

64219-7

64219-7

COA NO. 64219-7-I

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON  
DIVISION ONE

REC'D

APR 30 2010

King County Prosecutor  
Appellate Unit

STATE OF WASHINGTON,

Respondent,

v.

YOBACHI FRAZIER,

Appellant.

2010 APR 30 PM 4:20  
COURT OF APPEALS  
DIVISION ONE  
K

ON APPEAL FROM THE SUPERIOR COURT OF THE  
STATE OF WASHINGTON FOR KING COUNTY

The Honorable Michael C. Hayden, Judge

BRIEF OF APPELLANT

CASEY GRANNIS  
Attorney for Appellant

NIELSEN, BROMAN & KOCH, PLLC  
1908 East Madison  
Seattle, WA 98122  
(206) 623-2373

**TABLE OF CONTENTS**

	Page
A. <u>ASSIGNMENT OF ERROR</u> .....	1
Issue Pertaining to Assignment of Error.....	1
B. <u>STATEMENT OF THE CASE</u> .....	1
1. Procedural Facts.....	1
2. Second Trial.....	2
C. <u>ARGUMENT</u> .....	9
1. THE TRIAL COURT COMMITTED REVERSIBLE ERROR IN FAILING TO ADEQUATELY INQUIRE INTO WHETHER A JUROR WAS SLEEPING DURING TRIAL.....	9
a. <u>The Issue Of The Sleeping Juror Was A Recurring            Theme At Trial</u> .....	9
b. <u>The Court Had A Duty To Voir Dire The Juror To            Protect Frazier's Right To A Fair Trial</u> .....	15
c. <u>The Court's Failure To Conduct Appropriate            Inquiry Into The Juror's Potential Misconduct Is            Reversible Error</u> .....	27
D. <u>CONCLUSION</u> .....	29

**TABLE OF AUTHORITIES**

Page

WASHINGTON CASES

Carson v. Fine,  
123 Wn.2d 206, 867 P.2d 610 (1994)..... 17

In re Marriage of Littlefield,  
133 Wn.2d 39, 940 P. 2d 1362 (1997)..... 17

In re Pers. Restraint of Fleming,  
142 Wn.2d 853, 16 P.3d 610 (2001)..... 28

State v. Boling,  
131 Wn. App. 329, 127 P.3d 740 (2006)..... 27

State v. Davenport,  
100 Wn.2d 757, 675 P.2d 1213 (1984)..... 16

State v. Elmore,  
155 Wn.2d 758, 123 P.3d 72 (2005)..... 17

State v. Jackson,  
75 Wn. App. 537, 879 P.2d 307 (1994)..... 16

State v. Jordan,  
103 Wn. App. 221, 11 P.3d 866 (2000)..... 16, 23-25, 27

State v. Kell,  
101 Wn. App. 619, 5 P.3d 47 (2000)..... 27

State v. Lemieux,  
75 Wn.2d 89, 448 P.2d 943 (1968)..... 27

State v. McDonald,  
143 Wn.2d 506, 22 P.3d 791 (2001)..... 28

State v. Neal,  
144 Wn.2d 600, 30 P.3d 1255 (2001)..... 18

**TABLE OF AUTHORITIES**

Page

WASHINGTON CASES

State v. Regan,  
143 Wn. App. 419, 177 P.3d 783 (2008)..... 28

State v. Tigano,  
63 Wn. App. 336, 818 P.2d 1369 (1991)..... 16

State v. White,  
94 Wn.2d 498, 617 P.2d 998 (1980)..... 18

State v. Williamson,  
100 Wn. App. 248, 996 P.2d 1097 (2000)..... 17

OTHER STATE CASES

Commonwealth v. Braun,  
74 Mass. App. Ct. 904, 905 N.E.2d 124 (Mass. App. Ct. 2009).  
.....18, 21, 22, 28

Commonwealth. v. Dancy,  
75 Mass. App. Ct. 175, 912 N.E.2d 525 (Mass. App. Ct. 2009) ..... 18, 28

People v. Buel,  
53 A.D.3d 930, 861 N.Y.S.2d 535 (N.Y. App. Div. 2008) ..... 22

People v. McClenton,  
213 A.D.2d 1, 630 N.Y.S.2d 290 (N.Y. App. Div. 1995) ..... 28

People v. South,  
177 A.D.2d 607, 576 N.Y.S.2d 314 (N.Y. App. Div. 1991). ..... 20, 28

People v. Valerio,  
141 A.D.2d 585, 529 N.Y.S.2d 350 (N.Y. App. Div. 1988).. . 16, 20, 21, 28

**TABLE OF AUTHORITIES** (CONT'D)

Page

OTHER STATE CASES (CONT'D)

State v. Hampton,  
201 Wis.2d 662, 549 N.W.2d 756 (Wis. 1996) ..... 18

State v. Reevey,  
159 N.J. Super. 130, 387 A.2d 381 (N.J. Super. Ct. App. Div. 1978)..... 21

RULES, STATUTES AND OTHERS

CrR 6.5 ..... 17

RCW 2.36.110 ..... 16, 17

RCW 4.44.260 ..... 16

RPC 3.3(a)(1)..... 18

U.S. Const. Amend. V ..... 15, 16

U.S. Const. Amend. VI ..... 15

U.S. Const. Amend. XIV ..... 16

Wash. Const. art. I, § 3 ..... 15, 16

Wash. Const. art. I, § 22 ..... 15

A. ASSIGNMENT OF ERROR

The trial court erred when it failed to adequately inquire into whether a juror was sleeping through testimony.

