**COURT OF APPEALS**
**DECISION**
**DATED AND FILED**

**April 10, 2018**

**Sheila T. Reiff**
**Clerk of Court of Appeals**



**Appeal No. 2017AP607-CR** **Cir. Ct. No. 2014CF2474**

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

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**STATE OF WISCONSIN,**

**PLAINTIFF-RESPONDENT,**

**V.**

**ALLEN D. BLAND,**

**DEFENDANT-APPELLANT.**

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APPEAL from a judgment and an order of the circuit court for Milwaukee County: STEPHANIE ROTHSTEIN and MARK A. SANDERS, Judges. *Affirmed*.

Before Brennan, P.J., Kessler and Dugan, JJ.

¶1 PER CURIAM. Allen D. Bland appeals from a judgment of conviction, entered on a jury verdict, for first-degree sexual assault of a child under age twelve. The charge was based on Bland's sexual assault of his eleven-year-old daughter, T., at his house when she was there for a weekend visit in June 2014. The jury acquitted Bland on a second charge of three or more sexual assaults of the same child. He also appeals the circuit court's order denying his postconviction motion.[1]

¶2 Bland seeks a new trial on the grounds that his constitutional and statutory rights were violated. In the alternative, he seeks an evidentiary hearing on his claims (1) that trial counsel failed to question Juror 14 about his attentiveness during testimony and (2) that trial counsel failed to assert Bland's constitutional and statutory right to be present during the individual questioning of Juror 1 and Juror 3 by the court and trial counsel. He argues his absence during the court's questioning of Jurors 1 and 3, and the failure to question Juror 14 at all denied him a fair trial. He further argues that trial counsel rendered constitutionally ineffective assistance for failing to move for a mistrial, and for failing in closing argument to attack the victim's testimony about a specific assault as "wholly incredible." We reject Bland's arguments and affirm.

[1] The Honorable Stephanie Rothstein presided over Bland's jury trial and the Honorable Mark A. Sanders denied Bland's postconviction motion.

## BACKGROUND

**The trial testimony of the child.**

¶3 At Bland's jury trial, the child, T., testified that Bland had performed sex acts on her from the time she was ten. She testified that he put his mouth on her vagina and nipples; put his finger in her vagina; and put a vibrator on and inside her vagina. T. also testified that Bland forced her to perform sex acts on his penis using her hands and her mouth "more than one time." In addition to the physical acts, T. testified that Bland told her to send naked pictures of her "private parts and [her] nipples" to his cell phone. T. testified that if she refused to send the pictures or did not allow him to touch her, she would get "a whooping." She testified that Bland also texted her pictures of "naked people" who were "humping each other."

¶4 Testimony established that Bland had moved to Illinois in 2013, and T. had spent part of the summer of 2013 with him. In spring of 2014, Bland moved back to Milwaukee and T. began visiting "every weekend." T. testified about a specific incident that occurred in June 2014 in Bland's bedroom during one of T.'s weekend visits. She testified that Bland told her to take her clothes off. When the prosecutor asked T. why he did that, T. answered that Bland told her he wanted to see "how the hole felt. That's where he put his finger in, where I pee." She testified that when Bland put his finger in her vagina, she "started crying because it really hurted." She testified that her younger brother was wearing headphones and playing on a cell phone on the floor in the room when that happened but that he had not seen what Bland did.

¶5 T. testified that she texted with Bland often. She testified that he had sent messages promising that she "wouldn't have to do it anymore" after she

turned thirteen, and she understood "it" to mean "[i]nappropriate stuff." She explained in her testimony that "eating you out" meant "put[ting] his mouth on my private part," and "the mouth thing" meant "put[ting] my mouth on his private part." T. testified that Bland sometimes told her that she would "owe him," and this meant that she would "have to do the mouth on the private part things," and it happened when she would get "in trouble." On redirect, T. testified that Bland had at some point used "whoopings" as punishment, but he stopped doing so; instead of a "whooping," he would make her put her mouth on his penis.

