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NO. 48210-0-II

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

STATE OF WASHINGTON,

Respondent,

v.

GARY TAYLOR BROWN,

Appellant.

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

The Honorable F. Mark McCauley, Judge
The Honorable David Edwards, Judge

BRIEF OF APPELLANT

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A. ASSIGNMENTS OF ERROR

1. The trial court's finding that juror number one was asleep for approximately one minute is not supported by substantial evidence in the record.

2. The trial court committed reversible error by failing to excuse the sleeping juror and by denying defense counsel's motion for a mistrial.

3. The trial court's imposition of the DNA collection fee and interest on non-restitution legal financial obligations (LFOs) violates recent statutory amendments applicable to all cases pending appeal.

Issues Pertaining to Assignments of Error

1. The court, prosecutor, defense attorney, defendant, trial observer and State's witness all observed that juror number one was asleep, failed to stand when a recess was called, and had to be shaken awake. The court and attorneys all stated on the record that they had not noticed the juror was asleep until just before the recess. The State's witness noted the juror "was out," the defendant noted the juror was asleep "for some time," a trial observer noted the juror was asleep for 20 minutes, and the juror herself provided conflicting testimony that she was just resting her eyes, could not recall being woken, and was not asleep. Given

the above, does the record provide substantial evidence to support the trial court's finding the juror was asleep for approximately one minute?

2. The trial court reasoned the defendant was not prejudiced because the juror slept through the State's witness testimony. Did the court apply an incorrect standard of law to deny the defense motion for a mistrial? If so, does a correct application of law warrant reversal and remand for a new trial?

3. The trial court failed to appoint an alternate juror. Did the court improperly prioritize judicial economy over the defendant's right to a fair trial?

4. The trial court imposed the DNA collection fee and interest on non-restitution LFOs. In light of recent amendments to the LFO statute, must these LFOs be stricken?

B. STATEMENT OF FACTS

1. Charges & Plea

The Grays Harbor County Prosecutor's Office charged appellant Gary Brown with first degree trafficking in stolen property and possession of a controlled substance, alleging he transported stolen alder logs and possessed methamphetamine in a syringe found in his truck. CP 23-24;

1RP 27.¹ Brown pleaded not guilty to both charges and proceeded to trial by jury. 1RP 27.

2. Trial Evidence

In the summer of 2013, the appellant's neighbor Bruce Brown² was logging alder trees with permission from landowner Curt Shrek. 1RP 76, 79. Bruce was selling these logs as "pillars" to Raintree Logging Company. 1RP 76-77. One day Bruce had alder logs with him and encountered appellant Gary Brown and Brown's brother-in-law Edmond "Buggo" Ferry at a local store.³ 1RP 76-77, 167-68. The three had a conversation about the going price of alder logs. 1RP 76-77, 169. Bruce testified Buggo appeared "more interested" in the conversation than Brown. 1RP 77.

One night in the summer of 2013, Buggo came to Brown's home in the middle of the night pounding on the door. 1RP 168. This was not an unusual occurrence. 1RP 168. Buggo lived on his uncle's land in a

¹ This brief refers to the verbatim report of proceedings as follows: 1RP (7/7/14, 8/12/14, 8/13/14, 7/31/15, 8/21/15, 9/16/15); 2RP (8/11/14, 8/13/14 (duplicate)).

² Because the witness shares a last name with the appellant Gary Brown, the witness is referred to in this brief by his first name to avoid confusion. No disrespect is intended.

³ Because Mr. Edmund Ferry is referred to throughout testimony by his nickname "Buggo" he is referred to by that name in this brief to avoid confusion. No disrespect is intended.

trailer without power. 1RP 178-79. He was desperate, without any resources, constantly on the edge of starvation, had no concept of time, no appreciation of the fact that Brown and his fiancée Edna (Buggo's sister) were parents to three small children, and would show up at all hours demanding to borrow a vehicle or some other form of assistance. 1RP 178-79, 187. When this happened, Brown felt the only way to handle the situation was to help Buggo with whatever he needed. 1RP 187. On one particular evening, Buggo turned up demanding Brown help him by using his truck to move pre-cut alder logs to Bruce's property. 1RP 169.

