubic area in a sexual-assault examination shortly after the assault was consistent with Sellers's DNA profile, which would be found in only 1 in 278 African Americans. (R. 8:110, 114, 116.) If Sellers was not the assailant, how did DNA matching his profile get on K.A.B.'s body?

DHA's decision did not address Analyst Burns's probative, non-hearsay testimony or her DNA report whatsoever, even though this evidence was the focus of the ALJ's revocation decision. (R. 8:65 ("The credible testimony of Analyst Burns confirms that a DNA profile consistent with Mr. Sellers was recovered from K.A.B. There is no credible explanation for why Mr. Sellers' DNA would be on K.A.B. but for the assault.").) This evidence tied Sellers directly to K.A.B.'s assault. DHA did not question Analyst Burns's credibility; instead, it did not address her testimony and conclusions at all.

In addition to the key DNA evidence, DHS ignored multiple pieces of circumstantial evidence that K.A.B. had been sexually assaulted without her consent. Specifically, she immediately called the police and reported the assault. (R. 7:18, 19, 36, 45; 8:87, 90.) She consented to a sexual assault forensic examination at a hospital shortly after the assault. (R. 7:36, 46–48; 8:70, 90.) She installed a security system at her home a few days after the assault. (R. 8:90.) And Sellers never argued that he had consensual sexual contact with K.A.B. (R. 7:28–32 (Sellers's statements).) These undisputed facts are not hearsay, and they show that on September 15, 2021, K.A.B. was assaulted and did not consent to the sexual contact.

In sum, DHA's decision regarding Sellers's assault of K.A.B. was reversibly wrong because, in light of the key

non-hearsay DNA evidence linking Sellers and other circumstantial evidence of the assault, the decision was "unreasonable and represented [DHA's] will and not its judgment," and "the evidence was such that [DHA could not] reasonably make the order or determination in question." *Washington*, 239 Wis. 2d 443, ¶ 16 (citation omitted).

2. DHA ignored the videos and related testimony establishing that Sellers trespassed on K.A.B.'s porch.

As to whether Sellers trespassed on K.A.B.'s porch, DHA did not address security-camera footage from K.A.B.'s porch showing a man who witnesses identified as Sellers peeping into the first-floor window, trespassing. This was also reversible error.

A camera took two different videos of the trespasser, four minutes apart, after midnight on September 22, 2021. (R. 7:36; R. 7:1 (noting that DHA filed a CD labeled Exhibit #6 in the circuit court containing video files named "1246nCass_Video1.mp4" and "1246nCass_Video2.mp4"); R. 65–67 (granting a motion to supplement the record with the disc).) K.A.B. believed that the man in the videos was the same man who sexually assaulted her based upon his height, weight, build, approximate age, receding hairline, prominent forehead, and cigarette tucked behind his ear in the videos (because he smelled heavily of cigarettes during the assault). (R. 7:37.)

Agent Kellen knew Sellers and identified him in the videos. She testified that she was "99%" certain that "it was Mr. Sellers [on the videos] based on his appearance, based on his walk, and based on the fact that [she] supervised him, you know, for almost 18 months." (R. 8:129.) There was no reason for Sellers to be on K.A.B.'s porch that night, and he was trespassing, as evinced by the fact that K.A.B. installed security cameras around her residence shortly after she was

sexually assaulted. In other words, she did *not* consent to Sellers being on her porch. And the fact that he trespassed and window peeped one week after the assault corroborated K.A.B.'s statements that her attacker told her that he had been watching her for one year and had gone into her home when she was not there. (R. 7:34.)

DHA's decision ignored the video evidence and Agent Kellen's identification, neither of which was hearsay evidence. DHA subverted the "substantial evidence" standard by ignoring key non-hearsay evidence. *See Ortega*, 221 Wis. 2d at 386.

In light of the video footage and testimony confirming that it was Sellers in the video, DHA's decision was "unreasonable and represented [DHA's] will and not its judgment," and "the evidence was such that [DHA could not] reasonably make the order or determination in question." *Washington*, 239 Wis. 2d 443, ¶ 16 (citation omitted). This Court should affirm the circuit court's reversal of DHA's decision as to Sellers's trespassing.