**The trial testimony about text messages found on T.'s phone that were sent from Bland's phone.**

¶6 T.'s mother, M., testified that a few days after that June 2014 visit, she needed to use T.'s cell phone because her own phone was not working. While she was making a call on T.'s cell phone, she saw a text message arrive from a number identified in T.'s phone as "Daddy." The text message she saw said, "Baby hold on now. You said it felt good just as long as my beard didn't touch it." M. testified that her first thought was that the text must have been intended for someone else, but she testified that as she looked through other messages, she "realized these text messages [were] for [T.]" After she read a second text from Bland's phone—this one said, "I see you're cool with the mouth thing as the only punishment, right?"—she called Bland from T.'s phone. She testified that Bland answered, and after she confronted him about the texts, he "started to apologize." She testified that he claimed that "it only happened one time," that he had "apologized to his daughter," and that "he was drunk." She testified that he was "pleading with [her] not to call the police." She testified that she immediately took T. to the police.

¶7 The texts T.'s mother found were among those ultimately recovered from T.'s phone. A detective who works as a forensic examiner with the Milwaukee Police Department examined T.'s cell phone and Bland's cell phone. The detective testified that he recovered relevant evidence from both cell phones; however, he was able to recover only existing items—anything that had been deleted from the two phones before he examined them was unrecoverable. Among the texts recovered from T.'s phone and entered into evidence was a text exchange at about 3 p.m. on June 10, 2014. The text conversation had started with texts that showed that they were from Bland's phone, asking T., "What's been gone on wit the boys?" and her response was that nothing was going on. It continued with Bland telling her that he wanted her to be wild around him—"I be wantin you to be wild, baby, cuz I know that's how you are when grownups ain't around"—and telling her that he would continue with the sexual acts until she turned thirteen, using the "mouth thing" as the only punishment. At that point, the records showed that the text conversation was interrupted and several messages from Bland went unanswered. However, at about 6 p.m., the exchange resumed.

¶8 The detective testified that all of the above messages were retrieved from T.'s cell phone and showed that they had been sent from Bland's number, but none of them remained on Bland's cell phone. The detective did retrieve multiple *undeleted* messages that were on *both* Bland's phone (as sent messages) and T.'s phone (as received messages) on June 12, 2014. In these messages, directed at T.'s mother, Bland denied sexual contact with T. He claimed that he had gone through T.'s phone and found messages from a boy about sex. He claimed that the explicit texts he had sent her had been his attempt to "handle it" and "scare her out of it."

¶9 Bland testified. He testified that his relationship with T. was "[w]onderful, just like with all my other kids." He described that on weekends he typically had his kids over, and when he had the majority of his twelve kids over at one time, he would take them to a park or an indoor playground to play. He denied ever having sexual contact with T.

¶10 Bland never denied sending the texts from his phone that were found on T.'s phone. He tried to characterize the texts as an attempt to re-enact the sexting messages he claimed to have seen on her phone's Kik Messenger app between her and a specific thirteen-year-old boy: "I was going into what her and the boy was – I was basically trying to like do what they did, see how it feel. Look how you making me feel, too …. That was me going along with what the boy said and I just said it to her."

**The remainder of the trial testimony.**

¶11 A nurse who examined T. testified that there was redness visible during a vaginal exam of T. and that penetration by a finger could have caused the redness. A forensic analyst testified that there was no male DNA found on swabs taken from T.'s vagina. Two officers who interviewed T. also testified. For the defense, in addition to Bland, Bland's girlfriend and the mother of Bland's girlfriend testified generally that Bland had a good relationship with T. and that they had seen nothing wrong or out of the ordinary about his relationship with his children. A woman who described herself as a longtime friend of Bland testified that after Bland had caught T. sexting, Bland had asked her for advice, and she had advised him to take T.'s phone away.