This request did not strike Brown as odd for several reasons. First, it was well known in the community that Bruce used alder and cedar wood to smoke fish for local native people, such as themselves, and Buggo had led him to believe the logs were firewood to be used for this purpose. 1RP 171. Second, Brown asked Buggo if he had a logging permit, and although Buggo did not produce it for his inspection that evening, Brown had seen Buggo in possession of a logging permit just a week or so prior. 1RP 169, 179-81. Buggo further explained he had a permit from Don Hagara granting him permission to remove the logs for firewood, and Brown also knew a permit was not necessary to remove firewood from private property. 1RP 169, 179-81. Third, Brown knew that Buggo and Bruce's son Brandon were having a dispute because Brandon was dating

Buggo's girlfriend. 1RP 170. Buggo felt he could not go to Bruce's house at a time that might risk an encounter with Brandon. 1RP 170. Bruce corroborated Buggo and Brandon were having a dispute over a woman. 1RP 81.

Brown testified he drove to "Gossler's Pit," a gravel pit on Elda and Fred Gossler's private property, and helped Buggo transport three alder logs from there to Bruce's property. 1RP 169-70, 174-75. Gossler's Pit was distinct from Rayonier Pit, the latter of which was located nearby on Rayonier property. 1RP 175-76, 179. Testimony from Rayonier employee Jessica Joseph confirmed Gossler's Pit was not on Rayonier land, but the Rayonier lands had a gravel pit on company property nearby. 1RP 142-43. Brown testified he did not go to Rayonier property, did not remove any logs from Rayonier lands, and explained there was "no possible way" his two-wheel truck could traverse the lands between the two pits "because it's dug out in between." 1RP 176.

Brown testified he and Buggo hauled the logs and left them on Bruce's property. 1RP 170. Three days later, Buggo sent Brown to Bruce's house to collect \$40 for the logs. 1RP 170. Bruce paid Brown the \$40. 1RP 170. It was undisputed at trial that Brown gave statements to police that he conveyed this money to Buggo, who gave him a package of cigarettes for his trouble. See 71, 73-74. Bruce corroborated that the logs

turned up during the night and Brown came by asking for money on behalf of Buggo. 1RP 78-79.

Brown testified that a short time later, he sold his truck to Alfred “Bud” Robinette for \$800. 172. Robinette paid him \$400 up front and promised to pay the rest in the following months at a rate of \$200 per month. 1RP 172. Brown transferred the registration into Robinette’s name but retained the title in case of non-payment. 1RP 172. Sure enough, Robinette fell behind on his payments. 1RP 174. A friend later called Brown to say they had seen his truck on a logging road, and that it appeared damaged and in bad condition. 1RP 172-73. The transmission had been removed, two back tires were missing, and the engine has seized up. 1RP 172-73. Brown’s friends helped him tow the truck to a friend’s house. 1RP 173. Brown was staying in a trailer on his friend’s property temporarily while an exterminator visited his home to take care of bats who had taken up residence. 1RP 184. Brown testified he did not have access to the inside of the truck, and it sat in the driveway for approximately a week and a half to two weeks while his friend worked on the truck trying to get it in working order. 1RP 174.

During this time, in response to a tip from a community member, Deputy Sean Gow had begun an investigation into three alder logs allegedly stolen from Rayonier company property next to Gossler’s Pit.

1RP 83-84, 86. Rayonier employee Joseph testified no logging was authorized on that property. 1RP 141. On October 22, 2013 Gow went to the area in question; he drove part way and walked the rest. 1RP 85-86. He noted the path he took was not passable by a truck or car but was “[m]aybe” passable by an All-Terrain Vehicle (ATV). 1RP 88. He knew of two other routes—a railroad track and a steep embankment. 1RP 91. He testified the railroad tracks may have been passable by “quads” but likely not a vehicle, and that the embankment was too steep to enter but might have been usable as an exit for a vehicle traveling downhill. 1RP 91.

At the location, Gow observed what he believed to be recent vehicle tracks in the overgrown grass on the path to the area, evidence that three alder logs that had been recently cut down, one of which had been left behind. 1RP 87-89. A Rayonier employee testified he also observed the site and could tell “[i]t wasn’t a professional job” because the log left behind had been cut in a manner that caused it to fall onto rocks and split, rendering it useless for anything but firewood. 1RP 137.

Gow set up a “game camera” to capture a series of still images upon detection of motion at night. 1RP 95. In late October, the camera was triggered and caught images that Gow identified as Buggo walking by himself at the location during the day. 1RP 97, 100. At night the camera

captured images of Buggo and another man moving a log off the property with a truck. 100-01. Gow was unable to identify the second man or the truck. 1RP 104. He testified, however, that the position of the headlights indicated it was an older truck, and this was consistent with the truck he knew Brown drove. 1RP 103-04. After learning that the number of alder logs sold by Bruce to Raintree did not match the number Bruce had lawfully logged from Shrek's property, Gow spoke to Bruce. 1RP 105-06. He then obtained a warrant to search Brown's truck for evidence of alder logs, logging equipment, and paperwork or receipts documenting the sale of alder logs. 1RP 106.