Issue Pertaining to Assignments of Error

Defense counsel informed the trial court of his observations of a sleeping juror. Sleeping is a form of juror misconduct. Did the trial court deny appellant a fair jury trial by not conducting appropriate inquiry, thereby failing to ensure the juror was able to render a verdict after having heard all the evidence?

B. STATEMENT OF THE CASE

1. Procedural Facts

The State charged Yobachi Frazier with first degree premeditated murder while armed with a firearm. CP 279-84. The first trial ended in a mistrial. 8RP 26-29.<sup>1</sup> A jury convicted Frazier as charged after a second trial. CP 345-46. The jury declined to find Frazier guilty of second degree murder as a lesser offense. CP 347. The court sentenced to Frazier to 608 months confinement. CP 393. This appeal follows. CP 400.

---

<sup>1</sup> The verbatim report of proceedings is referenced as follows: 1RP - 4/15/09; 2RP - 4/16/09; 3RP - 5/1/09; 4RP - 5/4/09; 5RP - 5/20/09, 5/22/09 & 6/1/09; 6RP - 6/15/09; 7RP - 6/16/09; 8RP - 6/17/09; 9RP - 6/22/09; 10RP - 6/23/09; 11RP - 6/24/09 (two consecutively paginated volumes); 12RP - 6/25/09; 13RP - 6/29/09; 14RP - 6/30/09; 15RP - 7/1/09; 16RP - 7/6/09; 17RP - 7/7/09; 18RP - 7/9/09; 19RP - 9/4/09.

## 2. Second Trial

On the evening of July 4, 2007, a crowd of more than 100 people gathered in a Skyway parking lot near Ezell's Chicken to light fireworks. 11RP 29-31, 94, 213; 13RP 28; 15RP 125-26. It was dark outside. 11RP 30. The parking lot was dim. 11RP 43, 100; 12RP 46; 15RP 127. The scene was chaotic. 15RP 126.

Don Dowlen was among those who went to the parking lot to shoot off fireworks. 11RP 92-93. Dowlen was shot and he died. 15RP 63. Eyewitnesses to events that night testified at trial.

Rena Carpenter drank as much as six glasses of vodka at a barbeque before arriving at the parking lot that night. 11RP 28-30, 33-34, 65-66.<sup>2</sup> She drank more vodka in the parking lot. 11RP 34. She had .17 blood alcohol content when tested at the hospital later that night. 16RP 148, 150, 179.

Carpenter said she was familiar with Frazier prior to the events of July 4. 11RP 37-42. She saw Frazier in the parking lot. 11RP 37, 42, 46. She called out his name and Frazier told her not to say his name. 11RP 42, 70-72.

---

<sup>2</sup> Carpenter had a child by Dowlen. 11RP 24-25. Carpenter was married to someone else. 11RP 105-06.

Sometime later, Dowlen's stepdaughter, 15 year old I.W., saw someone's fireworks hit her mother's car.<sup>3</sup> 12RP 132, 145. According to Dowlen's brother-in-law Anthony Godine, Dowlen confronted Frazier about lighting fireworks under his girlfriend's vehicle. 14RP 57. Dowlen started kicking and stomping them and became "really mad." 14RP 57. Godine told him to just leave it alone, but then Dowlen became "real aggressive" and went toward Frazier. 14RP 57, 60. Dowlen and Frazier argued back and forth. 14RP 59.

Other witnesses agreed Dowlen kicked the fireworks over and profanity laced argument erupted. 12RP 143, 145-46; 13RP 35, 39-40, 84. Carpenter heard Dowlen tell Frazier to quit popping fireworks by his car. 11RP 48. It was a heated argument. 11RP 48. Dowlen and Frazier were close together. 13RP 40.

Eyewitness accounts of the actual shooting agreed in some respects and differed in others. Carpenter said she inserted herself between the two men and pushed Dowlen away. 11RP 50. Dowlen began to walk away and fell to the ground. 11RP 51, 73-74. Carpenter looked back and saw Frazier shooting at Dowlen. 11RP 51. Shots were fired while Dowlen was on the ground. 11RP 52. Carpenter did not know where the gun came from. 11RP 51, 75. She later identified Frazier to police by name

---

<sup>3</sup> I.W.'s mother was Linda Jackson, Dowlen's fiancé. 12RP 133, 156.

and from a single photo shown to her. 11RP 55, 59-60. She remembered Frazier wore a red Chicago jersey. 11RP 82, 86.

Carpenter's daughter, Serwa Ashford, knew Frazier prior to the shooting. 11RP 28; 13RP 18-21, 79-81. Ashford had consumed vodka and wine cooler before coming to the parking lot with Carpenter. 11RP 67; 13RP 23, 54. She had been convicted for a crime of dishonesty. 13RP 53.

Ashford said Frazier was wearing a black (not red) "Jordan" jersey that night. 13RP 32, 79, 88. According to Ashford, the Dowlen and Frazier were standing right in front of each other when the shooting occurred. 13RP 41. As described by Ashford, "it happened so fast." 13RP 37. Dowlen was shot first while he faced Frazier. 13RP 38. Frazier shot again as Dowlen dropped to the ground and after he dropped. 13RP 42-43. Ashford did not see how Frazier obtained the gun. 13RP 41. Ashford later told police "Yobachi" was the shooter. 11RP 159. She identified Frazier after being shown a single photo by police. 11RP 160-63; 13RP 50-51.

