STATE OF WISCONSIN

S U P R E M E C O U R T

Case No. 2011AP394-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

DEMONE ALEXANDER,

Defendant-Appellant-Petitioner.

REVIEW OF A DECISION OF THE
COURT OF APPEALS, DISTRICT I,
AFFIRMING A JUDGMENT AND ORDER OF THE
CIRCUIT COURT FOR MILWAUKEE COUNTY,
CARL ASHLEY, JUDGE

BRIEF FOR PLAINTIFF-RESPONDENT

J.B. VAN HOLLEN
Attorney General

THOMAS J. BALISTRERI
Assistant Attorney General
State Bar #1009785

Attorneys for Plaintiff-Respondent

Wisconsin Department of Justice
Post Office Box 7857
Madison, Wisconsin 53707-7857
(608) 266-1523 (Phone)
(608) 266-9594 (Fax)
balistreritj@doj.state.wi.us

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ORAL ARGUMENT AND PUBLICATION

The supreme court ordinarily hears oral arguments and publishes its opinions.

ARGUMENT

I. IN THE CIRCUMSTANCES OF THIS CASE, ALEXANDER'S ATTORNEY COULD WAIVE ALEXANDER'S PRESENCE AT HEARINGS HELD DURING THE TRIAL TO DETERMINE WHETHER TWO JURORS WHO WERE SELECTED DURING THE VOIR DIRE SHOULD NOW BE DISMISSED FOR REASONS THAT SURFACED AFTER THE TRIAL STARTED.

As a general rule, a criminal defendant may have a right to be present when any substantive, rather than merely procedural, step is taken in his case. *State v. Anderson*, 2006 WI 77, ¶ 42, 291 Wis. 2d 673, 717 N.W.2d 74; *Leroux v. State*, 58 Wis. 2d 671, 689, 207 N.W.2d 589 (1973); *Williams v. State*, 40 Wis. 2d 154, 160, 161 N.W.2d 218 (1968). This would ordinarily include the defendant's presence at his trial. *State v. Carter*, 2010 WI App 37, ¶ 19, 324 Wis. 2d 208, 781 N.W.2d 527; *Anderson*, 291 Wis. 2d 673, ¶ 37.

Mindful of this right, this court has admonished trial courts to be solicitous in allowing defendants to be present at conferences and hearings held during the trial outside the presence of the jury. *Leroux*, 58 Wis. 2d at 690. Conferences held without the defendant being there should be rare. *Leroux*, 58 Wis. 2d at 690.

This case presents one of those rare instances where the defendant was not present at such a hearing. The defendant, Demone Alexander, was not present because his attorney waived his right to be present (84:58, 64).

The questions that arise because of Alexander's absence are: (1) whether Alexander's attorney could waive Alexander's presence at the hearing under the

circumstances of this case, (2) if it was error for counsel to waive Alexander's presence, who should have the burden to show prejudice, and (3) whether any error was prejudicial.

A. Since Alexander Had No Constitutional Right To Be Present At The Particular Hearings Held In This Case, His Attorney Was Not Constitutionally Constrained From Waiving His Presence As A Matter Of Trial Tactics.

Neither the state nor the federal constitution specifically guarantees a criminal defendant a right to be present at a trial. Rather, the right to be present is derived from the defendant's right to be heard, right to confront the witnesses against him, and right to due process. *Carter*, 324 Wis. 2d 208, ¶ 19; *Anderson*, 291 Wis. 2d 673, ¶ 38.

Since the confrontation component of the right to be present applies with respect to the presentation of testimony by witnesses which is considered by the trier of fact on the issue of guilt, *Gaertner v. State*, 35 Wis. 2d 159, 166-67, 150 N.W.2d 370 (1967), it is not applicable in a case like this one which involves a hearing extraneous to the issue of guilt held outside the presence of the jury.

When the defendant is not actually confronting the witnesses against him, due process provides the basis for a defendant's right to be present. *Kentucky v. Stincer*, 482 U.S. 730, 745 (1987). The right to be heard is not a separate right but one of the specific requirements of due process. *Brown County v. Shannon R.*, 2005 WI 160, ¶ 64, 286 Wis. 2d 278, 706 N.W.2d 269; *State ex rel. Kaufman v. Karlen*, 2005 WI App 14, ¶ 7, 278 Wis. 2d 332, 691 N.W.2d 879.

The due process right to be present at the trial is qualified, not absolute. Due process does not insist that the defendant be present at every conference or hearing held during the trial.