On December 3rd, Gow located Brown in a trailer on his friend's property; Brown's truck was parked in the driveway. 1RP 107. Another woman who Gow could not identify was also present with Brown. 1RP 107. Gow searched Brown's truck. 1RP 104, 106. The truck bed contained pieces of wood and tree bark which Gow opined he could identify as "western red alder." 1RP 109-10. He also found hand tools and non-functional, disassembled chain saw parts. 1RP 109.

Gow testified that Brown gave conflicting statements about his logging activities. He testified that in the initial verbal statement, Brown denied being at the theft site, and claimed he had cut wood with Bruce at Curt Shrek's property. 1RP 116. Gow testified Brown later signed a

written statement admitting he had helped Buggo move alder logs around 1:00 or 2:00 A.M. from the site, that the logs were later sold to Bruce as firewood, and that Brown was only there helping Buggo. 1RP 164 (citing Ex 2). On cross examination, Gow conceded Brown had referred to Gossler's Pit in his written statement, explained he had moved logs from that area, and stated the logs had already been cut and were on the south side of the pit (i.e. not on Rayonier land). 1RP 118.

While searching the truck, Gow also found two eyeglass cases, one on the passenger side floorboards and one in the passenger side glovebox. 1RP 112. The case in the glovebox contained a pair of eyeglasses and a syringe filled with a liquid that later tested positive for methamphetamines. 1RP 113, 144; 1RP 158. Gow disposed of the needle without dusting for fingerprints. 1RP 147. Gow testified he knew Brown to wear glasses "similar" to those found in the case. 1RP 113. Gow also found a wallet, paperwork, and identification cards bearing Brown's name, signature and photograph. 1RP 112, 114-15. The truck bed also contained a blanket and clothes. 1RP 111.

Brown testified he was not aware of the eyeglass cases, drugs, or needles inside the truck. 1RP 174. Robinette had left numerous possessions in the vehicle, and Brown had not entered the truck or sorted through these items. 1RP 173-74. The woman with Brown at the time

Gow searched the truck was Robinette's girlfriend. 1RP 173. She had also left clothes and various personal items in the truck, and had stopped by to retrieve them. 1RP 174.

3. Jury Instructions, Closing Argument & Verdict

In addition to the charged offenses, the court instructed the jury on the lesser offense of second-degree trafficking in stolen property. CP 34-35.

Defense counsel argued Brown did not know the logs were stolen, and the jury should acquit him of first-degree trafficking. 1RP 240-41. Brown may have disregarded some signs that Buggo had stolen the logs, but Brown's conduct was not a "gross deviation" from the conduct of a reasonable person, and the jury should acquit him of second-degree trafficking as well. 1RP 241. Furthermore, there was more than a reasonable doubt the methamphetamine belonged to Robinette or his girlfriend, not Brown. 1RP 241-44.

The State pointed to the circumstances of the logging operation, and alleged inconsistencies in Brown's statements to police to argue he knew the alder logs were stolen, as required for first degree trafficking. 1RP 226-29, 232, 234-35. The State also pointed to various documents and cards found in the truck to argue Brown possessed the methamphetamine. 1RP 229-31, 236.

The jury found Brown guilty of both first-degree trafficking and possession of methamphetamine as charged. 2RP 29.

4. Sleeping Juror

During Deputy Gow's trial testimony, juror Chanelle Burton fell asleep. 1RP 119. When the trial court called a recess, all the other jurors stood and left the room. 1RP 119. Burton had to be shaken awake and told to leave. 1RP 119. At that time, the trial court, prosecutor, defense counsel, defendant, Deputy Gow, and the defendant's mother Patricia Taylor (who was observing the trial) all verified that the juror had been sleeping. 1RP 119. Defense counsel moved for a mistrial. 1RP 124. The trial court denied the motion. 1RP 124-25.

After the jury had rendered its verdict, defense counsel asked to put Taylor on the stand to testify regarding how long the juror had been sleeping. 2RP 33. The court heard sworn testimony from both Taylor and the juror, but did not revise its original ruling. 2RP 32, 34, 37.

5. Sentence & Appeal

Sentencing was initially delayed, pending the outcome of a separate case. 2RP 30-31. That case ultimately resulting in additional convictions for arson and assault, and the court then held a joint sentencing hearing. 1RP 266. The court imposed a mid-range sentence of

72 months for trafficking and 18 months for drug possession, to run concurrent with one another. 1RP 279; CP 51.