Godine, who had two beers earlier that day, testified he looked up and saw a gun pointed at Dowlen's chest as he got ready to pull Dowlen away and heard the gun go off three or four times. 14RP 43, 46, 59. Dowlen was facing Frazier at the time. 14RP 60. Dowlen went to the

ground and Godine ran. 14RP 60-61. He did not know if additional shots were fired. 14RP 61. Godine saw Frazier head through the crowd. 14RP 67. Godine was unable to identify Frazier as shooter night of incident but was positive on the stand that Frazier was shooter. 14RP 52, 79, 84. He saw Frazier wearing a Jordan jersey. 14RP 55.

According to I.W., the shooter shot Dowlen in the back as he tried to turn and run away and then four or five more times. 12RP 143. She was not able to see shooter because the lighting was very dim. 12RP 144-45.

Ophelia Whitfield knew Dowlen and saw him get shot. 11RP 204, 206. After being told Dowlen was arguing with someone, Whitfield located Dowlen and hooked his arm while Dowlen backpedaled. 12RP 12-13. Dowlen maintained eye contact with the person he was arguing with. 12RP 13, 19. The two men were a short distance away. 12RP 19-20

According to Whitfield, the argument "seemed like it was dead" and then gunshots started going off. 12RP 13. Dowlen was first hit in the front shoulder while he was facing the shooter. 12RP 52. Whitfield released Dowlen at this point and started running. 12RP 13-14. Whitfield took four or five steps when she heard the next gunshot. 12RP 14. She ran back to Dowlen. 12RP 23. The person wearing a Jordan jersey was

the shooter. 12RP 20-21, 24-25. She saw a person wearing a red and white no. 23 Jordan jersey running away. 12RP 8, 14, 25-26. She never saw the shooter's face. 12RP 30, 50-51. Whitfield acknowledged a Jordan jersey was common and it was possible other people in crowd that night could have been wearing similar type of jersey. 12RP 58-59.

According to Ahmad Harris, Dowlen and the shooter were two or three feet away facing each other. 15RP 130, 140. Five or six shots were fired. 15RP 129-30. Harris saw Dowlen fall to the ground. 15RP 131. He did not know if shooting continued after the fall. 15RP 131. Harris did not get a good look at shooter and could not identify him. 15RP 127-28, 142-47. He saw someone with red Chicago bulls Jordan no. 23 jersey run past him with a shocked look in his eyes. 15RP 132, 148.

Dowlen's cousin, Latica Meneese, had prior familiarity with Frazier. 15RP154-56, 164. Meneese said she saw Frazier wearing a red Chicago bulls Jordan jersey that night. 15RP 163. Dowlen's son D.D.<sup>4</sup> said he saw a person wearing a red and black Chicago Bulls jersey with the number 23 running away after his mom told him Dowlen had been shot. 11RP 91, 95-96, 98.

---

<sup>4</sup> D.D. was sixteen years old at the time of trial. 11RP 91.

An acquaintance saw Frazier wearing yellow and blue no. 23 Jordan sweatsuit earlier that day. 17RP 56, 58. Jordan clothing was common for people to wear. 17RP 67.

The crowd was yelling and extremely hostile when police arrived on the scene a short while after the shooting. 11RP 123. Nine shell casings and some bullet fragments were recovered from the parking lot area. 11RP 131, 168; 12RP 179-80; 13RP 102, 107, 112, 119.

A firearm examiner testified a semi-automatic firearm fires bullets as fast as a person can pull the trigger. 14RP 188. The examiner said he could fire nine shots in a second or two. 14RP 203. He examined the nine spent shell casings recovered from the scene and concluded they were fired from the same semi-automatic handgun. 14RP 191, 200. There was no DNA testing of the shell casings because the crime lab contaminated them before such testing was carried out. 13RP 141, 146-53.

A medical examiner conducted an autopsy and found nine gunshot wounds. 15RP 45. There were three front entry wounds, three side entry wounds, and three back entry wounds. 15RP 51-62. One front entry bullet struck Dowlen in the chest. 15RP 50-51.

Airline records showed a one way ticket in the name of "Troy Taylor" was reserved on July 5 for a July 6 flight from Portland to Alaska. 13RP 172, 174, 177. According to those records, "Taylor" got on this

flight. 13RP 179. Frazier's cell phone records from July 3-5 showed calls to or from the same number given as the contact number for the flight reservation. 13RP 173-74; 14RP 101-02.

Authorities apprehended Frazier in Anchorage, Alaska on July 31, 2007. 14RP 6-7. Upon arrest, Frazier said his name was "Troy Taylor." 14RP 11-12. He had identification with that name. 14RP 13-14. He had a cell phone in his possession associated with an account under the name of Troy Taylor. 14RP 17-21.

The defense was mistaken identity. 17RP 143-44, 149. Psychologist Dr. Geoffrey Loftus, an expert in human perception and memory, testified a number of factors can lead to mistaken identification and that memory, which changes over time, can be inaccurately affected by environmental factors and post-event information. 16RP 17-19, 27-30, 111. Defense counsel also argued Dowlen's family was biased and unreliable. 17RP 142-160. Two of the eyewitnesses — Carpenter and Ashford — were intoxicated, otherwise lacked credibility, and did not really see the shooting. 17RP 142-53, 157. Godine was not credible because he did not identify Frazier as the shooter to the police right after the event. 17RP 153-55.