Due process, which is synonymous with fundamental fairness, *G.G.D. v. State*, 97 Wis. 2d 1, 8, 292 N.W.2d 853 (1980), guarantees the presence of the defendant only to the extent that a fair and just hearing would be impeded by his absence. *Stincer*, 482 U.S. at 745; *Leroux*, 58 Wis. 2d at 691. A defendant has a due process right to be present at a particular proceeding during the trial if the proceeding is critical to the outcome of the trial and the defendant's presence would contribute to the fairness of the proceeding. *Stincer*, 482 U.S. at 745; *Carter*, 324 Wis. 2d 208, ¶ 19.

Thus, the question of whether a defendant has a due process right to attend a particular conference or hearing held during the trial has no categorical answer. *Leroux*, 58 Wis. 2d at 691; *State v. Clarke*, 49 Wis. 2d 161, 175, 181 N.W.2d 355 (1970); *Ramer v. State*, 40 Wis. 2d 79, 84, 161 N.W.2d 209 (1968). However, when the conference or hearing deals solely with questions of law or matters of procedure, the defendant's presence ordinarily is not indispensible. *Leroux*, 58 Wis. 2d at 691; *Clarke*, 49 Wis. 2d at 175; *Ramer*, 40 Wis. 2d at 85.

The hearings Alexander's attorney did not want him to attend were concerned with whether two jurors who had survived the voir dire and were seated during the trial should be dismissed because of matters that became known after the trial had started.

The first juror expressed concern that the mother of Alexander's child, who she knew, with whom she did not get along, and who was present in court during the trial, might retaliate against her (84:58-59, 62; 85:12). The second juror belatedly realized that he knew one of the defense witnesses when the witness testified at the trial (84:66-67).

Whether a juror should be removed for cause is a tactical decision delegated to the attorney to make. *State v. Oswald*, 2000 WI App 2, ¶ 63, 232 Wis. 2d 62, 606 N.W.2d 207; *State v. Brunette*, 220 Wis. 2d 431, 444-45, 583 N.W.2d 174 (Ct. App. 1998); I ABA Standards for Criminal Justice, Standard 4-5.2(b) (2d ed. 1986). So Alexander did not have to be present at the hearing so he could decide whether either juror should be removed. His presence would have been necessary only to the extent that he could give his attorney significant assistance in making the decision whether any juror should be removed.

Although Alexander did not physically attend the hearings regarding the jurors, his attorney consulted with him, told him what happened in chambers, and got his input to take back to the hearings (84:64-65, 79).

Alexander's attorney advised the court that the woman in the courtroom was the mother of Alexander's baby, but that he was not close to her and had not seen her for sixteen months (84:64-65). Counsel said Alexander did not know any of the woman's friends, and did not know either the juror or the juror's sister, who was also acquainted with the woman in the courtroom (84:65).

There is nothing in the record which suggests that Alexander had any knowledge about the acquaintance between the second juror and the witness, which stemmed from their mutual interest in motorcycles (84:66-67).

Alexander's inability to contribute anything to the factual framework for determining whether the jurors should be dismissed for cause indicates that he had no constitutional right to be present at the hearing where that matter was determined. *See Stincer*, 482 U.S. at 747 (no due process right to be present at hearing where no evidence defendant's knowledge of facts could assist counsel or court in making determination); *State v. Hatch*, 144 Wis. 2d 810, 830-31, 425 N.W.2d 27 (Ct. App. 1988) (indicating defendant need not be present when defendant has no personal knowledge of relevant facts).

Alexander asserts that if he had been present at the hearings he could have suggested questions for his attorney to ask the jurors and arguments for his attorney to make to the court. Brief for Defendant-Appellant at 17. But Alexander does not specify what additional questions or arguments he could have suggested, and does not explain why he could not have made any possible suggestions when he discussed the matter with his attorney in private. Alexander's attorney told the court that Alexander agreed with counsel's decision that neither juror should be removed (84:71, 76, 79).

Under these circumstances, where Alexander's presence would not contribute anything to the fairness of the proceeding, there was no need for him to be present at the hearings to determine whether the two sitting jurors should be removed for cause, so he had no due process right to be present. *See State v. Lehman*, 108 Wis. 2d 291, 300, 321 N.W.2d 212 (1982) (inquiry regarding whether juror should be removed during trial should *generally* be made in presence of defendant).

When a defendant accepts counsel to conduct his defense, he necessarily delegates to counsel the ability to make tactical decisions, including the waiver of all but the most fundamental constitutional rights. *Brunette*, 220 Wis. 2d 443; *State v. Albright*, 96 Wis. 2d 122, 129-32, 291 N.W.2d 487 (1980).

Since Alexander had no constitutional right to be present at the hearings to determine whether the jurors should be removed, his attorney could waive his presence at these hearings as a matter of trial tactics without violating his constitutional right to be present at his trial. *See State v. McMahon*, 186 Wis. 2d 68, 86-88, 519 N.W.2d 621 (Ct. App. 1994) (suggesting attorney may waive defendant's presence at conference).