During the hearing, the trial court made no inquiry into Brown's financial circumstances. See 1RP 281-88. The court imposed the \$100 DNA collection fee. CP 53. The court also imposed interest on all LFOs, making no distinction between restitution and non-restitution LFOs, "at the rate applicable to civil judgment." CP 54.

Brown timely appealed.⁴

C. ARGUMENT

1. THE TRIAL COURT ERRED BY FAILING TO EXCUSE THE SLEEPING JUROR.

Both the Washington and federal 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 an accused with a fair trial also violates minimum standards of due process. State v. Davenport, 100 Wn.2d 757, 762, 675 P.2d 1213 (1984); State v. Jackson, 75 Wn. App. 537,

⁴ Brown was sentenced on 9/16/2015 and appealed on 10/15/2015. CP 48, 60. The Court of Appeals initially dismissed the case and issued a mandate noting the absence of the filing fee or order of indigency. CP 71-73. However, the Court then recalled the mandate and instructed Brown to cure the defect by obtaining an order of. CP 76. On Brown's motion, the trial court then entered an order of indigency. CP 78. The appeal is now properly before this Court.

543, 879 P.2d 307 (1994), rev. denied, 126 Wn.2d 1003 (1995); U.S. CONST., AMEND. IVX, VI; WASH. CONST., ART. I, § 3.

“A sleeping juror may prejudice the defendant’s due process rights and right to an impartial jury.” In re Pers. Restraint Caldellis, 187 Wn.2d 127, 146, 385 P.3d 135 (2016) (citing State v. Hughes, 106 Wn.2d 176, 204, 721 P.2d 902 (1986); see also Tanner v. United States, 483 U.S. 107, 126-27, 107 S. Ct. 2739, 97 L. Ed. 2d 90 (1987)).

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), rev. denied, 143 Wn.2d 1015 (2001). 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 Brown’s case was accordingly instructed to render a verdict after consideration of “the evidence presented to you during this trial.” CP 30-31 (Instruction 1). A sleeping juror cannot listen to all the evidence and so cannot fulfill her oath to base her verdict on the evidence presented. Considering a sleeping juror’s impact on a trial, a New York court concluded, “A juror who has not heard all the evidence in the case . . . is grossly unqualified to render a verdict.” People v. Valerio, 141 A.D.2d 585, 586, 529 N.Y.S.2d 350 (N.Y. App. Div. 1988).

Under RCW 2.36.110, the judge also has an affirmative statutory 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 specifies, “If 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, and the clerk shall draw the name of an alternate who shall take the jurors place on the jury.” RCW 2.36.110 and CrR 6.5 place a “continuous obligation” on the trial judge 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).

A trial judge is afforded discretion in its investigation of juror misconduct. Elmore, 155 Wn.2d at 773-74. Discretion, however, does not mean immunity from accountability. Carson v. Fine, 123 Wn.2d 206, 226, 867 P.2d 610 (1994). “A trial court abuses its discretion if its decision is manifestly unreasonable or based upon untenable grounds or reasons.” State v. Lamb, 175 Wn.2d 121, 127, 285 P.3d 27 (2012) (internal quotations omitted). “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). “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 court denied the initial motion for mistrial reasoning the juror had been sleeping “anywhere from a minute to whatever,” noted it was during the State’s presentation and stated, “I think they would be more concerned about it than anything,” and ultimately concluded “just a minute or so of a jury dosing off” was not a basis for a mistrial. 1RP 124-25. Furthermore, the court elected not to revise its original ruling after hearing additional testimony. 1RP 125; 2RP 37.

The court’s reasoning was in error for several reasons. First, the ruling rested on the erroneous finding that the juror was merely dosing for a minute or so, where the record supports finding the juror was sound asleep for 20 minutes. Second, the trial court applied an incorrect legal standard by concluding there was no prejudice simply because the juror was sleeping during the State’s witness. Jurisprudence applying the correct legal standard shows the only acceptable choice was to declare a

mistrial. Third, the record suggests the court permitted considerations of judicial economy to overcome Brown's constitutional rights to a fair trial – again applying an incorrect legal standard.

- i. The record shows the juror was sound asleep for a significant portion of Gow's testimony.

Here, it was undisputed by the parties, the judge, and even another State's witness that the juror had fallen asleep. 1RP 119. To the extent the trial court later found otherwise, or found the juror had been sleeping for only a minute or so, such a finding is not supported by the record and should be set aside by this Court.