**Voir dire, jury selection, and three juror-related issues.**

*Separate Voir Dire of Juror 1*

¶12 During voir dire at the beginning of the trial, before the jury was selected and sworn, Juror 1 had been permitted to answer a question about her employment in chambers outside the jury's presence. Bland's counsel, court staff, the prosecutor, and the judge went into chambers with Juror 1. Bland was not present. The trial court asked the juror, "[Y]ou indicated that there was some questions that you preferred to answer privately …. What would you like to tell us?" In response to the judge's questions, the juror answered that she had previously worked in booking at the Milwaukee County Jail, that she did not know Bland, and that the work at the jail would not affect her ability to be a juror. Juror 1 was excused and returned to the jury in the courtroom. The lawyers and court remained in chambers and the lawyers presented the judge with their joint request of jurors to be excused for cause. Neither lawyer requested that Juror 1 be excused for cause. The court approved strikes for cause.

¶13 Then the lawyers, judge, and staff returned to the courtroom where Bland and the jury were present. The lawyers then made their final peremptory strikes and the final jury of thirteen was selected, which included Juror 1. When the lawyers were done with their selections, the judge instructed the clerk to read the names of those chosen for the jury panel. After the clerk did so, the judge asked both counsel, in Bland's presence, "[I]s this the jury that you have chosen?" and both answered yes. The judge told the jurors what time to return the next day for instructions, opening statements, and testimony. Then, after dismissing the jury for the day, the trial court told Bland and both counsel that the court wanted to make a record of the conference in chambers regarding the strikes for cause.

The court asked trial counsel if he had waived Bland's appearance for that conference. Trial counsel confirmed that he had. Then trial counsel informed the court, "And also I discussed [the strikes for cause] with [Bland] and he was in total agreement with all of it."

*Separate Voir Dire of Juror 3*

¶14 Later, after the parties had left for the day, the trial court was informed that Juror 3 had expressed concern to court staff about whether he was eligible to serve on the jury. The following morning, before the jury and Bland were brought in, Juror 3 was brought into the courtroom for further questioning on the record with both counsel present. Trial counsel waived Bland's appearance. In answer to the questions of the trial court and both counsel, Juror 3 stated that he had once been convicted of taking a car without the owner's consent and once been convicted of a firearms charge, and he stated that these experiences would not cause him to be biased in deciding Bland's case.

¶15 After both counsel and the trial court questioned Juror 3 without Bland being present, Juror 3 left the courtroom and Bland was brought into the courtroom wearing street clothes and in shackles because he was in custody. The trial court explained what had happened, telling Bland that the court did not have him brought in because it would have been apparent to the juror that Bland was in custody, which was potentially prejudicial to Bland. The trial court and trial counsel discussed, in Bland's presence, what to do about Juror 3's disclosure of his prior convictions. One potential solution that was suggested was to wait until the end of the trial and then designate Juror 3 as the alternate. The trial court responded that it was "a good proposal" and Juror 3 would be left on the panel for the time being and that the parties would "revisit the issue prior to selecting the

alternate." The trial court confirmed with Bland: "Mr. Bland, is that satisfactory for you?" and Bland answered, "Yes." The trial court continued, noting that if the defense's position changed, "there is sufficient time certainly before we select an alternate for the [c]ourt to hear from you. All right?" Bland responded, "Okay." Bland's trial counsel advised the court on the record in Bland's presence that he had talked to Bland about the issue regarding Juror 3 before and after the questioning of Juror 3 and Bland had agreed to the proposal of waiting until later in the trial to determine whether Juror 3 would be the alternate or not.

*Discussions regarding Juror 14*

¶16 During the first full day of testimony, another juror-related issue arose. The trial court announced a brief break, excused the jury, and addressed the parties: "I want to make a record that I'd called a break because it looked like we were kind of losing one of our jurors. He was starting to look very drowsy …. I didn't see him actually sleeping …. So we'll just note that and make the parties aware of it." At the close of the day, after the jury had been excused for the day, the trial court revisited the concern about Juror 14, summarizing that he had been "quite awake" during testimony by some witnesses and had "seem[ed] to be dozing" for less than thirty seconds at a time during the testimony of two witnesses. Counsel were invited to make a record; neither had anything further to add. The trial court then stated that more would be done when trial resumed the following day to "ensure that [Juror 14] stays awake," such as having the jurors "stand, move around, and leave the courtroom." The trial court restated that "the topic of who's going to be the alternate" would be "revisit[ed]."