The jury was given the option of finding Frazier guilty of the lesser offense of second degree murder. CP 336-38, 347. The court denied

Frazier's post-trial motion for arrest of judgment based on insufficient evidence of premeditation. 19RP 15-22; CP 348-52, 382-84. The court, however, acknowledged evidence of premeditation was "minimal." 19RP 102.

C. ARGUMENT

1. THE TRIAL COURT COMMITTED REVERSIBLE ERROR IN FAILING TO ADEQUATELY INQUIRE INTO WHETHER A JUROR WAS SLEEPING DURING TRIAL.

Frazier's constitutional right to a fair jury trial required each juror to consider all the evidence before reaching a verdict. Defense counsel alerted the trial court to his observations of a juror repeatedly sleeping through testimony. Rather than voir dire the juror to determine whether he was in fact sleeping, the court held fast to his position that no one could know whether the juror was really sleeping. The court committed reversible error in failing to conduct inquiry of the juror after receiving reliable information the juror may have been sleeping through portions of the trial.

- a. The Issue Of The Sleeping Juror Was A Recurring Theme At Trial.

On the second day of trial, defense counsel told the court that one of the jurors, an older gentleman in the front row, was having difficulty staying awake. 11RP 186-87. The trial judge said he did not see the juror

asleep and theorized people sometimes close their eyes while listening. 11RP 186. Counsel told the court the juror dropped his pen. 11RP 186. The court did not believe the pen drop showed the juror was not listening, but said he would "keep an eye on it." 11RP 186.

The juror in question was 77 years old. 11RP 187. The court told counsel that he knew the age of the jurors when exercising challenges for cause during voir dire and knew "at that age people will nod off sometimes." 11RP 187. To remedy the situation, the judge suggested he would make a loud sound, take more breaks, or ask the jury to stand up and stretch. 11RP 187. The judge said he did not "particularly want to pick on him for falling asleep. I'll probably — at that age, I'll fall asleep too." 11RP 187.

At the end of the second day, the court said he had been looking at juror number 9 and he seemed alert. 11RP 217. Counsel said he noticed the juror appeared to be sleeping for a moment, but also thought the juror looked down when he was thinking. 11RP 217-18. The court told counsel to let him know if he noticed the juror appearing to sleep again. 11RP 218. The judge said "I will tell you that I didn't see him before because he's right behind my computer screen, so I had to kind of look around the computer screen in order to see him." 11RP 218.

As the fourth day of trial began, defense counsel notified the court that both he and his client observed juror 9 sleeping during the trial. 14RP 1. The judge agreed juror 9 needed to be awake, but suggested it be brought to his attention when the juror was present. 14RP 1. The judge explained the juror was sitting directly behind his computer screen, "so unless somebody draws to my attention the fact that I should look around my computer screen to notice that he is sleeping, I don't see it." 14RP 1-2. Defense counsel said he would raise his right hand as a signal. 14RP 2. The prosecutor offered that there were three occasions the day before (third day of trial) that he thought juror 9 was asleep but in actuality was not. 14RP 2-3.

Frazier himself then spoke up, maintaining the juror had been asleep several times since the issue was last addressed and nobody was doing anything about it. 14RP 3. The judge said "I don't know if he's been asleep or not. He may have his eyes closed. That does not mean he's asleep." 14RP 3. The judge said the juror appeared alert at times when he saw him, but reiterated his computer screen obstructed his view and that it should be brought to his attention when it happened. 14RP 3-4.

After the last witness testified before the lunch recess on the fourth day, the court and the parties once again returned to the issue of whether juror 9 was sleeping. 14RP 104. Defense counsel raised his hand during

the testimony of the previous witness as a signal that juror 9 was sleeping. 14RP 104.<sup>5</sup> The court said the juror was awake when he looked over in response, although "he may have been nodding off before I looked over." 14RP 104. The prosecutor said he did not think the juror was sleeping. 14RP 105. The court said he communicated with the court reporter, who has the opportunity to look straight at the juror the entire time, and that the reporter had not noticed the juror falling asleep. 14RP 105.

The court acknowledged the juror perhaps had his eyes closed but could not see "anything else to do" other than "what we're doing now." 14RP 105. Defense counsel put on the record that the juror's eyes had been closed for periods of the trial. 14RP 105. The court said he could not be sure the juror was asleep if he had his eyes closed: "I don't know what he's doing." 14RP 105-06. Short of dropping his head into his lap and falling out of his chair, he could not know if the juror was asleep. 14RP 106. The judge would assume the juror was sleeping if his eyes were closed and his head was down on his chest. 14RP 106. Defense counsel said the juror had his eyes closed, his head off to the side. 14RP 106. The judge said that could just mean he was concentrating. 14RP 107.

---

<sup>5</sup> The previous witness was AT&T store manager Gerald Lamas, who testified about Frazier's cell phone records. 14RP 87-104.

The defense wanted a new jury. 14RP 107. The court rejected that request because there were 12 jurors still available even if the challenged juror was dismissed. 14RP 107. Counsel then asked that the juror be dismissed if the pattern continued. 14RP 107.