After Deputy Gow's testimony was complete, and immediately after the jury exited, defense counsel stated, "I think the question is, how long was that juror asleep?" 1RP 119. Neither the court nor the prosecutor disputed the juror had been asleep. Instead, both noted that they could not see the juror directly and had noticed her sleeping only when she failed to stand and leave with the rest of the jury. 1RP 119. The trial court noted "She is the furthest one from me. I didn't know it until I saw that we didn't have everybody leaving." 1RP 119. The prosecutor stated, "Until the jurors walked out, I didn't notice it, either, Your Honor, I can't really look at them." 1RP 119. Defense counsel noted "[s]omebody pointed it out to me about a minute before we sent [the jury] out." 1RP

119. Brown stated, “She has been sleeping for quite a while.” 1RP 119. The prosecutor then stated, “For the record, that’s juror number one, asleep at the break.” 1RP 119. When the prosecutor asked State witness, Deputy Gow, if he saw, he commented “Not until the last one, she was out.” 1RP 119 (emphasis added).

From this record, it was clear from the outset that the juror was asleep for more than a brief moment in time. All parties agreed she had been sleeping, including the judge and State’s witness. No party claimed she had been sleeping only a brief moment in time. All parties who could observe her stated she “was out” or had “been sleeping for quite a while.” 1RP 119. Moreover, common sense dictates that a juror who was lightly dozing would not have failed to stand with her colleagues when they left the courtroom – she was in a deep sleep.

After the break, but before the trial recommenced, defense counsel moved for a mistrial. 1RP 124. The court reasoned the juror had been sleeping “anywhere from a minute to whatever,” noted it was during the State’s presentation and stated, “I think they would be more concerned about it than anything.” 1RP 124. The court denied the motion noting “just a minute or so of a jury dosing off” was not a basis for a mistrial. 1RP 125. Defense counsel argued Taylor was watching the trial and had observed the juror “asleep for some time.” 1RP 125. The court

responded, “I still haven’t heard of any definite time,” and declined to revise its ruling. 1RP 125.

The trial court’s finding was not supported by the record. As pointed out by defense counsel, the court had already heard an offer of proof from three people (the defendant, an observer, and the State’s witness) that the juror had been asleep for longer than “a minute or so.” 1RP 125 (Court’s statement). Despite the court’s reasoning that it hadn’t “heard of any definite time,” the court had heard a statement of duration from three parties. 1RP 125. Moreover, the court, prosecutor, and defense attorney had all stated on the record they had not been able to see the juror or had not noticed, and so could not dispute these offers of proof with their own observations. 1RP 119. At this point, there was literally nothing in the record to support finding the juror had been asleep only for “a minute or so.” 1RP 125. The trial court’s findings on this matter should be set aside.

After the jury had rendered its verdict, at the request of defense counsel, and then the State, the court heard sworn testimony from both Taylor and the juror. 2RP 32, 34. This additional testimony strengthened the case for finding the juror had been asleep for a significant period of time, and provided no substantial evidence to support finding otherwise.

Taylor testified under oath that she had been keeping track of the time and had observed the juror asleep for “a little over 20 minutes.” 2RP 33. This was consistent with, and more specific than, counsel’s original offer of proof regarding her observations.

Juror Chanelle Burton testified under oath as well. 2RP 34-35.

The follow questions and answers occurred:

- Q. Did you fall asleep during trial?
- A. I had my eyes closed.
- Q. But were you asleep?
- A. Not to my knowledge, because - -
- Q. Okay.
- A. Because I was listening to everything that was going on.

2RP 35.

Tellingly, when asked twice whether she had been asleep, the juror failed to respond directly to the question. Instead, she stated her eyes were closed and that she was not aware that she was asleep. This shows the juror was being evasive and did not want to admit to having been asleep.

Burton explained she had her eyes closed because the air conditioner was drying her eyes out, the lighting was not very good, and she is light sensitive. 2RP 35-36. She produced her eye drops to corroborate her statement. 2RP 35-36. However, even if entirely true, this provides an explanation for why her eyes were closed, not a direct comment on whether or not she then fell asleep.

Defense counsel cross-examined Burton as follows:

Q. ... you remember that you were still in your seat after the rest of the jury had left the room at one - -

A. Yes, I remember that.

Q. Did you not realize that the rest of the jury had gotten up and left?

A. Not at the moment. I know we were watching a movie the movie and my - well, it wasn't really a movie. It was a - a picture of the - that was on the screen. It was very hard for me to concentrate on that - you know, the picture because of my eyes.

Q. Mm-hmm.

A. And I had to keep closing them.

Q. Did you hear the judge loudly telling you to wake up?

A. I heard somebody tell me to wake up, but I wasn't asleep.

Q. You didn't actually react until somebody came over and physically shook you?

A. I don't remember that.

2RP 36-37 (emphasis added).