3. The ALJ permissibly relied upon hearsay and non-hearsay evidence in revoking Sellers's probation.

There was no *Gehin* problem with the ALJ's decision; DHA created one. ALJ Carlson could "accept hearsay evidence." Wis. Admin. Code HA § 2.05(6)(d). When she recounted K.A.B.'s statements to police and Agent Kellen, in her decision, ALJ Carlson's use of that hearsay evidence was permissible. (R. 8:62–64.) It would have been impermissible to "rely[ ] *solely* on uncorroborated hearsay in reaching [the revocation] decision," *Gehin*, 278 Wis. 2d 111, ¶ 56, but that did not happen. ALJ Carlson cited both K.A.B.'s hearsay statements *and* the non-hearsay DNA, video, and testimonial evidence described above, consistent with how DOC presented its case.

ALJ Carlson explained that, instead of relying only upon K.A.B.'s hearsay statements, DOC "chose instead to rely upon the DNA testing and the surveillance video rather than have K.A.B. testify." (R. 8:64.) "The submitted crime laboratory report is not hearsay, as Analyst Burns provided testimony at the final revocation hearing." (R. 8:65.) Analyst Burns' "credible testimony" and the surveillance video were the primary bases for the revocation decision. (R. 8:65.)

DHA's focus with the "good cause" standard for accepting hearsay evidence in a probation proceeding was off-base because it assumed the decisions turned on hearsay statements about Sellers' identity. (R. 8:72–73.) But that was not the case. ALJ Carlson's decision did not rely on K.A.B.'s statements in making her decision; instead, she focused on the probative DNA and video evidence and related testimony that was *not* hearsay. (R. 8:65.) DHA constructed a straw man and then knocked it down.

II. Hayes's and Sellers's arguments are not persuasive.

On appeal, Hayes and Sellers primarily argue that DOC was required to have K.A.B. testify to avoid violating Sellers's due-process rights. (*See* Hayes Br. 13–17; Sellers Br. 10–12.) Neither Hayes nor Sellers addresses the key non-hearsay evidence that DHA's decision ignored, and their due-process theory both does not apply and was forfeited.

A. The key non-hearsay evidence showed that the rules violations occurred and that K.A.B.'s encounters with Sellers were not consensual.

Contrary to the appellants' arguments, the key non-hearsay evidence that DHA's decision ignored, coupled with other circumstantial evidence, showed that the rules violations occurred and that K.A.B.'s encounters with Sellers

were not consensual. Neither Hayes' nor Sellers's brief addresses the key non-hearsay evidence presented to ALJ Carlson as to the assault or Sellers' trespass.

As to the sexual assault, credible testimony from Analyst Burns explained that a specimen containing DNA consistent with Sellers was retrieved from K.A.B.'s pubic area shortly after the assault; circumstantial evidence showed that K.A.B. had been sexually assaulted without her consent, including her immediate call to the police reporting the assault (R. 7:18, 19, 36, 45; 8:87, 90); the sexual assault forensic examination at a hospital shortly after the assault (R. 7:36, 46–48; 8:70, 90); and K.A.B.'s installation of a security system at her home right after the assault (R. 8:90). Sellers never even argued that he had consensual sexual contact with K.A.B. (R. 7:28–32.) The combination of this non-hearsay evidence showed that on September 15, 2021, K.A.B. was assaulted by Sellers and did not consent to the sexual contact.

As to the trespassing, the security-camera footage from K.A.B.'s porch showing a man identified as Sellers peeping into the first-floor window, trespassing, and only one week after K.A.B. was sexually assaulted. Agent Kellen testified and confirmed that the man was Sellers. K.A.B.'s immediate installation of security cameras around her residence after the assault showed her lack of consent to Sellers' presence on her porch that night. (R. 8:90.)

Hayes and Sellers lean into the standard of review, but they recognize DHA's decision must be supported by substantial evidence. (*See* Hayes Br. 19–20; Sellers Br. 13–14.) An agency fails the "substantial evidence" test when it ignores key evidence. That is because "reasonable minds could [not] arrive at the same conclusion [that DHA] reached" without similarly—and erroneously—ignoring the key non-hearsay evidence. *Ortega*, 221 Wis. 2d at 386. DHA's decision was "unreasonable and represented [DHA's] will and

not its judgment," and "the evidence was such that [DHA could not] reasonably make the order or determination in question." *Washington*, 239 Wis. 2d 443, ¶ 16 (citation omitted).

