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Court of Appeals
Division II
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NO. 48210-0-II

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

STATE OF WASHINGTON,
Respondent,

v.

GARY LEE BROWN, JR.
AKA GARY LEE TAYLOR,
Appellant.

APPEAL FROM THE SUPERIOR COURT OF THE STATE
OF WASHINGTON FOR GRAYS HARBOR COUNTY

THE HONORABLE F. MARK MACCAULEY, JUDGE

BRIEF OF RESPONDENT

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RESPONSE TO ASSIGNMENTS OF ERROR

- 1. The trial court did not believe the juror had been asleep for a substantive amount of time, but even if she had been, the Defendant has failed to show prejudice.**
- 2. The State has no objection to striking legal financial obligations that are now discretionary.**

RESPONDENT'S COUNTER STATEMENT OF THE CASE

Bruce Brown had an agreement with Curt Schrek that Bruce¹ could cut some alder logs from Mr. Schrek's 40 acres. RP II at 79-80. Bruce was selling the logs for pillars to Raintree, a mill located in Mason County. RP II at 76-77.

Bruce ran into the Defendant and "Buggo" at the Humptulips store. RP II at 76. The Defendant asked Bruce how much the logs were going for, and Bruce told him 50 or 60 dollars a log. RP II at 76-77.

After this encounter, three logs showed up at Bruce's house at four in the morning. RP II at 78. Bruce had not requested the logs, but the Defendant came to Bruce a few days later and picked up the money for them. RP II at 78-79. The Defendant told Bruce that he was picking up the money for Buggo. RP II at 78-79.

¹ The State refers to Bruce Brown by his first name to avoid confusion as the Defendant could also be "Mr. Brown."

Deputy Gow was the resident deputy for the heavily forested north beach area. RP II at 83. Deputy Gow had noticed Bruce hauling alder logs. RP II at 83. Deputy Gow had investigated Bruce's logging of Curt Schrek's property, but found that Bruce had a permit, permission, and everything appeared to be in order. RP II at 105-06. However, when Deputy Gow investigated Raintree's records, he found that there was a discrepancy in the number of logs taken from Curt Schrek's property and how many Bruce had sold to Raintree. RP II at 106.

To follow up, Deputy Gow investigated an area known as Gossler's Pit. RP II at 86. Deputy Gow followed some tracks and found signs of a logging operation, including fresh sawdust and an alder log. RP II at 87. Deputy Gow knew that Rayonier owned this land. RP II at 94. Assuming that whoever was logging the area would be back for the logs, Deputy Gow installed a motion detecting game camera. RP II at 95. The images from that camera were admitted at trial as Exhibit #1. RP II at 96-97.

In the daytime photos from the game camera Deputy Gow saw Buggo (Edmund Ferry) walking in the area. RP II at 97. Photos taken that night showed two individuals loading logs into a truck. RP II at 97.

Deputy Gow knew that the Defendant drove a full-sized pickup truck whose brake lights looked like the brake lights on the truck in the nighttime game camera pictures. RP II at 103-04. On December 2 Deputy Gow obtained a search warrant to search for evidence of logging. RP II at 104. The warrant was served on the Defendant's truck on December 3. RP II at 107.

When Deputy Gow went to serve the warrant, he put the Defendant in his patrol car, advised him of his rights, and asked him about the wood that he and Buggo had cut. RP III at 203-04. The Defendant denied involvement. RP III at 204.

In the bed of the Defendant's truck, Deputy Gow found western red alder bark and two chain saw bars. RP II at 110. Deputy Gow found an eyeglasses case containing a hypodermic needle in the glove compartment of the truck. RP II at 112-13. Deputy Gow suspected that the fluid from the hypodermic needle was methamphetamine, so he sent it to the Washington State Patrol Crime Lab. RP II at 144-45. The liquid from the hypodermic needle would later prove to be methamphetamine. RP II at 158.

After searching the Defendant's truck, the Defendant was interviewed by Deputy Gow at the Hoquiam Police Department. RP at

115. Deputy Gow confronted the Defendant with the fact that they had found meth in his truck. RP III at 204-05. The Defendant then changed his story. RP III at 205. The Defendant admitted that he and Buggo went to the site and removed three alder saw logs at about 1:00 AM at night. RP at 118. He also admitted that he took them to Bruce Brown's, because he knew that Bruce was already selling logs. *Id.* The Defendant claimed that he gave the \$40 he received to Buggo, and only received a pack of cigarettes for his work. *Id.* The Defendant's written confession to this effect was admitted at trial as Exhibit #3. RP at 117.