B. Alexander's Attorney Was Not Constrained By Any Statute From Waiving Alexander's Presence As A Matter Of Trial Tactics.

Wisconsin Statute § 971.04(1)(b) and (c) (2011-12) provides that "the defendant shall be present . . . [a]t trial" and "[d]uring voir dire of the trial jury."

The structure of this statute, which switches the expected sequence of the voir dire and the trial, makes clear that the voir dire and the trial are considered to be separate and distinct proceedings in the continuing course of a criminal prosecution. *State v. Dwyer*, 181 Wis. 2d 826, 836-37, 512 N.W.2d 233 (Ct. App. 1994).

Since the statute does not define "voir dire," this term is given its common, ordinary and accepted meaning as explicated in a recognized dictionary. *Orion Flight Serv. v. Basler Flight Serv.*, 2006 WI 51, ¶¶ 16, 24, 290 Wis. 2d 421, 714 N.W.2d 130; *State v. Williquette*, 129 Wis. 2d 239, 248, 385 N.W.2d 145 (1986); *Perry Creek Cranberry Corp. v. Hopkins Ag. Chem. Co.*, 29 Wis. 2d 429, 435, 139 N.W.2d 96 (1966); Wis. Stat. § 990.01(1) (2011-12).

Dictionaries define "voir dire" as the preliminary examination of prospective jurors to determine their competence or suitability. The American Heritage Dictionary of the English Language at 2001 (3d ed. 1996); Black's Law Dictionary at 1605 (8th ed. 2004); Webster's Third New International Dictionary at 2562 (unabridged ed. 1986). Thus, the voir dire is a proceeding that is preliminary to and separate from the trial.

The trial, within the meaning of the statute, begins "'when the selection of the jury has been completed and the jury sworn.'" *State v. Miller*, 197 Wis. 2d 518, 521-22, 541 N.W.2d 153 (Ct. App. 1995). *See State v. Koopmans*, 210 Wis. 2d 670, 679, 563 N.W.2d 528 (1997); *Dwyer*, 181

Wis. 2d at 836-37. *See also* Wis. Stat. § 972.07(2) (2011-12) (jeopardy attaches in jury trial when selection of jury completed and jury sworn).

Once the voir dire has finished and the trial has begun the defendant may voluntarily absent himself from the proceedings. *Koopmans*, 210 Wis. 2d at 678; *Dwyer*, 181 Wis. 2d at 836-37; Wis. Stat. § 971.04(3).

The defendant may absent himself from any and all proceedings conducted after the trial has commenced. When the defendant is voluntarily absent during the progress of the trial, the trial "shall proceed in all respects as though the defendant were present in court at all times." Wis. Stat. § 971.04(3).

So while due process is concerned with the nature of what goes on at a proceeding, the statute is concerned solely with the procedural posture of the proceeding regardless of what may or may not happen there.

The hearings from which Alexander was absent were not hearings held during the voir dire, but were hearings held after the voir dire had ended and the trial had begun. They were hearings "[a]t trial." Therefore, as far as the relevant statutes are concerned, Alexander could voluntarily absent himself from these hearings.

A determination of whether Alexander's attorney could decide that Alexander should not be present at these hearings requires a more careful and precise analysis of §§ 971.04(1)(b) and 971.04(3) than has been undertaken in the past.

Although courts have sometimes spoken in shorthand terms about a defendant's statutory right to be present at the trial, *e.g.*, *Anderson*, 291 Wis. 2d 673, ¶ 37, as an actual legal matter there is no such statutory right.

The rights granted by statute to criminal defendants are enumerated in Wis. Stats. ch. 939, subchap. VI (2011-

12), which is entitled "RIGHTS OF THE ACCUSED." These rights relate to the presumption of innocence and burden of proof, Wis. Stat. § 939.70, the limitation on the number of convictions, Wis. Stat. § 939.71, the prohibition of convictions for both an inchoate and a completed crime, Wis. Stat. § 939.72, the imposition of a criminal penalty only on conviction, Wis. Stat. § 939.73, the time limits on prosecutions, Wis. Stat. § 939.74, and the exceptions to the statutes proscribing death or harm to an unborn child, Wis. Stat. § 939.75.

By contrast, §§ 971.04(1)(b) and 971.04(3) are found in a chapter of the statutes entitled "CRIMINAL PROCEDURE – PROCEEDINGS BEFORE AND AT TRIAL." Neither of these provisions evinces any legislative intent to bestow any rights on the defendant. Rather, these provisions establish procedures to be followed in criminal proceedings.