B. Hayes's and Sellers's due-process argument was forfeited and does not apply, in any event.

Hayes and Sellers argue that K.A.B.'s not testifying, or a lack of "good cause" for her not testifying, violated Sellers's due process rights. (*See* Sellers Br. 10–13; Hayes Br. 13–17, 20.) The argument was forfeited and misses the mark in this case, regardless.

Sellers did not raise due process or "good cause" concerns in his appeal to DHA and therefore forfeited the argument. *State v. Counihan*, 2020 WI 12, ¶ 25, 390 Wis. 2d 172, 938 N.W.2d 530 ("Forfeiture is the failure to make the timely assertion of a right."). During closing arguments at the revocation hearing, Sellers's counsel argued that "[t]he Allegations 1–4 in this case, it's all hearsay at this point" and that "we know that violations cannot be proven without some indication of reliability, and we don't have that here." (R. 8:138.) But neither during the hearing nor when he appealed ALJ Carlson's decision to DHA did Sellers argue a lack of "good cause" for K.A.B. not testifying or assert a due process violation. (R. 8:69–71.) Instead, Sellers recounted K.A.B.'s January 25, 2022, statement to DOC (R. 8:69–70), and argued that (1) the DNA evidence found on K.A.B. was not Sellers's DNA, (2) K.A.B. could not identify Sellers in a photo lineup, (3) cellphone records did not place Sellers at the scene of the assault, and (4) K.A.B.'s statement to police on September 21, 2021, was insufficient to identify Sellers as the man on her porch (R. 8:70–71).

It was important for Sellers to raise due process concerns at the revocation hearing. "The purpose of requiring

an adequate objection to preserve an issue for appeal is to give the parties and the court notice of the disputed issue, as well as a fair opportunity to prepare and address it in a way that most efficiently uses judicial resources." *State v. Kutz*, 2003 WI App 205, ¶ 27, 267 Wis. 2d 531, 671 N.W.2d 660. If he had raised the issue, ALJ Carlson—and DOC—could have addressed his concerns at that time. Sellers's brief does not explain how he preserved his argument.

Aside from forfeiture, the principle Sellers and Hayes rely upon does not apply given the basis of ALJ Carlson's decision. ALJ Carlson did not make a finding regarding the reliability of K.A.B.'s statements. (R. 8:64–65.) Instead of relying upon them, her revocation decision explained that K.A.B. did not testify and emphasized that "[t]he submitted crime laboratory report is not hearsay, as Analyst Burns provided testimony at the final revocation hearing." (R. 8:65.) This case is not like *State ex rel. Simpson v. Schwarz*, 2002 WI App 7, ¶ 14, 250 Wis. 2d 214, 640 N.W.2d 527, where both the ALJ and DHA depended on the reliability of a child victim in a case where the child's hearsay statements were admitted without an opportunity for cross-examination. Because the reliability of the victim was key to the case, the "good cause" standard applied. *See id.* ¶¶ 14–22.

Here, that standard does not apply because non-hearsay evidence in the record aside from K.A.B.'s account proved that Sellers assaulted her and trespassed on her property by a preponderance of the evidence. The case did not depend on the accuracy of K.A.B.'s account of the assault; to the contrary, she could not necessarily identify her masked attacker. The rule against considering certain hearsay in a revocation proceeding was not implicated because of the basis for ALJ Carlson's decision.

CONCLUSION

This Court should affirm the circuit court's final order.

Dated this 26th day of October 2023.

Respectfully submitted,

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FORM AND LENGTH CERTIFICATION

I hereby certify that this brief conforms to the rules contained in Wis. Stat. § (Rule) 809.19(8)(b), (bm), and (c) for a brief produced with a proportional serif font. The length of this brief is 6459 words.

Dated this 26th day of October 2023.

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CERTIFICATE OF E-FILE/SERVICE

I certify that in compliance with Wis. Stat. § 801.18(6), I electronically filed this document with the clerk of court using the Wisconsin Court of Appeals Electronic Filing System, which will accomplish electronic notice and service for all participants who are registered users.

Dated this 26th day of October 2023.

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