Deputy Denny also spoke to the Defendant that day. RP II at 162. The Defendant told Deputy Denny that he and Buggo had recovered some cut logs and sold them for firewood. RP II at 164. The Defendant claimed that he was just helping. *Id.* The Defendant's written statement to Deputy Denny was admitted as Exhibit #2. RP II at 163-64.

In response to Deputy Gow's report, Peter Nolin, a Rayonier forester, investigated the illegal logging operation. RP at 134-35. Mr. Nolin found that two alder logs had been taken, and a third had been felled, but had split when it hit an old railroad grade, and was unusable. RP II at 136. Mr. Nolin also found that someone had placed moss from the ground on the tops of the bright, freshly cut alder stumps. RP II at

137. Mr. Nolin opined that the logging was not a professional job. RP II at 137.

Jessica Josephs, also of Rayonier, testified at trial that the property belonged to Rayonier, and there Rayonier had not authorized any logging there. RP II at 142.

The State charged the Defendant with Trafficking in Stolen Property in the First Degree and Violation of the Uniform Controlled Substances Act - Possession of Methamphetamine. CP at 23-24. At trial, the Defendant testified consistently with the facts as laid out in the Brief of Appellant. On cross examination, the State impeached the Defendant with his prior convictions for Witness Tampering and Burglary. RP II at 182-83. The jury, apparently unimpressed with the Defendant's self-serving testimony, convicted him as charged. CP at 38-39.

ARGUMENT

- 1. The trial court did not believe the Defendant's claim that the juror had been asleep for a substantial amount of time, so it did not err by denying the request for a mistrial.**

The Defendant first claims that the trial court erred by failing to excuse a sleeping juror. However, the trial court stated that it had heard nothing to establish that the juror had done anything more than doze off

for a minute or so, and appellate courts defer to a trial court's determination of such matters. But even if the juror had fallen asleep, the Defendant has failed to point to specific prejudice, which the Washington Supreme Court has required in previous cases involving inattentive jurors. Prejudice is extremely unlikely because the testimony the juror could have slept through was the introduction of exhibits that were available in the jury room during deliberations.

The trial court decided there was no evidence the juror had done anything other than “doze off” for “a minute or so.”

Judges have a duty to excuse any juror who manifests unfitness to serve. RCW 2.36.110. In making this determination, a judge is both a witness and a decision maker. *State v. Jordan*, 103 Wn. App 221, 229, 11 P.3d 866 (2000). The trial judge has “fact finding discretion,” which allows her or him to weigh the credibility of the witnesses to the alleged unfitness. *Id.* (citing *Ottis v. Stevenson–Carson Sch. Dist. No. 303*, 61 Wn.App. 747, 753, 812 P.2d 133 (1991) and *State v. Rupe*, 108 Wn.2d 734, 749, 743 P.2d 210 (1987).) There is no mandatory format trial courts must follow in making such factual determinations. *Id.* Appellate courts defer to the trial judge's decision on these factual matters. *Id.* (citing *State v. Noltie*, 116 Wn.2d 831, 809 P.2d 190 (1991).)

In this case, when the judge announced a break, Juror No. 1 failed to leave the courtroom with the other jurors. RP II at 119. The judge said to her, “Ma'am, we are going to take a break now. Probably a good time for a break. All right.” *Id.* This occurred at 1:50 PM, 37 minutes after reconvening after lunch. *See* Supp. CP at 1.

The prosecutor, Deputy Gow and the judge all remarked that they didn't notice anything amiss until the other jurors left. RP at 119. Defense council apparently also did not see, saying “[s]omebody pointed it out to me about a minute before we sent them out.” *Id.* Only the Defendant claimed that “[s]he has been sleeping for quite a while.”² *Id.* The court then moved on to another matter and then took a break. RP II at 124.

After the break the Defendant's trial council moved for a mistrial based on the sleeping juror. The trial court denied the motion, stating “I don't know that anybody had any great timing on it,” but ruled that “just a minute or so of a jury [*sic*] dosing off” was not the basis for a mistrial. RP II at 124-25.