Section 971.04(1)(b) provides that "the defendant shall be present . . . [a]t trial." An obligation to appear in court is not a right but a procedural requirement. *State v. Grosnickle*, 189 Wis. 17, 22, 206 N.W. 895 (1926). The requirement that the defendant be present is for the proper functioning of the judicial process instead of the benefit of the defendant.

Section 971.04(3) provides in relevant part that

> [i]f the defendant is present at the beginning of the trial and thereafter . . . voluntarily absents himself or herself from the presence of the court . . . the trial . . . shall not thereby be postponed or delayed, but . . . shall proceed in all respects as though the defendant were present in court at all times.

Importantly, this section does not provide for the waiver of any rights. Nowhere does it say that a defendant can waive any right to be present at a trial.

Rather, this section establishes a procedure for what happens when a defendant is not present at a part of a trial. What happens is that the trial goes on even if the defendant is no longer there. The defendant cannot stop the parade of justice by marching out of the courtroom. Plainly, this provision is intended to insure the continued functioning of the judicial process rather than to afford the defendant any rights.

This section can be seen as in effect allowing a defendant to be absent when his presence would otherwise be required. However, the defendant would not be waiving any right to be present but would merely be freed from a requirement that he be present. By absenting himself, the defendant would not be putting down a sword but would be pulling off his shackles.

Under the statute the defendant's absence must be voluntary. But since no right is involved, the defendant does not have to knowingly, voluntarily and intelligently decide to absent himself. *Cf. State v. Hampton*, 2004 WI 107, ¶ 22, 274 Wis. 2d 379, 683 N.W.2d 14 (waiver of constitutional right must be knowing, voluntary and intelligent). The defendant's absence must merely be voluntary in the ordinary sense that it is done willingly and without coercion. *See* American Heritage Dictionary at 2002; Black's Law Dictionary at 1605; Webster's International Dictionary at 2564.

A defendant who willingly accepts counsel to conduct his defense, willingly accepts the tactical decisions he delegates to counsel, and need not be consulted with regard to these decisions. *See Brunette*, 220 Wis. 2d 443-44; *Albright*, 96 Wis. 2d at 129-32. *See also State v. Wilkens*, 159 Wis. 2d 618, 624, 465 N.W.2d 206 (Ct. App. 1990) (tactical waiver by a defendant's attorney binding on defendant); *State v. McDonald*, 50 Wis. 2d 534, 538, 184 N.W.2d 886 (1971) (same).

Because a defendant's presence at or absence from a trial are procedural matters rather than rights, an

attorney can decide as a matter of trial tactics whether a defendant should be present at or absent from a particular proceeding held during the trial. *See generally Brunette*, 220 Wis. 2d at 443-44 (tactical decisions for attorney to make). Or to use the shorthand terminology, an attorney can waive a defendant's presence at a part of the trial as a matter of trial tactics.

To the extent that §§ 971.04(1)(b) and 971.04(3) might be considered to create a right to be present at a trial, any such right would not be a fundamental right because it would be created by the legislature and subject to legislative control. *See State v. Sher*, 149 Wis. 2d 1, 12-13, 437 N.W.2d 878 (1989). *See also Brunette*, 220 Wis. 2d at 443 (listing fundamental rights that cannot be waived by counsel).

Because the statute would not create any fundamental right to be present, there would be no independent requirement of any personal waiver by the defendant that exceeds the parameters of the constitutional right. *See Brunette*, 220 Wis. 2d at 443-44. So an attorney could waive any statutory right to be present at a trial to the same extent that counsel could waive the defendant's constitutional right to be present at a trial, as discussed in the preceding section of this brief.

Because Alexander's attorney could waive his right to be present at the hearings held during the trial as a matter of trial tactics without violating Alexander's constitutional right to be present at his trial, his attorney could waive his right to be present without violating any possible statutory right to be present.

II. ALEXANDER HAS THE BURDEN TO PROVE THAT HIS ATTORNEY ERRED BY TACTICALLY WAIVING HIS PRESENCE AT HEARINGS DURING THE TRIAL AND THAT ANY ERROR WAS PREJUDICIAL UNDER THE APPLICABLE TEST FOR INEFFECTIVE ASSISTANCE OF COUNSEL.

In *Anderson*, 291 Wis. 2d 673, ¶ 63, this court indicated that a complaint about the defendant's absence from a proceeding would be treated as a direct challenge instead of a claim of ineffective assistance where defense counsel failed to object to the defendant's absence. The court stated that "something more than the failure to object is needed to convert the challenge from a direct challenge to the alleged error to a claim of ineffective assistance of counsel." *Anderson*, 291 Wis. 2d 673, ¶ 63.

Although the state respectfully disagrees that anything more than an attorney's failure to object is needed to make the test for ineffective assistance of counsel the appropriate procedure for reviewing an alleged error,[1] in this case there is "something more," indeed significantly more.