¶17 At the close of testimony, outside of the jury's, but in Bland's presence, the trial court asked counsel to state their positions on deliberately

picking an alternate or leaving it to chance. The State asked that Juror 14 be used as the alternate. Bland's counsel asked for a pause to confer with his client, then told the trial court that he agreed with the State and that he had just discussed the matter with Bland "and he concurs with my thoughts also." Comparing Juror 14 to Juror 3, the non-disclosing juror, Bland's counsel stated, "My client agrees with me also that the sleeping juror, you know, is a bigger problem. And he agrees with me and with the [S]tate that that should be – he should be the alternate." The trial court cautioned that the record should reflect that it had not made a finding that the juror was sleeping, and there was no finding made on whether the affected testimony was material. The trial court directly addressed Bland: "And Mr. Bland, that's correct, right?" and Bland responded, "Yes." Juror 14 was accordingly announced as the alternate and was excused before the jury began its deliberations.

**The verdict and postconviction motion.**

¶18 The jury returned a verdict of not guilty on the charge of repeated sexual assault of a child, and a verdict of guilty on the charge of first-degree sexual assault of a child under twelve years old. Bland filed a motion for postconviction relief arguing that his constitutional and statutory rights to be present were violated when he was not personally present during the individual questioning of Juror 1 and Juror 3 and when he was not given an opportunity to question Juror 14. He further argued that trial counsel rendered constitutionally ineffective assistance by failing to require his presence at those times, by failing to require a voir dire in his presence of Juror 14, by failing to move for mistrial on the grounds that both Juror 3 and Juror 14 were disqualified to serve, and by failing to emphasize in closing that T.'s testimony about the June 2014 sexual assault, the basis of count one, was "wholly incredible."

¶19 The postconviction court denied the motion without a hearing. This appeal follows.

## DISCUSSION

### I. Bland's constitutional rights were not violated by his absence from the individual voir dire of Juror 1 and the judge's interaction with Juror 3 after the jury was selected.

**Standard of review and relevant law.**

¶20 We construe both constitutional and statutory language to determine whether there was a violation of Bland's right to be present during the preliminary process during which the jury is selected or a violation of his right to be present for juror-judge interactions during trial. These constitute questions of law that we review *de novo*. ***State v. David J.K.***, 190 Wis. 2d 726, 738, 528 N.W.2d 434 (Ct. App. 1994).

¶21 "Both the United States and Wisconsin constitutions grant a criminal defendant the right to be present and to have counsel present during every critical stage of a criminal proceeding, including during jury *voir dire*." ***State v. Tulley***, 2001 WI App 236, ¶6, 248 Wis. 2d 505, 635 N.W.2d 807 (citing U.S. CONST. amends. VI and XIV and WIS. CONST. art. I, § 7). "The right to be present during *voir dire* and, if represented by counsel, the right to have counsel present during *voir dire* cannot be waived." ***Id.*** In ***United States v. Gagnon***, the United States Supreme Court explained, "The constitutional right to presence is rooted to a large extent in the Confrontation Clause of the Sixth Amendment … but we have recognized that this right is protected by the Due Process Clause in some situations where the defendant is not actually confronting witnesses or evidence against him." ***Id.***, 470 U.S. 522, 526 (1985). "[A] defendant has a due process

right to be present at a proceeding 'whenever his presence has a relation, reasonably substantial, to the fulness of his opportunity to defend against the charge.'" ***Id.*** (citation omitted). "[T]he presence of a defendant is a condition of due process to the extent that a fair and just hearing would be thwarted by his absence, and to that extent only." ***Id.*** (citation omitted). "[T]he exclusion of a defendant from a trial proceeding should be considered in light of the whole record." ***Id.*** at 526-27.