The Defendant now asks this Court to believe his self-serving statement that she had been “sleeping for some time,” when it is clear that

² There is nothing in the record to indicate the Defendant said anything about the juror sleeping beforehand.

the trial court did not. This is contrary to the long standing presumption that the trial judge, who is physically present, is in the best position to make such a determination. *See State v. Noltie*, 116 Wn.2d 831, 839, 809 P.2d 190 (1991). Essentially, this is a case of credibility, and “[c]redibility determinations are for the trier of fact and are not subject to review.” *State v. Thomas*, 150 Wn.2d 821, 874, 83 P.3d 970, 997 (2004) (citing *State v. Camarillo*, 115 Wn.2d 60, 71, 794 P.2d 850 (1990).)

The Defendant argues that the testimony of his mother and the juror proves that the trial court’s factual determination was wrong. But the Defendant’s mother essentially parroted what her son had said earlier. RP I at 33. If the Defendant and her mother had seen the juror sleeping for “some time” or twenty minutes, they said nothing about it until the court noticed the juror did not get up with her cohort.

And the trial court knew Defendant was impeachable, having been convicted of several crimes of dishonesty, including tampering with witnesses. CP at 15. His statements should be suspect even when they are not so self-serving.

The trial court found that the juror in question had done no more than doze off for a minute or two, and that was not enough for a mistrial. This Court should not second-guess that determination based on a cold

record, but instead defer to the trial judge's finding and uphold the conviction.

The trial court's remark does not establish the court used an incorrect standard.

The Defendant also claims that the trial court denied the motion because of a belief that only the State could be prejudiced. The Defendant makes this claim based upon the trial court's remark, "I will note that it was during the State's presentation. I think they would be more concerned about it than anything...."

The Defendant misunderstands the trial court's comment. The trial court's point was that it was the State, the party with the burden of proof, who should be the most concerned about a juror sleeping through its evidence, but here it was only the Defendant who was claiming the juror fell asleep. Essentially, this comment was simply pointing out how spurious the Defendant's claim was, especially given that, if true, the Defendant said nothing until someone else noticed it.

Because the trial court decided not to grant the mistrial because it was unconvinced that the juror had slept through a substantive portion of the trial, there was no error. Denial of a motion for a mistrial is reviewed only for abuse of discretion. *State v. Hopson*, 113 Wn.2d 273, 284, 778 P.2d 1014, 1019 (1989) (citing *State v. Mak*, 105 Wn.2d 692, 701, 719,

718 P.2d 407, *cert. denied, Mak v. Washington*, 479 U.S. 995, 107 S.Ct. 599, 93 L.Ed.2d 599 (1986).). There was no abuse of discretion based upon the trial court's findings. This Court should defer to that finding and uphold the conviction.

Prejudice must be established in the case of an inattentive juror.

The Defendant argues that an inattentive juror is presumed to be prejudicial. Brief of Appellant at 21. His argument takes the form of a syllogism: *State v. Jordan* defines sleeping by a juror to be misconduct, and *State v. Boling*, 131 Wn. App 329, 127 P.3d 740 (2006) states that misconduct is presumed prejudicial. Therefore a sleeping juror must be presumed prejudicial. However, Washington Supreme Court decisions on inattentive jurors holds that specific prejudice must be shown. Further, this stretches the holdings of *Jordan*, and *Boling*.

The Supreme Court has required a showing of specific prejudice.

In *In re Caldellis* the defendant claimed that the judge and multiple jurors slept during his trial, and asserted that this was structural error. *Caldellis*, 187 Wn.2d 127, 144-45, 385 P.3d 135 (2016). In support of his factual claims the defendant submitted affidavits of relatives and his trial attorney. *Id.*

The Washington Supreme Court rejected the defendant's contention, holding that, "[a] sleeping juror may prejudice the defendant's due process rights and right to an impartial jury" but that the defendant had failed to "state how long the jurors slept or what specific testimony they missed by sleeping... he has not shown specific evidence of prejudice due to the drowsiness of any juror." *Id.* at 146 (emphasis added, citing *State v. Hughes*, 106 Wn.2d 176, 204, 721 P.2d 902 (1986).)