After being pressed for a third time, the juror finally uttered the words, "I wasn't asleep." 2RP 26-27. However, immediately after this statement she claims she did not remember being shaken awake—an event all parties and even the judge observed at the time. See 1RP 119. This strongly suggests the juror was either not being honest, or genuinely did not remember because she was in such a deep sleep she did not recall the events that occurred as she was in the process of waking up. The trial court had already found she was sleep, and never revised this finding. 1RP 119, 125 (finding juror was asleep); 2RP 37 (no revision to findings).

Thus, the court did not find the juror's statement credible that she was not asleep. Regarding her statement that she did not remember being shaken awake, whether credible or not, it does not provide substantial support for the trial court's findings that she was asleep for only a minute or so. Either she was being dishonest, or she was completely unaware because she was sound asleep. Again, the record supports finding the juror was in a deep sleep for a substantial period of time during Gow's testimony. The trial court's findings to the contrary are not supported by the record and should be stricken.

- ii. The trial court's reasoning was in error where it concluded there could be no prejudice where the juror slept through the State's witness.

The trial court reasoned there was no prejudice because the juror had slept through the State's witness. See 1RP 124-25. This reasoning applies an incorrect legal standard, and so is an abuse of discretion. A review of similar cases shows that the relevant standard is as follows. A juror sleeping, through any part of the presentation of evidence, is misconduct. Jorden, 103 Wn. App. at 226, 230. Juror misconduct is presumed prejudicial. State v. Boling, 131 Wn. App. 329, 333, 127 P.3d 740 (2006). The State has the burden to demonstrate "it is unreasonable to believe the misconduct could have affected the verdict." Id. "Any doubt that the misconduct affected the verdict must be resolved against the

verdict.” State v. Briggs, 55 Wn. App. 44, 55, 776 P.2d 1347 (1989). The correct inquiry is whether the juror slept through relevant testimony, not whether it was simply the State’s witness. C.f. Jorden, 103 Wn. App. at 224-30 (holding juror who missed testimony was properly dismissed in case where defendant called no witnesses).

In Jorden, the trial court excused a juror who fell asleep several times during trial. 103 Wn. App. at 224-25. Because the juror did not hear all the evidence presented, her fitness was compromised, and the trial judge was required to dismiss her under RCW 2.36.110 and CrR 6.5. Id. at 230. The judge did not need to individually question the juror before dismissing her, because he allowed both parties to call witnesses, heard argument from both sides, and properly considered his own notes and observations about the juror’s conduct. Id. at 227. The Court of Appeals concluded the trial court had properly exercised discretion in dismissing the juror and appointing an alternate, and need not have held a further hearing on the matter before reaching this decision. Id. at 229. No part of the analysis included whether the missed testimony was presented by the State or by the defense. See id. at 224-30. However, in its statement of facts the Court of Appeals noted the defense called no witnesses. Id. at 226. Thus, the juror must have missed testimony presented by the State.

In United States v. Barrett, after the trial court instructed the jury but before deliberations began, a juror asked to be removed from the panel and informed the court he had been sleeping during trial. 703 F.2d 1076, 1082 (9th Cir. 1983). The court refused to dismiss the juror, believing it did not have authority to do so. Id. After the jury returned a guilty verdict, Barrett filed a motion to permit the defense to interview the sleeping juror. Id. The trial court denied the motion without conducting any investigation, finding “there was no juror asleep during this trial.” Id.

The Ninth Circuit felt the trial court’s “bare assertion” was improper, particularly in light of the juror’s own statement to the court. Id. at 1083. Trial courts have “considerable discretion in determining whether to hold an investigative hearing on allegations of jury misconduct and in defining its nature and extent.” Id. However, “in failing to conduct a hearing or make any investigation into the ‘sleeping’-juror question, the trial judge abused his considerable discretion in this area.” Id. The Ninth Circuit held remand was necessary for the trial court to hold a hearing on whether the juror was sleeping during trial and, if so, whether it denied Barrett a fair trial.⁵ Id.

⁵ State appellate courts have reached the same conclusion where the trial court fails or refuses to investigate a sleeping juror. See, e.g., Commonwealth v. Braun, 74 Mass. App. Ct. 904, 905, 905 N.E.2d 124 (2009) (“[W]e conclude that the judge abused his discretion by failing to conduct a voir dire where there was a very real basis for concluding that

In Jorden, the juror was removed before deliberations began and replaced with an alternate. 103 Wn. App. at 229. The issue of whether her misconduct prejudiced Jorden's right to a fair trial was therefore premature. Id. The Jorden court recognized, however, that the allegation of the sleeping juror in Barrett, "if true, prejudiced Barrett's right to a fair trial," because "he was convicted by a jury that included one member who had not heard all the evidence." Id. at 228.