¶22 The facts addressed in ***Gagnon*** illustrate that minor juror interactions occur during trial and do not necessarily give rise to constitutional issues. In that case, a juror met in chambers with the judge and with Gagnon's counsel; Gagnon argued on appeal that he had been denied his constitutional right to be present for the interaction:

> In this case [Gagnon's] presence … at the *in camera* discussion was not required to ensure fundamental fairness or a "reasonably substantial ... opportunity to defend against the charge." *The encounter between the judge, the juror, and Gagnon's lawyer was a short interlude in a complex trial*; the conference was not the sort of event which every defendant had a right personally to attend under the Fifth Amendment. *Respondents could have done nothing had they been at the conference*, nor would they have gained anything by attending. Indeed, the presence of Gagnon and the other respondents, their four counsel, and the prosecutor could have been counterproductive. [The juror] had quietly expressed some concern about the purposes of Gagnon's sketching, and the District Judge sought to explain the situation to the juror. *The Fifth Amendment does not require that all the parties be present when the judge inquires into such a minor occurrence*.

***Id.*** at 527 (emphasis added; citations omitted).

**Juror 1 interaction.**

¶23 The first question is whether Bland's absence thwarted "a fair and just hearing" during the in-chambers interaction with Juror 1 prior to jury selection. The proceeding was on the record, Bland's counsel was present, and Bland's counsel represented to the trial court later, in front of Bland, that he had discussed with Bland the jurors struck in chambers and those remaining on the jury (which included Juror 1) and that Bland was in "total agreement."

¶24 Applying the principles of ***Gagnon***, we conclude that the Juror 1 interaction—her conveying that she had previously worked for the jail and that she did not know Bland—is a minimal interaction, and Bland could not have done anything had he been present and he would not have gained anything. The juror shared her employment information, said she would follow the jury instructions and could be fair, and stated to the court and parties that she believed everyone should be able to defend themselves at the highest degree. Even in his postconviction affidavit, the best claim Bland can make for what he would have added by being present is that he would have asked unspecified questions about "weaknesses in her demeanor and personality to serve as a juror and to acquit a criminal defendant if the [S]tate could not prove its case beyond a reasonable doubt." But Juror 1 had already volunteered answers showing her fitness to be an impartial juror. In light of the whole record, Bland's absence from the interaction did not thwart "a fair and just hearing" and therefore does not constitute a violation of his due process rights.

**Juror 3 interaction.**

¶25 Bland next argues that his absence during the trial court's interaction with Juror 3 thwarted "a fair and just hearing." Both counsel were present, and the

proceeding was on the record. The issue raised by Juror 3 was his own failure to disclose two convictions during voir dire the previous day. Juror 3 had alerted the deputy at the end of the first day, but the conversation with him occurred the following morning. Juror 3 disclosed his convictions and assured the court and both counsel he could be fair. Neither lawyer asked that he be stricken at that time, but both asked the court to wait until later in the trial and discuss whether he should be the alternate at that time.

¶26 Bland was then brought into the courtroom and the judge explained that the reason he had been kept outside the courtroom was to avoid having the juror see his shackles and learn that he was in custody. The court also explained the lawyers' decision to wait until later in the trial to determine if Juror 3 should be the alternate. Bland's counsel confirmed that Bland agreed with that proposal. Later when the alternate was actually chosen, and it was Juror 14, not Juror 3, trial counsel made a record in Bland's presence that he had actually discussed Juror 3 with Bland both before and after the colloquy with Juror 3 and Bland was in agreement.

¶27 Again, applying the principles from ***Gagnon***, we conclude that the Juror 3 interaction is a minimal interaction of the sort that ***Gagnon*** describes: one in which Bland could have done nothing had he been present and one from which he would not have gained anything. Bland speculates that if present, he would have drawn the conclusion that if Juror 3 had insufficient backbone to stand up when asked about convictions during voir dire, he would have insufficient backbone to say honestly if he believed the evidence was insufficient to convict. Besides being merely speculation, Bland's argument ignores the fact that Juror 3 notified the bailiff that there was a problem, returned to court to deal directly with his failure to disclose, faced the admonishment of the judge, and disclosed

honestly his history. Bland's speculation about the juror's reticence is not borne out by the record. In light of the whole record, Bland's absence from this interaction did not thwart "a fair and just hearing" and thus did not violate his right to due process.