The Supreme Court also noted, with respect to the allegation regarding the sleeping judge, that the defendant had not shown the judge slept through any critical portions of the trial, or failed to make a ruling, or made a ruling that was impacted by sleeping during trial. *Id.* at 145. The *Caldellis* court also declined to hold that even the sleeping judge was structural error, observing, "very few errors are structural, and very few errors are presumed prejudicial." *Id.* at 145 (citing *In re Khan*, 184 Wn.2d 679, 691, 363 P.3d 577 (2015).)

The Supreme Court denied the defendant's request for a reference hearing, holding that his claim was only "conclusory" and that he had only "shown a dispute of fact as to a sleeping judge and jurors". *Id.* at 146-47.

Just as in *Caldellis*, here the Defendant here has only shown a dispute of fact as to whether the juror slept for any substantive amount of

time. As in *Caldellis*, the Defendant fails to specifically show how he was prejudiced. This Court should specifically state that *Caldellis* requires a showing of specific prejudice if a juror had been inattentive.

Similarly, in *State v. Hughes* the drowsiness of the jurors caused the trial court to stand and stretch every hour. *Hughes*, 106 Wn.2d 176, 204, 721 P.2d 176 (1986). One juror was replaced, and more frequent breaks were granted upon request. *Id.*

On appeal, the defendant claimed prejudice because of this inattentiveness, but the Supreme Court held that the trial court had properly addressed the issue and noted that, “[n]othing suggests that the jury drowsiness problem was such as to prejudice the defendant.” *Id.* Again, the Washington Supreme Court required a showing of prejudice, which is contrary to the cases the Defendant argues control this issue.

Jorden and Boling.

Contrary to the Defendant’s conclusion, *State v. Jorden* did not expressly rule that a juror who falls asleep commits misconduct. In *Jorden* the defendant claimed that the court erred by not questioning an apparently sleeping juror before dismissing her. *Jorden* at 226. The trial court in *Jorden* had decided that RCW 2.36.110 governed the issue and took testimony from the bailiff and a detective who had been seated at

counsel table. *Id.* at 225. The trial court denied the defendant’s motion to call the juror in question. *Id.*

On appeal, the defendant argued, “...the court should have questioned the juror to determine if misconduct had occurred...” *Id.* However, this Court ruled that the trial court retains discretion in how to hear and resolve such an issue, and mentioned in passing that, “[t]he test [for removing a juror] is whether the record establishes that the juror engaged in misconduct.” *Id.* at 229.

The State anticipates the Defendant will argue that this is akin to this Court declaring inattentiveness is misconduct. However, RCW 2.36.110 authorizes the removal of any juror who “has manifested unfitness as a juror” due to “...inattention or any physical or mental defect....”

Falling asleep makes a juror unfit, but “misconduct” implies a willful, volitional act. This distinction becomes important when considering the second prong of the Defendant’s argument, *State v. Boling*. In *Boling* the defendant was on trial for manslaughter after he punched and kicked a highly intoxicated man several times. *Boling*, 131 Wn.2d 329, 330, 127 P.2d 740 (2006). A medical examiner testified that

the cause of death was a brain injury caused by blunt force trauma to the head. *Id.* at 330-31.

One of the jurors was a former biology professor who was unimpressed by the medical examiner, and decided for himself that the brain swelling was insufficient to cause death. *Id.* at 331. That juror performed internet research, and convinced himself, based on his research, that alcohol poisoning was the cause of death. *Id.* Nevertheless, the juror voted to convict under his own legal theory that the defendant's failure to prevent the victim from drinking, despite a court order that the victim not drink, made the defendant responsible for the death. *Id.* After learning of the juror's conduct, the trial court ordered a new trial. *Id.* at 330.

Division 3 of this Court upheld the order for a new trial, holding that, “[j]uror use of extraneous evidence is misconduct and entitles a defendant to a new trial, if the defendant has been prejudiced.” *Id.* at 332 (citing *State v. Briggs*, 55 Wn.App. 44, 55, 776 P.2d 1347 (1989), emphasis added.)³

³ *Briggs* was a case in which a juror was misleading in *voir dire* and later introduced extraneous information into trial. *Briggs*, 55 Wn.App. 44, 54, 776 P.2d 1347 (1989.) As in *Boling*, the predicate question was whether the extraneous evidence inheres in the verdict. *Id.* at 55; *Boling* at 332-33. Any doubts in that inquiry are resolved against the verdict, resulting in the presumption of prejudice this Defendant now claims should be the standard in an inattentive juror case.