Like the trial court's finding in Barrett, the finding here is not supported by the record. However, here, there was a follow-up fact-finding hearing and so remand is not necessary. Rather, this court should strike the trial court's finding and conclude the juror was sound asleep for 20 minutes. According to the reasoning in Jordan, the fact that the juror slept through State witness testimony is irrelevant. The correct inquiry is

the juror was sleeping during testimony and the judge's instructions, thereby calling into question that juror's ability to fulfil her oath to try the issues according to the evidence."); People v. South, 177 A.D.2d 607, 608, 576 N.Y.S.2d 314 (1991) ("[T]he court should have granted the defendant's request and conducted a probing and tactful inquiry to determine whether juror number 9 was unqualified to render a verdict based upon her apparent sleeping episodes."); State v. Hampton, 201 Wis. 2d 662, 673, 549 N.W.2d 756 (1996) ("[W]e conclude that the responsibility of the trial court to assure the impartiality of the jury and due process is of such paramount importance that when it is conceded that a juror was sleeping, summarily foreclosing further inquiry is an erroneous exercise of trial court discretion.").

whether the juror slept through substantial portions of relevant testimony, and if she did, prejudice to Brown is presumed.

Here, Deputy Gow's testimony was relevant to several critical aspects of the State's case, including the nature and content of Brown's written statement to police (1RP 118), the location of the stolen Alder logs and the relationship to the location referenced by Brown in his statement to police (1RP 118), the content of Brown's alleged verbal statement to police and the officer's opinion that this statement was inconsistent with the written statement (1RP 116). The testimony also included assertions about what objects and documents were found in the truck and where, and whether pictures and objects had been altered or tampered with. E.g. 1RP 109-12, 114-15. Gow's testimony also included his assertions that Brown wore glasses "similar" to the eyeglasses found in the case with a needle full of methamphetamine, and that his truck was an "older Ford" with "taillights [that] appear to be in the same location" as the truck on the game video. 1RP 108, 113. He also testified that he did not recall the woman's name who was present that day when he searched the truck. 1RP 107. All these factual assertions were highly relevant to the trial, and Gow's credibility – particularly that establishing the chain of custody, lack of alteration to photos, and his assessment of the glasses and truck – was critical to the jury's assessment of the evidence.

Given the duration and depth of the juror's inattention and the nature of Gow's testimony, the record shows the juror slept through critical trial evidence. In addition, because Gow's testimony was central to the State's case against Brown, the State cannot overcome the presumption of prejudice. This Court should conclude the trial court's decision to deny the defense motion for mistrial was outside the range of acceptable choices and was an abuse of discretion. Remand and reversal for a new trial is required.

- iii. The trial court may have improperly permitted concerns of judicial economy to overcome Brown's constitutional right to a fair trial.

The record also suggests the trial court may have been affected by concerns of judicial economy, and allowed these concerns to overcome Brown's constitutional rights.

The trial court failed to appoint an alternate juror. Before trial, the court raised the issue once in two-part question to both parties, asking "Any other issues? Do you think we need an alternate?" 1RP 13. The prosecutor responded, "I don't think so, Your Honor," and moved on to a discussion of written suppression hearing findings. 1RP 13. It was unclear whether he was responding to the court's question about an alternate, about other issues, or both. The defense attorney then responded to the State's remarks about the written findings and did not address the

question about an alternate. 1RP 13. The court and parties never returned to the issue and an alternate was not appointed.

As a result, what might otherwise have been a motion to appoint an alternate juror, as in Jordan, here became a defense motion for mistrial. This circumstance, and a reluctance to redo the entire trial, may have contributed to the trial court's hesitancy to dismiss the juror. If that was the case, it was improper. In other contexts, such as joinder and severance, the Washington Supreme Court has held a defendant's constitutional right to a fair trial must prevail over concerns of judicial economy. State v. Bluford, 188 Wn.2d 298, 311, 393 P.3d 1219 (2017) (holding "[j]udicial economy is relevant to joinder but cannot outweigh a defendant's right to a fair trial."). Thus, here, to the extent the trial court allowed concerns of judicial economy to outweigh Brown's right to a fair trial, the court erred.

For the reasons discussed above, the trial court's failure to declare a mistrial was outside the range of acceptable choices and warrants reversal.