## II. The violation of Bland's statutory right to be present during the interaction with Juror 1 was harmless error.

¶28 WISCONSIN STAT. § 971.04(1)(c) (2015-16)[2] states that, with exceptions not relevant here, "the defendant shall be present … [d]uring voir dire of the trial jury[.]" In ***State v. Alexander***, 2013 WI 70, 349 Wis. 2d 327, 833 N.W.2d 126, our supreme court held that the use of "voir dire" in § 971.04(1)(c) referred to the pre-trial "preliminary examination of whether an individual can serve on a jury" and was inapplicable to an interaction between a juror, judge, and counsel that happens after a jury "had already been selected" and "trial had already commenced." ***Alexander***, 349 Wis. 2d 327, ¶¶5, 33.

¶29 The only juror interaction that even partially occurred before jury selection here was the in-chambers conference with Juror 1. After hearing from Juror 1 in chambers, both counsel and the court remained there for the stipulation to the strikes for cause. But then they returned to the courtroom where Bland was present for the actual jury selection with peremptory strikes. Bland affirmed his trial counsel's juror selections in open court. Therefore, part of the selection occurred in chambers, but the most occurred in the courtroom in Bland's presence. Nonetheless, we will assume, without deciding, that the in-chambers interaction with Juror 1 was a part of the preliminary examination with the purpose of

[2] All references to the Wisconsin Statutes are to the 2015-16 version unless otherwise noted.

determining who would serve on the jury,[3] and under ***Alexander***'s interpretation of WIS. STAT. § 971.04(1)(c) and under ***Tulley***, Bland had an unwaivable statutory right to be present. *See* ***Tulley***, 248 Wis. 2d 505, ¶6.

¶30 However, deprivation of both the defendant's right to be present and to have counsel present during voir dire is reviewed on appeal for harmless error. ***State v. Harris***, 229 Wis. 2d 832, 839-40, 601 N.W.2d 682 (Ct. App. 1999). Generally, an error is harmless if there is no reasonable possibility that it contributed to the conviction. ***State v. Dyess***, 124 Wis. 2d 525, 543, 370 N.W.2d 222 (1985). A "reasonable possibility" is one sufficient to undermine confidence in the outcome of the proceeding. ***State v. Patricia A.M.***, 176 Wis. 2d 542, 556, 500 N.W.2d 289 (1993). The burden of proof is on the beneficiary of the error to establish that the error was not prejudicial. ***Dyess***, 124 Wis. 2d at 544 n.11.

¶31 Bland relies on ***Harris*** for the proposition that this error cannot be harmless because it denied him the chance to make a personal assessment of the juror's bias via the person's responses and demeanor. Bland's reliance on ***Harris*** is misplaced because ***Harris*** involved a drastically different set of facts, and faced with those facts, this court found that the error of the defendant's absence from voir dire was not harmless. *See* ***Harris***, 229 Wis. 2d at 845. In that case, the defendant's production from jail for trial was unexpectedly delayed, and the trial court moved ahead with jury selection without him and without even his attorney for most of it: "Harris was not there for *any* of the colloquy with *any* of the jurors

[3] The interaction with Juror 3 occurred after the jury had been selected, and according to ***Alexander***, WIS. STAT. § 971.04(1)(c) is inapplicable to that interaction. *See* ***State v. Alexander***, 2013 WI 70, ¶5, 349 Wis. 2d 327, 833 N.W.2d 126. We therefore do not address Bland's claim that § 971.04(1)(c) gave him a statutory right to be present at the interaction with Juror 3.

that morning—either the first group of forty or a second group of twenty." ***Id.*** at 835. Harris's lawyer was not present for "ninety-nine percent" of the judge's interaction with the group of forty. ***Id.*** at 837. Finally, unlike here, "the trial court did not personally ask Harris any questions" once he arrived in the courtroom to ascertain that he understood what he had a right to and whether he was satisfied with the process. ***Id.*** at 837-38. In ***Harris***, this court examined the cases in which courts have found that a violation was harmless error and those in which they have found it was not. *See* ***id.*** at 841-43 (collecting cases). It concluded "the line between when reversal is warranted and when it is not warranted when a defendant and his or her lawyer are not present for jury selection is … thin." ***Id.*** at 841.