First, as discussed above, under the circumstances of this case, Alexander had no constitutional right to be present at the hearings held outside the presence of the jury during his trial. So Alexander's attorney was not constitutionally constrained from waiving[2] Alexander's

[1] In a nutshell, when an attorney fails to object to some action by the court, any right to claim that the action was erroneous is forfeited or waived. Thus, the cognizable problem is no longer the court's action but the attorney's failure to object to it.

[2]Although waiver is not technically correct with respect to the statutory obligation to be present, since both statutory and constitutional principles are involved here, the state will use the word waiver as a shorthand expression for counsel's decision that Alexander should not be present at the trial hearings.

presence at these hearings as a matter of trial tactics, and her decision to waive Alexander's presence was not constitutional error subject to direct review.

Second, there is no independent statutory right, certainly no fundamental statutory right, to be present at hearings during a trial. So Alexander's attorney was not statutorily constrained from waiving Alexander's presence at the trial hearings as a matter of trial tactics, and her decision to waive Alexander's presence was not statutory error subject to direct review.

Third, here there was not merely a thoughtless passive forfeiture but a deliberate waiver. So if there was any error, it would not have been constitutional or statutory error, but a procedural mistake.

Anderson suggests that a case involving an affirmative waiver of the defendant's presence would be treated differently than a case where there was a mere failure to object to the defendant's absence. *See Anderson*, 291 Wis. 2d 673, ¶¶ 46, 55, 56, 58, 63.

Counsel's express waiver of Alexander's presence (84:58) cannot be ignored. It was not the prosecutor who sought to have Alexander excluded from the hearings. It was not the court that ordered Alexander to be excluded. If it was error to exclude Alexander, it was an error committed exclusively by his attorney.

Whether the decision by Alexander's attorney to waive his presence was right or wrong, it was tactical. Counsel did not want Alexander to be present at the hearings because she did not want Alexander to be in a position where he might make any statements regarding the jurors on the record (84:64). Counsel wanted to talk to Alexander about the jurors outside the earshot of the court and filter any information she considered helpful (84:63-65).

A tactical waiver by a defendant's attorney is binding on the defendant. *Wilkens*, 159 Wis. 2d at 624; *McDonald*, 50 Wis. 2d at 538. As long as a defendant is represented by counsel whose performance is not constitutionally ineffective, there is no inequity in requiring him to bear the risk of attorney error that results in a procedural default. *Coleman v. Thompson*, 501 U.S. 722, 752 (1991).

A claim of ineffective assistance of counsel is a means of circumventing a waiver. *State ex rel. Rothering v. McCaughtry*, 205 Wis. 2d 675, 680 n.5, 556 N.W.2d 136 (Ct. App. 1996). A waived error, even a constitutional error, is not reviewed directly, but is analyzed under the standards for determining whether counsel was ineffective. *Kimmelman v. Morrison*, 477 U.S. 365, 375 (1986); *State v. Carprue*, 2004 WI 111, ¶ 47, 274 Wis. 2d 656, 683 N.W.2d 31.

Moreover, as *Anderson* noted, whether a claim of error is reviewed directly or under the test for ineffective assistance determines who has the burden of persuasion on the question of prejudice. *Anderson*, 291 Wis. 2d 673, ¶ 48. If the claim is reviewed directly, the state has the burden to prove that any error was harmless beyond a reasonable doubt. *Anderson*, 291 Wis. 2d 673, ¶ 49. But under the test for ineffective assistance, the defendant must prove that his attorney's performance was deficient and prejudicial. *Anderson*, 291 Wis. 2d 673, ¶ 48.

When the defendant's attorney makes a unilateral tactical decision over which the prosecutor has little or no control, it hardly seems fair to make the prosecutor prove that an error committed by someone else which he had little or no ability to avoid was harmless. After all, when the circuit court makes an error, an appellate court will usually refuse to consider it when the circuit court was afforded no opportunity to correct its mistake. *State v. Van Camp*, 213 Wis. 2d 131, 144, 569 N.W.2d 577 (1997).

In addition, it is usually the beneficiary of an error who has the burden to prove that the error was harmless. *Anderson*, 291 Wis. 2d 673, ¶¶ 45, 48.

But tactical decisions made by defense counsel are presumed to be reasonable. *State v. Mayo*, 2007 WI 78, ¶ 60, 301 Wis. 2d 642, 734 N.W.2d 115; *State v. Thiel*, 2003 WI 111, ¶ 19, 264 Wis. 2d 571, 665 N.W.2d 305; *State v. Johnson*, 133 Wis. 2d 207, 217, 395 N.W.2d 176 (1986). So it is presumed that the defendant stands to benefit from, and is the beneficiary of, any tactical decision made by his attorney.