The court said he did not have an E.E.G. machine that showed the juror's brain wave patterns. 14RP 108. Counsel reiterated he had a good line of sight and it appeared the juror was sleeping during parts of the proceeding. 14RP 108. The judge said he had not seen him sleeping. 14RP 108. Counsel pointed out the computer screen obstructed the judge's view. 14RP 108.

The prosecutor chimed in, stating he had been watching the juror and had seen him close his eyes but did not see him fall asleep. 14RP 108-09. According to the prosecutor, juror 9 immediately looked at defense counsel when he raised his hand even though nobody said anything. 14RP 108-09.

The judge said "unless truly the pattern is repetitive and the juror is missing testimony, I don't know there's any rule that says every juror has to be keenly awake at every point during the trial." 14RP 109. "All I can do is, if I see him asleep, I'll wake him up. I haven't." 14RP 110.

By the fifth day of trial, only twelve jurors remained after a juror was excused due to a pending death in the family. 15RP 33-37. The

judge had earlier recognized "get below twelve, you got trouble, all right?"

13RP 2.

Later on the fifth day, defense counsel once again brought up the issue of the sleeping juror. 15RP 117. The following exchange occurred:

The Court: I don't think he's been asleep. At least he's had -  
- he's been struggling. I've been watching him, and I've also watched the rest of the people in the courtroom. He's not the only one yawning through your testimony, believe me.

The Defendant: You've just seen it, though. You slammed your pen down. You've seen it.

The Court: I did, because he was --

The Defendant: He was asleep.

The Court: He immediately reacted.

The Defendant: But he's sleeping, though.

The Court: He -- I don't think he's sleeping. I think he's got his eyes shut. He certainly is having difficulty staying awake through all this thrilling testimony, and I use the word "thrilling" in quotes. But I can't guarantee that the lawyers are so inspiring and exciting that it can keep everyone on edge all the time.

15RP 117.

The judge believed the juror was paying attention, although he was "struggling" and occasionally closed his eyes. 15RP 118. Whenever the juror closed his eyes, the judge dropped his pen and the juror immediately reacted, showing he was not in a "deep sleep" but struggling to stay awake. 15RP 118.

Defense counsel put on the record that he observed the juror sleeping during the prosecutor's direct examination. 15RP 118. The judge

responded "You don't know he's sleeping, Counsel." 15RP 118-19. Counsel retorted "Well, I know that when you dropped your pen, you definitely startled -- he awoke in a startling fashion." 15RP 119. The court responded "He was startled" but that "no one here knows he was sleeping." 15RP 119. The judge's impression was that the juror occasionally closed his eyes and was struggling to stay awake. 15RP 119. The judge repeated an earlier referenced theme that "I'm not going to look into brain waves and say he was sleep or not." 15RP 119. The court then chastised counsel for being boring. 15RP 119.

The judge also said "if I see a juror nodding off, I take steps. I did. I had the jurors stand up, and they looked at me like I was crazy." 15RP 120. "That's all I can do. Make noise if I think the-re not — their attention's waning, drop my pen, make some motion. I do not think this juror has been sleeping through the testimony. Period." 15RP 120. Defense counsel attempted to say something more but was shut down by the judge: "We're done." 15RP 121. 12 jurors convicted Frazier. Juror 9 was among them. 18RP 8-9.

b. The Court Had A Duty To Voir Dire The Juror To Protect Frazier's Right To A Fair Trial.

Both the Washington and United States constitutions guarantee the right to a fair and impartial jury trial. U.S. Const. amend. V, VI; Wash.

Const. art. I, §§ 3, 22. The failure to provide defendant with a fair trial violates minimal standards of due process. State v. Jackson, 75 Wn. App. 537, 543, 879 P.2d 307 (1994); State v. Davenport, 100 Wn.2d 757, 762, 675 P.2d 1213 (1984); U.S. Const. amends. V, XIV; Wash. Const. art. I, § 3. A constitutionally valid jury trial must be free of disqualifying jury misconduct. State v. Tigano, 63 Wn. App. 336, 341, 818 P.2d 1369 (1991).

Sleeping during trial is a form of juror misconduct warranting removal. State v. Jorden, 103 Wn. App. 221, 226, 230, 11 P.3d 866 (2000); People v. Valerio, 141 A.D.2d 585, 586, 529 N.Y.S.2d 350 (N.Y. App. Div. 1988). To serve, a juror must take an oath that in substance promises to "well, and truly try, the matter in issue . . . and a true verdict give, *according to the law and evidence as given them on the trial.*" RCW 4.44.260 (emphasis added). The jury in Frazier's case was accordingly instructed to render a verdict after consideration of *all* of the evidence. CP 323-24 (Instruction 1). A sleeping juror cannot listen to all of the evidence and fulfill his oath of basing his verdict on all the evidence. "A juror who has not heard all the evidence in the case . . . is grossly unqualified to render a verdict." Valerio, 141 A.D.2d at 586.

Under RCW 2.36.110, the judge has a duty "to excuse from further jury service any juror, who in the opinion of the judge, has manifested unfitness as a juror by reason of . . . *inattention* . . . or by reason of

conduct or practices incompatible with proper and efficient jury service." (emphasis added). CrR 6.5 states that: "[i]f at any time before submission of the case to the jury a juror is found unable to perform the duties the court shall order the juror discharged." RCW 2.36.110 and CrR 6.5 place a "continuous obligation" to investigate allegations of juror unfitness and to excuse jurors who are found to be unfit. State v. Elmore, 155 Wn.2d 758, 773, 123 P.3d 72 (2005).