¶32 The basis for the ***Harris*** court's conclusion that the error was not harmless was this:

> Although the trial court was well-intentioned by trying to save time and "weed out" jurors before Harris arrived and, for the most part, when Harris's lawyer was not in court, *its extensive colloquy with potential jurors on the morning of September 23 essentially presented Harris and his lawyer with a pig in a poke.*

***Id.*** at 845 (emphasis added). It concluded that "[t]he State has not established that *this* did not adversely affect Harris's substantial rights[.]" ***Id.*** (emphasis added).

¶33 The concerns present in ***Harris*** are not present in this case. Unlike Harris, Bland had an opportunity to observe the demeanor and responses of every juror who ultimately served on his jury. There was no "extensive colloquy" with Juror 1, and the trial court confirmed with Bland, after the interaction, that he had no opposition to the jury strikes. Further, Wisconsin law recognizes that even if "[a] trial court erroneously acted *when the defendant's lawyer was not present*[]" it

still may be that, "in the context of the case, the deprivations were essentially *de minimis*." ***Id.*** at 841 (emphasis added). In this case, Bland's lawyer *was* present, and the fact that Bland did not observe the in-chambers interaction with Juror 1 merely meant that Bland did not personally hear her disclose that her former place of employment was the Milwaukee County Jail, that she did not know Bland, and that her work at the jail would not affect her ability to be a juror. The deprivation is *de minimus* because Bland observed all of the remainder of voir dire of Juror 1 and one hundred percent of the voir dire of the remainder of the jury, he was promptly informed on the record of the contents of the in-chambers interaction by his lawyer, and he affirmatively told the trial court he was satisfied with the jury selection. Any error in failing to have Bland present for the in-chambers interaction is harmless.

## III. Bland is not entitled to an evidentiary hearing on his claims of ineffective assistance of counsel.

**Standard of review and governing law.**

¶34 The relief Bland seeks is a new trial, based on a claim of constitutionally ineffective assistance of counsel; he is entitled to that relief if he establishes that counsel's performance was deficient and that the deficient performance resulted in prejudice to the defense. *See* ***Strickland v. Washington***, 466 U.S. 668, 687 (1984). Whether a defendant's postconviction motion alleges sufficient facts to entitle the defendant to a hearing for the relief requested is a mixed standard of review. ***State v. Allen***, 2004 WI 106, ¶9, 274 Wis. 2d 568, 682 N.W.2d 433. If the postconviction motion raises sufficient material facts that if true would entitle the defendant to a hearing, the circuit court must hold an evidentiary hearing. ***Id.*** If the motion does not raise facts sufficient to entitle the movant to relief, or presents only conclusory allegations, or if the record

conclusively demonstrates that the defendant is not entitled to relief, the postconviction court has the discretion to grant or deny a hearing. ***Id.*** We review a postconviction court's discretionary decisions under the deferential erroneous exercise of discretion standard. ***Id.***

¶35 We conclude both that Bland has not raised sufficient material facts that if true would entitle him to a hearing and that the record conclusively demonstrates that Bland is not entitled to one.

¶36 First, Bland's claims relating to trial counsel's failure to require his presence at the interactions with Juror 1 and Juror 3 are disposed of by our analysis of the above claims. There was no constitutional due process violation as to the juror interactions and the statutory violation was harmless error. It follows that neither could constitute ineffective assistance of counsel because neither could satisfy the prejudice requirement of ***Strickland***.

¶37 Second, Bland's claim relating to trial counsel's failure to seek voir dire of Juror 14 and his removal from the trial is contrary to the record—the trial court made no finding that the juror was sleeping and made no finding that even the moments when the juror had "dozed" for a minute constituted material testimony such that the juror must be removed. *See* ***State v. Novy***, 2013 WI 23, ¶47, 346 Wis. 2d 289, 827 N.W.2d 610 ("The right to a fair trial by an impartial jury underlies the requirement that jurors have heard all of the material portions of the trial."). In any event, as the State notes, trial counsel's failure to have Juror 14 removed cannot be prejudicial because Juror 14 *was* removed from the trial when the parties agreed to select Juror 14 as the alternate. Bland's counsel did in fact seek to have Juror 14 removed from the trial.