2. THE TRIAL COURT'S IMPOSITION OF DISCRETIONARY LFOS AND NON-RESTITUTION INTEREST VIOLATES THE AMENDED STATUTE.

The recently amended statute on LFOs prohibits the imposition of discretionary costs on indigent defendants and sets limitations on the

imposition of non-restitution interest. The trial court's order violates both these provisions. The proper remedy is to remand to strike the DNA costs and modify the judgment to comply with the new non-restitution interest requirements.

i. The DNA collection cost must be stricken.

Brown has prior felony convictions that required him to submit a DNA sample. CP 49-50. Therefore, the \$100 DNA collection fee should be stricken from Brown's judgment and sentence.

The Washington Supreme Court recently discussed and applied Engrossed Second Substitute House Bill 1783, 65th Leg., Reg. Sess. (Wash. 2018) (HB 1783), which became effective June 7, 2018 and applies prospectively to cases pending on appeal. State v. Ramirez, 191 Wn.2d 732, 738, 745-49, 426 P.3d 714 (2018).

HB 1783 amended "the discretionary LFO statute, former RCW 10.01.160, to prohibit courts from imposing discretionary costs on a defendant who is indigent at the time of sentencing as defined in RCW 10.101.010(3)(a) through (c)." Ramirez, 191 Wn.2d at 746 (citing LAWS OF 2018, ch. 269, § 6(3)); see also RCW 10.64.015 ("The court shall not order a defendant to pay costs, as described in RCW 10.01.160, if the court finds that the person at the time of sentencing is indigent as defined in RCW 10.101.010(3)(a) through (c).").

The record established Brown was “indigent” as defined by RCW 10.101.010(3)(d) at the time of sentencing and remains indigent now. Brown moved for an order of indigency solely at public expense, declaring he had previously been found indigent for purposes of this case, there had been no financial change since that time, and he lacked sufficient funds to pursue his appeal. CP 74. Brown filed a second declaration asserting his “complete financial statement” setting forth all assets and debts was as follows: no cash, no assets in a checking or savings account, no expenses, and a monthly income of \$6.00 from his job in prison. CP 77. Brown attached documentation of his prison funds account showing an average spendable balance of \$6.63. CP 79. The trial court found Brown “indigent,” “lacks sufficient funds to prepay the filing fee,” and authorized to proceed on appeal wholly at public expense. CP 77-78.

Despite finding Brown indigent, the sentencing court ordered him to pay the DNA collection cost. CP 53. However, in Brown’s case, this fee is discretionary. House Bill 1783 also amended the statute controlling the imposition of the \$100 DNA collection fee, which now provides:

Every sentence imposed for a crime specified in RCW 43.43.754 [including adult felonies] must include a fee of one hundred dollars unless the state has previously collected the offender’s DNA as a result of a prior conviction.

RCW 43.43.7541 (emphasis added); Laws of 2018, ch. 269, § 18.

Brown has prior criminal history, including several adult felony convictions between 1986 and 2016. CP 49-50. This indicates the State has previously collected his DNA. See State v. Maling, 6 Wn. App.2d 838, 844-45, 431 P.3d 499 (2018) (striking \$100 DNA fee based on Maling’s indigence and because “Mr. Maling’s lengthy felony record indicates a DNA fee has previously been collected.”). Because Brown’s case is not yet final, the new statute applies, and the DNA fee should therefore be stricken. Ramirez, 191 Wn.2d at 747-50.

- ii. The court’s order violates new limitations on non-restitution interest and must be modified.

The trial court also imposed interest on all Brown’s LFOs and made no distinction between restitution versus non-restitution LFOs. CP 54. This violates recent statutory amendments.

RCW 10.82.090 requires the court to impose interest on restitution costs. RCW 10.82.090(1). However, the statute also states, “As of June 7, 2018, no interest shall accrue on nonrestitution legal financial obligations.” RCW 10.82.090(1). In addition, the statute provides “[t]he court shall waive all interest on the portions of the legal financial obligations that are not restitution that accrued prior to June 7, 2018.” RCW 10.82.090(2)(a).

This Court should remand with instructions to modify the judgment and sentence to waive any non-restitution interest collected before June 7, 2018 and to strike any non-restitution interest as of June 7, 2018.

D. CONCLUSION

Where the record shows a juror was asleep for 20 minutes during relevant testimony, the trial court erred in failing to grant Brown's motion for mistrial.

Brown respectfully asks this Court to reverse his convictions and remand for a new trial. Brown also respectfully asks this Court to remand to strike the DNA collection costs and modify the judgment and sentence to comply with new restrictions on non-restitution interest.

DATED this 16th day of May, 2019.

Respectfully submitted,

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