The trial judge is afforded discretion in its investigation of jury problems. Elmore, 155 Wn.2d at 773-74. Discretion does not mean immunity from accountability. Carson v. Fine, 123 Wn.2d 206, 226, 867 P.2d 610 (1994). "A court's decision is manifestly unreasonable if it is outside the range of acceptable choices, given the facts and the applicable legal standard; it is based on untenable grounds if the factual findings are unsupported by the record; it is based on untenable reasons if it is based on an incorrect standard or the facts do not meet the requirements of the correct standard." In re Marriage of Littlefield, 133 Wn.2d 39, 47, 940 P. 2d 1362 (1997). At some point, the judge makes a decision outside the range of acceptable discretionary choices and thereby abuses discretion. State v. Williamson, 100 Wn. App. 248, 257, 996 P.2d 1097 (2000). "The range of discretionary choices is a question of law and the judge abuses his or

her discretion if the discretionary decision is contrary to law." State v. Neal, 144 Wn.2d 600, 609, 30 P.3d 1255 (2001).

The trial judge abused its discretion in the manner in which it resolved the disputed fact of whether juror 9 was sleeping. "[I]f there is a sufficient showing of juror inattentiveness, the appropriate remedy is to engage in a fact finding process to establish a basis for the exercise of discretion." State v. Hampton, 201 Wis.2d 662, 672-73, 549 N.W.2d 756 (Wis. 1996). That is, inquiry should be conducted if there is a real basis for concluding a juror was sleeping. Commonwealth v. Braun, 74 Mass. App. Ct. 904, 905, 905 N.E.2d 124 (Mass. App. Ct. 2009). A judge's receipt of "reliable information" that a juror is asleep "requires prompt judicial intervention to protect the rights of the defendant and the rights of the public, which for intrinsic and instrumental reasons also has a right to decisions made by alert and attentive jurors." Commonwealth v. Dancy, 75 Mass. App. Ct. 175, 181, 912 N.E.2d 525 (Mass. App. Ct. 2009).

Defense counsel "is an officer of the court. As such, he owes it a duty of frankness and honesty." State v. White, 94 Wn.2d 498, 502, 617 P.2d 998 (1980). Counsel's duty of candor prevents him from making a knowingly false statement of fact to the court. RPC 3.3(a)(1). Defense counsel's report that he observed juror 9 repeatedly sleeping should be deemed a reliable source of information necessitating further inquiry

beyond what was done here. Counsel had a good sightline on the juror. 14RP 108. There is no indication in the record that counsel reported anything but his honest observation of the juror's conduct.

The judge's view of the juror was blocked by a computer screen, which meant the judge was only able to observe the juror intermittently. 11RP 218; 14RP 1-4, 108. The judge gave alternative explanations for the juror's behavior, maintaining he would assume the juror was asleep only if the juror fell off his chair or his head slumped on his chest. 11RP 186; 14RP 3; 14RP 106-07. On more than one occasion, the judge indicated he could not know the juror was sleeping short of hooking the juror up to a machine to measure his brain patterns. 14RP 108; 15RP 119.

Under these circumstances, it could not fairly be determined whether juror 9 was in fact sleeping without asking the juror himself. The judge maintained no one in the courtroom could know whether the juror was sleeping based on observation alone. 14RP 3, 105-06; 15RP 119. A judge may have fact finding discretion to determine whether a juror is asleep, but in this case the judge himself repeatedly stated there was no way of knowing whether the juror was asleep. The court preferred to rest in conjecture rather than get to the bottom of the matter. When pressed on the matter by defense counsel, the judge, exasperated at having to address the issue again, said he did not think the juror had been sleeping. 15RP

120. This statement contradicts the judge's repeated remarks to the effect that no one could tell he was sleeping. The court abused his fact-finding discretion and further abused his discretion in failing to conduct adequate inquiry to determine whether the juror was actually sleeping.

Because sleeping juror cases are highly fact specific, there is no case factually identical with Frazier's case. Comparison with similar cases, however, reveals the court here failed in its obligation to conduct proper investigation into whether juror 9 was sleeping.

In People v. South, the trial court committed reversible error in failing to conduct proper inquiry after defense counsel informed the court a juror was sleeping, even though the court only acknowledged the juror had closed his eyes for short periods of time. People v. South, 177 A.D.2d 607, 607-08, 576 N.Y.S.2d 314 (N.Y. App. Div. 1991). Under these circumstances, the trial court should have conducted "a probing and tactful inquiry to determine whether juror number 9 was unqualified to render a verdict based upon her apparent sleeping episodes." South, 177 A.D.2d at 608.

In Valerio, the trial court committed reversible error in failing to make inquiry of two jurors, where the court noted they were dozing during a readback of testimony and defense counsel suggested the court conduct an in camera inquiry of one juror whose eyes were closed and seemed

asleep. Valerio, 141 A.D.2d at 586. Valerio recognized a defendant is deprived of his constitutional right to a jury trial and entitled to a new one when the court unjustifiably fails to make inquiry of an allegedly sleeping juror and allows that juror to deliberate on the defendant's guilt. Id. "It is incumbent upon the trial court to conduct a probing and tactful inquiry to determine whether a sworn juror is unqualified. The court may not speculate upon the juror's qualifications but must ascertain the juror's state of mind and must place its reasons for excusing or retaining the juror on the record." Id.