Unless and until the presumption of reasonableness is overcome, the state cannot be tagged as the beneficiary of any error that might have been committed by the defendant's attorney in making a tactical decision. The presumption of reasonableness is overcome when the defendant proves his attorney performed deficiently under the test for ineffective assistance of counsel. *Mayo*, 301 Wis. 2d 642, ¶ 60; *Thiel*, 264 Wis. 2d 571, ¶¶ 18, 19; *Johnson*, 133 Wis. 2d at 217.

Counsel's conscious tactical waiver of Alexander's presence in a case where counsel had the ability to waive Alexander's presence makes the question of prejudice in this case a claim under the test for ineffective assistance of counsel.

Therefore, if Alexander wants his conviction reversed because of his absence from the hearings to determine whether the sitting jurors should be removed for cause, he has a dual burden to prove both that his attorney's performance was deficient and that the deficient performance prejudiced his defense. *State v. Allen*, 2004 WI 106, ¶ 26, 274 Wis. 2d 568, 682 N.W.2d 433; *Thiel*, 264 Wis. 2d 571, ¶ 18.[3]

[3] On review, the appellate court will uphold the circuit court's findings of fact unless they are clearly erroneous. *Thiel*, 264 Wis. 2d 571, ¶ 17. Whether counsel's performance was deficient

III. ALEXANDER FAILED TO PROVE HIS ATTORNEY WAS INEFFECTIVE FOR TACTICALLY WAIVING HIS PRESENCE AT THE HEARINGS HELD DURING THE TRIAL.

A. Alexander Failed To Prove That His Attorney Performed Deficiently By Waiving His Presence At The Hearings Held During His Trial.

To prove that his attorney's performance was deficient, the defendant must overcome a strong presumption that counsel acted reasonably, and establish that counsel's representation fell below an objective standard of reasonableness. *Mayo*, 301 Wis. 2d 642, ¶ 60; *Thiel*, 264 Wis. 2d 571, ¶ 19; *Johnson*, 133 Wis. 2d at 217. The reasonableness of an attorney's acts is judged deferentially on the facts of the particular case viewed from counsel's contemporary perspective to eliminate the distortion of hindsight. *State v. Maloney*, 2005 WI 74, ¶ 25, 281 Wis. 2d 595, 698 N.W.2d 583; *Johnson*, 133 Wis. 2d at 217.

The test for ineffective assistance of counsel does not assess the legal correctness of counsel's judgments, but the reasonableness of those judgments under the circumstances of the case. *State v. Weber*, 174 Wis. 2d 98, 115, 496 N.W.2d 762 (Ct. App. 1993). So strategic decisions by counsel are virtually invulnerable to second guessing. *State v. Westmoreland*, 2008 WI App 15, ¶ 20, 307 Wis. 2d 429, 744 N.W.2d 919; *State v. Walker*, 2007 WI App 142, ¶ 15, 302 Wis. 2d 735, 735 N.W.2d 582. Even if a strategic decision appears to have been unwise in hindsight, counsel will not be found to have performed deficiently if his decision was reasonable under the circumstances existing at the time it was made. *State v.*

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and/or prejudicial to the defense are questions of law which are determined independently. *Thiel*, 264 Wis. 2d 571, ¶ 23.

Snider, 2003 WI App 172, ¶ 22, 266 Wis. 2d 830, 668 N.W.2d 784; *State v. Nielsen*, 2001 WI App 192, ¶ 44, 247 Wis. 2d 466, 634 N.W.2d 325.

Alexander has not shown that his attorney performed deficiently by waiving his presence at the hearings because he has not shown that waiving his presence was not precisely what he personally wanted to do.

Alexander's absence was legally voluntary because of the tactical waiver by his attorney. Alexander has not shown that his absence was not actually voluntary as well. Alexander has not shown that he wanted to be at the hearings where his presence was waived. There is no evidence that he disagreed with his attorney's decision that he should not be there.

To the contrary, the record shows that Alexander's attorney talked to him about the events in chambers (84:64), so he was well aware of what was going on in his absence. Counsel relayed to the court information provided by Alexander relating to the situation being discussed in chambers (84:64-65). This suggests that Alexander was satisfied with this manner of proceeding, and did not want to be present at the hearings in person.

Not only has Alexander failed to prove that his attorney's decision to waive his presence at the hearings regarding the reexamination of the jurors was not his decision as well, but he has also failed to prove that his attorney's decision to waive his presence was not reasonable.

Alexander has not shown that his attorney did not have a valid concern that if he was present at the hearings, he might say something on the record which could be used against him by the prosecutor, the court and/or the jurors.