¶38 Bland next argues that trial counsel's failure to move for a mistrial as to his right to be present during the questioning of Jurors 3 and 14, constituted ineffective assistance.[4] This argument is based on the premise that "[b]oth the court and counsel were clearly aware they had a serious problem with Juror No. 3 and … Juror No. 14 continuing to serve on the jury." This assertion is not consistent with the record. The record reflects that the trial court and both counsel were noncommittal about Juror 3 after talking with him—the consensus was to take a wait-and-see approach. In discussion about the potential problem of Juror 14, the record reflects, the trial court recognized that Juror 3, the one who had been discussed previously, had been paying particular attention to the testimony. The record also reflects that both counsel agreed that Juror 14 should be removed as the alternate. There is nothing in the record that would compel the conclusion that failing to move for a mistrial constituted deficient performance by counsel as defined and required by ***Strickland***. Nor does Bland develop any argument why he was prejudiced by the failure to move for mistrial. As we have shown above, the motion would not have been granted.

¶39 Finally, Bland argues that trial counsel's failure during closing argument to attack T.'s testimony about the June 2014 sexual assault as "wholly incredible" constituted ineffective assistance of counsel. The wholly conclusory argument is premised on the assertion that the assault T. described could not have occurred on the bed with T.'s younger brother playing in the same room on the

[4] Bland also conclusorily argues that trial counsel's failure to move for mistrial was also plain error that entitles him to a new trial. However, he does not develop this argument. He fails even to provide the test for applying the plain error doctrine. We will not abandon our neutrality to develop arguments for parties. *See* ***M.C.I., Inc. v. Elbin***, 146 Wis. 2d 239, 244-45, 430 N.W.2d 366 (Ct. App. 1988).

floor with headphones on and distracted by a cell phone. In the matter of closing argument, "wide latitude" is granted to counsel, and there is "a broad range of legitimate defense strategy at that stage." ***Yarborough v. Gentry***, 540 U.S. 1, 5-6 (2003).

¶40 The prosecutor is entitled to argue from the facts. T.'s testimony was compelling, specific, and she was subject to cross-examination. Her testimony was corroborated by the texts on both her and Bland's phone. It was further corroborated by Bland's admission to T.'s mother of at least one sexual assault. And the cross-examination of Bland revealed an arguable weakness in his defense that he was simply repeating T.'s "sexting" with another boy. We disagree with Bland's assertion that more closing argument about the alleged incredibility of T.'s younger brother not hearing or seeing the assault would have a reasonable probability of altering the result. A jury may well have believed that the young child, preoccupied with earphones and a cell phone, didn't see or did not want to report. In any event, we cannot conclude that in omitting that argument from closing, Bland's counsel "made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment," ***Strickland***, 466 U.S. at 687, or that he suffered any prejudice from it.

¶41 The record conclusively shows that Bland is not entitled to an evidentiary hearing on his claims of ineffective assistance of counsel. The circuit court did not erroneously exercise its discretion in denying his postconviction motion.

¶42 Bland's constitutional and statutory rights were not violated, and he is not entitled to a new trial. It was not deficient performance for his trial counsel

to fail to question Juror 14 about his attentiveness during testimony and or to fail to assert Bland's constitutional and statutory right to be present during the individual questioning of Juror 1 and Juror 3 by the court and trial counsel. His absence during the court's questioning of Jurors 1 and 3, and the failure to question Juror 14 at all did not deny him a fair trial. Trial counsel did not render constitutionally ineffective assistance by failing to move for a mistrial or by failing in closing argument to attack the victim's testimony as "wholly incredible." For the reasons stated above, we reject these arguments and affirm.

*By the Court.*—Judgment and order affirmed.

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