In Braun, the judge abused his discretion by failing to voir dire the juror where there was a real basis for concluding the juror was sleeping during testimony and the judge's instructions. Braun, 74 Mass. App. Ct. at 905. The juror's inattentiveness was not a momentary lapse, but an inattention that spanned all or portions of the testimony of two witnesses and the judge's instructions. Id. "That the judge was not certain whether the juror was sleeping and was unwilling to make such a finding should not have ended the inquiry. Uncertainty that a juror is asleep is not the equivalent of a finding that the juror is awake." Id.

By not conducting a voir dire, the judge in Frazier's case "prevented himself from obtaining the information necessary to a proper exercise of discretion." Braun, 74 Mass. App. Ct. at 905; see also State v.

Reevey, 159 N.J. Super. 130, 133-34, 387 A.2d 381 (N.J. Super. Ct. App. Div. 1978) (where defense counsel informed court juror was sleeping; trial judge should have conducted a hearing and questioned this juror as to whether she was in fact dozing or sleeping, or whether she was listening to the summations and the charge but merely had her eyes closed); cf. People v. Buel, 53 A.D.3d 930, 931, 861 N.Y.S.2d 535 (N.Y. App. Div. 2008) (upon realizing juror appeared to be sleeping, court questioned juror; juror informed court he was tired but had heard the testimony and had not fallen asleep; based on this appropriate inquiry, court had an adequate basis for its conclusion that the juror had not missed significant portions of the trial testimony and, therefore, was not grossly unqualified to continue to serve as a juror).

The trial court's impression of whether the juror was sleeping is not an adequate substitute for an explanation from the only person who could have demystified the situation, juror 9. On this record, whether the juror was sleeping is a question that can only be answered by resorting to speculation.

Instead of bickering over who had the better interpretation of the juror's conduct, the issue should have been resolved by simply asking the juror himself. The court's preference for willful blindness rather than simply questioning the juror may have been because confirmation from

the juror that he had been sleeping may have required a mistrial because no alternate jurors were left. Regardless of motive, the court did not fulfill its duty to investigate juror inattentiveness by choosing to remain ignorant of whether the juror's sleeping or sleepiness undermined his ability to participate in the case and deliberate upon the evidence.

In Jorden, Division Two was unwilling to impose on the trial court a mandatory format for establishing a juror engaged in misconduct: "Instead the trial judge has discretion to hear and resolve the misconduct issue in a way that avoids tainting the juror and, thus, avoids creating prejudice against either party. Jorden, 103 Wn. App. at 229.

Frazier is not asking this Court to impose a mandatory format. On the particular facts of this case, the trial court had a duty to conduct further investigation and abused its discretion in failing to conduct that inquiry.

In Jorden, the court did not err in failing to ask a juror if she had been sleeping because the judge, based on independent observation, was able to determine the juror was in fact sleeping without the need for further inquiry and there was *no dispute* that the juror was sleeping at a hearing on the matter. Id. at 228.

In Frazier's case, whether the juror was sleeping was very much in dispute. The judge was in no better position than defense counsel to assess whether the juror was in fact sleeping. Indeed, defense counsel was

in a better position, given that he had a good sightline on the juror while a computer monitor blocked the judge's view.

Unlike in Jorden, Frazier's constitutional right to a fair jury trial was on the line. In determining the constitutional interest affected, there is a difference between removing a juror for sleeping versus keeping that juror on to deliberate on guilt. A defendant has the right to an impartial jury composed of 12 individuals. A defendant has no right to an impartial jury of 12 *particular* individuals. Id. at 229. By removing the offending juror in Jorden, the defendant's right to a fair and impartial jury trial was in no way affected because the remaining jurors were entirely qualified to serve.

In contrast, the juror in question here remained on the jury after the court refused to conduct further inquiry and was one of the jurors who convicted Frazier of first degree murder. As recognized by Jorden, that difference is significant in determining whether a trial court abuses its discretion in failing to conduct adequate inquiry into juror misconduct. Id. at 228.

In Jorden, Division Two did not fault the trial judge for not questioning the juror because (1) questioning may have been embarrassing to the juror; (2) if the judge had questioned her, the parties presumably would also have been entitled to question her, which may

have put her in an adversarial position with the State; and (3) if the juror denied sleeping, the State may have proposed calling other jurors to report their observations, which could have put the juror in an adversarial position to the other juror-witnesses. Id.

These concerns arguably retain validity in a case where the defendant's constitutional right to fair jury trial was not actually implicated by juror *removal*. Such concerns, however, must give way to a defendant's constitutional right to a fair trial when the issue is whether a juror accused of engaging in misconduct should be allowed to *remain* on the jury.

To the extent, if any, the Jorden court's concerns are applicable to the latter situation, its reasoning is flawed. The Jorden court's resolution of the inquiry issue was to assume *any* inquiry would taint the juror and prejudice one of the parties. The court used a sledgehammer when a pin tack would do. A tactful and sensitive inquiry makes the realization of these concerns a remote possibility. If accepted as a *per se* rule, the Jorden approach shields all sorts of jury misconduct from appropriate scrutiny, given that there is always a theoretical possibility a juror may be embarrassed by questions about an ability to follow his or her oath.