Nor has Alexander shown that his attorney could not have a valid concern that the jurors could have been

less candid about potential conflicts involving Alexander's acquaintances if he was sitting only a few feet away from them in chambers.

Finally, Alexander has not shown that it was unreasonable for his attorney to determine that contemporaneously telling him what was transpiring at the hearings and relaying to the court tactically selected parts of what he said in response was not a preferable equivalent alternative to his potentially problematic personal appearance.

Alexander failed to prove that his attorney performed deficiently by tactically waiving his presence at the hearings where the jurors were reexamined during the trial.

B. Alexander Failed To Prove That He Was Prejudiced By His Absence When The Jurors Were Questioned.

Deficient performance is prejudicial when there is a sufficiently strong probability that the result of the proceeding would have been different without the error to undermine confidence in the reliability of the existing outcome. *Allen*, 274 Wis. 2d 568, ¶ 26; *Thiel*, 264 Wis. 2d 571, ¶ 20.

It is not enough for a defendant to speculate on what the result of the proceeding might have been if his attorney had not erred. *State v. Erickson*, 227 Wis. 2d 758, 774, 596 N.W.2d 749 (1999); *State v. Flynn*, 190 Wis. 2d 31, 48, 527 N.W.2d 343 (Ct. App. 1994); *State v. Wirts*, 176 Wis. 2d 174, 187, 500 N.W.2d 317 (Ct. App. 1993). The defendant must show actual prejudice. *State v. Keeran*, 2004 WI App 4, ¶ 19, 268 Wis. 2d 761, 674 N.W.2d 570; *Erickson*, 227 Wis. 2d at 773; *Wirts*, 176 Wis. 2d at 187.

When the defendant alleges that his attorney was ineffective, he must show with specificity what a different action would have accomplished if it had been taken, and how its accomplishment would have altered the result of the proceeding. *See State v. Byrge*, 225 Wis. 2d 702, 724, 594 N.W.2d 388 (Ct. App. 1999), *aff'd*, 2000 WI 101, 237 Wis. 2d 197, 614 N.W.2d 477; *Flynn*, 190 Wis. 2d at 48.

In this case, the "proceeding" is not the entire trial. The "proceeding" here, rather, is the hearings to determine whether two previously selected and sworn jurors should belatedly be discharged. Those were the proceedings from which Alexander was absent.

The result of those proceedings was that the jurors were dismissed for cause over the objections of Alexander and his attorney (84:71, 76, 79; 85:17, 20).

Although the jurors said the matters they raised would not affect their ability to be fair (84:69; 85:11-13), the court dismissed both of them because, despite their disavowal of any bias, the court determined that they were actually biased (85:17, 20). *See Oswald*, 232 Wis. 2d 62, ¶ 19 (court can make factual finding of bias despite juror's denial of bias).

The court decided to dismiss the first juror because the juror was concerned that a woman present in court, who was the mother of Alexander's child and was hostile to her, might retaliate against her (84:58-59, 62; 85:12, 17). The court decided to dismiss the second juror because he knew one of the defense witnesses (84:37, 66-67; 85:20).

To show prejudice from his absence, therefore, Alexander must show it is reasonably probable that the jurors would not have been dismissed for these reasons if he had been present in person at the hearings. But Alexander cannot make any such showing.

Although Alexander did not physically attend the hearings regarding the jurors, his attorney told him what happened there, and got his input to take back (84:64-65, 79). So Alexander was able to convey to the court through counsel anything he and his attorney considered to be relevant regarding the questions about the jurors' possible partiality that surfaced during the trial (84:64-65).

But Alexander had no information relevant to whether either of the jurors might be unable to be impartial (84:64-65). There is no indication that he had any suggestions for questions to the jurors or argument to the court. So Alexander could not have contributed anything to the factual or legal basis for determining whether the jurors should be dismissed for cause if he had been present at the hearing in chambers. He could not have contributed anything which might have changed the court's mind and altered its decision to dismiss the jurors.

Alexander conveyed his legal position that he did not want either of the jurors to be dismissed, a position with which his attorney agreed (84:61, 71, 79). However, the court disagreed with both of them.

Whether or not the circuit court might have committed error by dismissing these jurors for cause is unimportant in this case. Any such error could not be raised in Alexander's brief as an independent reason for reversal of his conviction since no claim of error in dismissing the jurors was raised in the Petition for Review. *See* Petition for Review at 2. A correct determination by the court would merely provide an additional reason why Alexander was not prejudiced by his absence, which would be superfluous since it is already manifest that there was no prejudice because Alexander could not have contributed anything which could have changed the result if he had been present.

Alexander's suspicion regarding a racial motivation for the removal of the jurors, Brief for Defendant-Appellant at 17, 19, is too little too late. Not only has this

claim never been raised before in this case, the claim raised now lacks any factual or legal support.