Later in the same opinion, in discussing the various burdens in the case, the *Boling* court said, “Once juror misconduct is established, prejudice is presumed. To overcome this presumption, the State must satisfy the trial court that, viewed objectively, it is unreasonable to believe the misconduct could have affected the verdict.” *Boling* at 332 (citing *State v. Briggs*, 55 Wash.App. 44, 55, 776 P.2d 1347 (1989).)

There are two important distinctions between *Boling* and the instant case: first, the record in *Boling* made it clear that the action of the juror injected extrinsic information into deliberations, which then inhered in the verdict. Second, the juror in *Boling*’s matter acted volitionally and in violation of the court’s instructions. The juror’s act in *Boling* could not be characterized in any other terms than misconduct. Not so in the instant case.

Here, the Defendant asks this Court to apply the same standard to a juror allegedly involuntarily dozing off as is applied to a juror willfully disregarding the trial court’s instructions and the oath of jurors.⁴ Essentially, it would make the accusation of a sleeping juror a *per se* structural error. Not only would such a ruling conflict with Supreme

⁴ See WPIC 1.01.

Court precedent on the issue, it would discourage people from wanting to serve on juries.

If this Court chooses to second-guess the trial court's factual finding and believe the Defendant instead, it should expressly rule that inattentiveness is not misconduct that is presumed to be prejudicial. In this case, since the Defendant fails to point to specific prejudice, this Court should then affirm his conviction.

Even if the juror had slept for longer than a minute, there would be no prejudice.

Even if the juror had been "asleep for some time," she would have only missed foundational testimony for exhibits which were then admitted.

The record indicates that the break was called at 1:50 PM. Supp. CP at 1. Court had reconvened at 1:13 PM. *Id.* During that time, Deputy Gow was the only witness, and the State admitted Exhibits 1, 31, 11, 24, 13, 18, 22, 21 and 3. *Id. and see* RP II at 99-119. All of these exhibits were available to the jurors during their deliberations, so even if she had been asleep, she could examine those exhibits during deliberations. Prejudice is extremely unlikely. The verdict should be upheld.

2. The State does not object to striking the Defendant's now-discretionary legal financial obligations.

The State does not object to modifying the Defendant's legal financial obligations in accordance with the Laws of 2018, ch. 269, § 17, *State v. Ramirez*, 191 Wn.2d 732, 426 P.3d 714 (2018). The Defendant will be in prison for many decades to come and is obviously indigent.

CONCLUSION

The Defendant asks this Court to ignore the trial court's factual finding, believe his self-serving statement, presume prejudice and reverse his conviction. This would be a radical departure from precedent.

The judge who was physically present has long been held to be in the best position to observe and determine what happened, which is why appellate courts have long deferred to the trial court to make such determinations. A cold record cannot convey important information available to a person who is actually present. In this case, the trial court did not believe that the juror had done anything but doze off for a minute or two, and clearly did not believe the Defendant. To ignore that is to set a dangerous precedent and invites a flood of claims of sleeping jurors.

Even if the juror had fallen asleep, this Court should not presume prejudice. It is contrary to Washington Supreme Court case law on the

issue. If this Court goes so far as to believe the Defendant over the trial court, it should rule that specific prejudice must be shown if a juror falls asleep during trial or is otherwise inattentive.

And that showing is unlikely to exist here. Even if the juror had slept through all 37 minutes of Deputy Gow's testimony after lunch, she would have missed the introduction of exhibits that she had the opportunity to examine later in the jury deliberation room.

Not every juror can hear and remember every word of testimony. A juror who dozed off even for a few minutes might still miss less, in sum, than a juror who did not fall asleep at all, but took copious notes and missed inadvertently missed important testimony. Prejudice should not be presumed, and the trial court's determination of what actually happened should be respected.

For these reasons, this Court should uphold the Defendant's conviction.

DATED this 18th day of July, 2019.

Respectfully Submitted,

BY: 

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JFW /

GRAYS HARBOR COUNTY PROSECUTING ATTORNEY'S OFFICE

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