In any event, embarrassment to a juror should not trump a defendant's constitutional right to a fair trial. Moreover, the possibility

that the sleeping juror could have been placed into an adversarial position with one of the parties or other jurors had further inquiry been conducted is theoretical speculation untethered from the facts of this case or any other. Again, the solution is tactful inquiry, not dispensing with inquiry altogether.

Questioning of other jurors would not take place in the presence of the juror alleged to have been sleeping. In camera questioning avoids the theoretical problem of intra-juror hostility. The offending juror would not know what other jurors said. If the offending juror were removed after other jurors confirmed he was asleep and guessed other jurors said he was asleep, then the question of whether the excused juror subsequently felt hostile towards remaining jurors becomes irrelevant to the question of whether the defendant receives a fair trial. If the offending juror were not excused, then there would be no basis for supposing questioning would cause an adversarial relationship between jurors.

Where inquiry into whether the juror actually fell asleep is inadequate, there is no way for the reviewing court to fairly determine whether proper grounds existed to justify discharge of that juror. On the facts of this case, this Court should hold the trial court had a duty to investigate the potential sleeping juror by asking the juror whether he had fallen asleep.

c. The Court's Failure To Conduct Appropriate Inquiry Into The Juror's Potential Misconduct Is Reversible Error.

Juror misconduct that causes prejudice warrants a new trial. State v. Lemieux, 75 Wn.2d 89, 91, 448 P.2d 943 (1968). The defendant bears the burden of showing that the alleged misconduct occurred. State v. Kell, 101 Wn. App. 619, 621, 5 P.3d 47 (2000). Prejudice is presumed once juror misconduct is established, and the State bears the burden of overcoming this presumption beyond a reasonable doubt. State v. Boling, 131 Wn. App. 329, 333, 127 P.3d 740 (2006); Kell, 101 Wn. App. at 621. If juror 9 was in fact sleeping, that juror's conduct prejudiced Frazier's right to a fair trial because he was convicted by a jury that included one member who had not heard all the evidence. Jorden, 103 Wn. App. at 228.

Frazier, however, is entitled to a new trial regardless of whether the record shows misconduct occurred. This case presents the question of what should happen when the trial court fails to conduct adequate inquiry into juror misconduct, thereby preventing the defendant from adequately showing the misconduct in fact occurred. Under that circumstance, courts have held the failure to conduct inquiry when needed is reversible error. Valerio, 141 A.D.2d at 586; South, 177 A.D.2d at 607-08; Dancy, 75 Mass. App. Ct. at 181; Braun, 74 Mass. App. Ct. at 905; cf. People v.

McClenton, 213 A.D.2d 1, 6, 630 N.Y.S.2d 290 (N.Y. App. Div. 1995) (removal of a juror could have proved unnecessary had the court conducted appropriate inquiry into the claimed misconduct, but lack of such inquiry "means that it will never be known whether this defendant was tried by a jury which did not engage in premature deliberations, did not commence deliberations with a predisposition toward a finding of guilt, or did not operate under a time constraint for reaching its verdict.").

Inquiry is needed in other contexts to ensure the protection of important constitutional rights. For example, reversal of a defendant's conviction is required if the trial court knows or reasonably should know of a potential attorney-client conflict and the trial court fails to conduct an adequate inquiry after timely objection. State v. Regan, 143 Wn. App. 419, 425-26, 177 P.3d 783 (2008); State v. McDonald, 143 Wn.2d 506, 513-14, 22 P.3d 791 (2001). Due process requires inquiry once reason to doubt competency exists. In re Pers. Restraint of Fleming, 142 Wn.2d 853, 863, 16 P.3d 610 (2001).

Protection of a defendant's fundamental constitutional right to a fair jury trial is entitled to no less consideration. There was a sufficient basis for the trial court to reasonably know the juror was potentially sleeping. Voir dire of the juror was needed to ensure Frazier's right to a fair trial.

D. CONCLUSION

For the reasons stated, this Court should reverse conviction and remand for a new trial.

DATED this 30<sup>th</sup> day of April, 2010.

Respectfully Submitted,

NIELSEN, BROMAN & KOCH, PLLC.

  
\_\_\_\_\_  
CASEY GRANNIS  
WSBA No. 37301  
Office ID No. 91051  
Attorneys for Appellant

**IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON  
DIVISION ONE**

---

STATE OF WASHINGTON, )

Respondent, )

v. )

YOBACHI FRAZIER, )

Appellant. )

COA NO. 64219-7-I

FILED  
COURT OF APPEALS  
STATE OF WASHINGTON  
2010 APR 30 PM 4:20

---

**DECLARATION OF SERVICE**

I, PATRICK MAYOVSKY, DECLARE UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOLLOWING IS TRUE AND CORRECT:

THAT ON THE 30<sup>TH</sup> DAY OF APRIL, 2010, I CAUSED A TRUE AND CORRECT COPY OF THE **BRIEF OF APPELLANT** TO BE SERVED ON THE PARTY / PARTIES DESIGNATED BELOW BY DEPOSITING SAID DOCUMENT IN THE UNITED STATES MAIL.

[X] YOBACHI FRAZIER  
DOC NO. 774762  
CLALLAM BAY CORRECTIONS CENTER  
1830 EAGLE CREST WAY  
CLALLAM BAY, WA 99326

**SIGNED** IN SEATTLE WASHINGTON, THIS 30<sup>TH</sup> DAY OF APRIL, 2010.

x Patrick Mayovsky