Factually, Alexander cites nothing in the record to show that the two jurors who were removed were African-American, or that none of the jurors who were left were African-American. Even if both assertions were true, it is clear that these jurors would not have been removed for racial reasons but because they were the only jurors to raise matters relevant to their ability to be impartial during the trial.

Legally, the jury that actually decides a case does not have to reflect a fair cross section of the community. *State v. Horton*, 151 Wis. 2d 250, 258-59, 445 N.W.2d 46 (1989). A defendant is not entitled to have members of his race who might thereby be prejudiced in his favor on his jury. *Wilson v. State*, 59 Wis. 2d 269, 282, 208 N.W.2d 134 (1973).

Alexander has not shown how he might have been able to help his attorney convince the court not to dismiss the jurors for these reasons stated by the court if he had been personally present at the proceeding. He has not shown that the result of the proceeding would have been different, i.e. that the court would not have dismissed the jurors, if he had been present at the hearings where the jurors were dismissed. He has not shown any reason why he might have been prejudiced by his attorney's tactical decision to waive his presence at the hearings.

This case is nothing like *State v. Harris*, 229 Wis. 2d 832, 601 N.W.2d 682 (Ct. App. 1999), where the court examined some sixty potential jurors before the defendant was ever brought into the courtroom.

Rather, as far as the question of prejudice, this case bears some similarity to *State v. David J.K.*, 190 Wis. 2d 726, 528 N.W.2d 434 (Ct. App. 1994), where the defendant was absent from an in camera voir dire of three prospective jurors.

In *David J.K.*, the defendant was absent because of a deliberate choice made by the defendant and his attorney. *David J.K.*, 190 Wis. 2d at 737. After the prospective jurors were examined, counsel advised the defendant what had transpired. *David J.K.*, 190 Wis. 2d at 737. The defendant and his attorney agreed that two of the persons who were examined in chambers should serve on the jury. *David J.K.*, 190 Wis. 2d at 737.

The court found that any error was harmless because the same persons would have served on the jury even if the defendant had been present in chambers for the voir dire. *David J.K.*, 190 Wis. 2d at 738. Therefore, there was no reasonable possibility that any error contributed to the conviction. *David J.K.*, 190 Wis. 2d at 738.

Alternatively, the defendant argued that his attorney was ineffective for waiving his right to be present at the in camera voir dire. *David J.K.*, 190 Wis. 2d at 738. But of course, a defendant cannot show prejudice because of his absence from a hearing when his absence was harmless beyond a reasonable doubt. *David J.K.*, 190 Wis. 2d at 740. *See also State v. Tulley*, 2001 WI App 236, ¶¶ 10-11, 248 Wis. 2d 505, 635 N.W.2d 807 (absence of defendant from in camera examination of three prospective jurors harmless because defendant was present at voir dire of all persons who actually sat on jury).

Alexander failed to prove that he was prejudiced by his absence from the hearings held during the trial to determine whether two sitting jurors should be dismissed for cause.

Having failed to prove either that his attorney performed deficiently by waiving his presence at the hearings, or that he was prejudiced in any way by that waiver, Alexander has failed to prove that the assistance he received from his attorney was ineffective.

CONCLUSION

It is therefore respectfully submitted that the decision of the court of appeals affirming the judgment and order of the circuit court should be affirmed.

Dated this 7th of January, 2013.

J.B. VAN HOLLEN
Attorney General

THOMAS J. BALISTRERI
Assistant Attorney General
State Bar #1009785

Attorneys for Plaintiff-Respondent

Wisconsin Department of Justice
Post Office Box 7857
Madison, Wisconsin 53707-7857
(608) 266-1523 (Phone)
(608) 266-9594 (Fax)
balistreritj@doj.state.wi.us

CERTIFICATION

I hereby certify that this brief conforms to the rules contained in Wis. Stat. § 809.19(8)(b) and (c) for a brief produced with a proportional serif font. The length of this brief is 6,356 words.

Dated this 7th day of January, 2013.

_____
Thomas J. Balistreri
Assistant Attorney General

CERTIFICATE OF COMPLIANCE WITH WIS. STAT. § (RULE) 809.19(12)

I hereby certify that:

I have submitted an electronic copy of this brief, excluding the appendix, if any, which complies with the requirements of Wis. Stat. § (Rule) 809.19(12).

I further certify that:

This electronic brief is identical in content and format to the printed form of the brief filed as of this date.

A copy of this certificate has been served with the paper copies of this brief filed with the court and served on all opposing parties.

Dated this 7th day of January, 2013.

_____
Thomas J. Balistreri
Assistant Attorney General