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No. 53157-7-II

**Court of Appeals, Div. II,
of the State of Washington**

State of Washington,

Respondent,

v.

Johnny W. Miller,

Appellant.

Brief of Appellant

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1. Introduction

Johnny Miller was accused of an ongoing pattern of child molestation and rape based on the allegations of A.G., the daughter of Miller's ex-girlfriend. Miller waived his right to a jury, and the case was tried to the judge. During key testimony on both mornings of trial, the judge appeared inattentive and tired, closing his eyes for long periods. Miller stated that he saw the judge doze off. Although the judge denies it, the video recording of the trial shows multiple instances of the judge with his eyes closed and showing signs of sleepiness during the presentation of testimony.

A bench trial with a sleeping judge is no trial at all. It is structural error in violation of Miller's constitutional right to a fair trial. This Court should reverse the conviction and remand for a new trial.

2. Assignments of Error

Assignments of Error

1. The trial court judge fell asleep or was otherwise inattentive during key testimony in a bench trial.

Issues Pertaining to Assignments of Error

1. A judge's absence from the bench during trial is structural error requiring reversal and remand for new trial. Here, the trial judge in a bench trial was absent by falling asleep during key testimony. Should

this Court reverse the convictions and remand for a new trial? (assignment of error 1)

3. Statement of the Case

3.1 Miller was accused of a pattern of child molestation and rape based on the allegations of A.G., the daughter of his ex-girlfriend. Miller waived his right to a jury and proceeded with a bench trial.

Johnny Miller lived with Stephanie Wagner in a dating relationship from 2013 to 2017. 1 RP 76-77, 79. Wagner's two children from a prior marriage, B.G. and A.G., lived with her and Miller under a 50/50 parenting plan. 1 RP 75-76.

Three months after Miller moved out, A.G. confided to a friend at school that Miller had touched her inappropriately and raped her. 1 RP 28-30. The friend told school officials and an investigation was opened. 1 RP 32, 130, 135. In a forensic interview, A.G. disclosed that Miller had sexual contact with her. 1 RP 172-73. She described it as happening many times over three years, including full intercourse. 1 RP 177-78.

The State charged Miller with three counts of child rape and two counts of child molestation. CP 1-3. All counts included aggravating factors of an ongoing pattern of sexual abuse and abuse of a position of trust. CP 1-3. Miller waived his right to a jury and proceeded to a bench trial. *See* CP 20.

3.2 While A.G. testified the first morning of trial, the trial court judge fell asleep.

A.G. was the first witness on the first day of trial. 1 RP 3. She testified that when she was eight years old, Miller invited her into the bedroom, had her remove her clothes, and had sex with her. 1 RP 7-9. She testified that it happened multiple times over the course of three years until Miller moved out. 1 RP 12-14.

While A.G. was testifying, Miller observed the judge dozing off. *See* 2 RP 248 (Miller spoke out at sentencing hearing). The video recording of the trial shows the judge with his eyes closed on multiple occasions, yawning on multiple occasions, and appearing to wake up from sleep at one point.¹ *See* Trial Video of 12/17/18 at 9:20:59am – 9:21:02am (appearing to wake from sleep); 9:33:38am – 9:33:41am (eyes closed as if sleeping); 10:34:35am – 10:34:36am (yawning); 10:39:13am – 10:39:15am (sniff/yawn, eyes closed); 10:56:27am – 10:56:28am (yawn during A.G.'s mother's testimony).

¹ Although the courtroom has multiple cameras, including one focused on the judge, the recording alternates from one view to another based on the sound that is captured on the courtroom microphones, so that the video usually shows the person who is speaking at any given time. As a result, the trial video rarely shows the judge. Nevertheless, the recording does show the judge in a few key moments with eyes closed, yawning, rubbing his face or eyes, or otherwise appearing to be asleep or just waking from sleep.

3.3 While A.G.'s forensic interview was played in court the second morning of trial, the trial court judge fell asleep again.

The second morning of trial, a recording of A.G.'s forensic interview was played in court. 1 RP 156-87. The judge's eyes were closed for much of this playback, and he again showed signs of sleeping. *See* Trial Video of 12/18/18 at 9:18:58am – 9:19:00am (eyes closed); 9:24:04am – 9:24:07am (eyes closed); 9:24:42am – 9:24:46am (eyes closed); 9:25:35am – 9:25:39am (eyes closed); 9:27:31am – 9:27:36am (eyes closed); 9:27:42am – 9:27:45am (momentarily opens eyes then closes them again); 9:28:32am – 9:28:36am (closes eyes after taking a drink); 9:29:08am – 9:29:18am (rubs sleep from face, eyes closed); 9:30:08am – 9:30:10am (moves in seat, eyes closed); 9:39:08am – 9:39:11am (closes eyes); 9:39:54am – 9:39:57am (rubs sleep from eyes); 9:44:04am – 9:44:08am (eyes closed); 9:48:46am – 9:48:50am (eyes closed); 9:54:41am – 9:54:46am (rubs eyes).

3.4 At the conclusion of trial, the trial court found Miller guilty of all counts and aggravating factors and sentenced him to an indeterminate sentence of 360 months to life.

Miller did not testify or present any witnesses. 2 RP 215. After closing arguments, the judge gave his oral ruling. 2 RP 234-38. The judge found A.G. credible and convincing beyond a reasonable doubt that she was abused on multiple occasions. 2 RP 235. The judge found that there were at least five occasions

of sexual intercourse or sexual contact to prove the elements of the charged crimes. 2 RP 236-37. The judge found that there was an ongoing pattern of abuse and abuse of a position of trust, establishing the aggravating factors. 2 RP 237-38. The judge found Miller guilty on all counts, with aggravating circumstances. 2 RP 238.

At sentencing, Miller denied committing the crimes. 2 RP 248. He also informed the judge, “During my trial I watched – I seen with my own eyes you dozed off a couple times in my trial.” 2 RP 248. After Miller completed his statement, the judge responded, “Mr. Miller first of all I [didn’t] nod off during the trial no matter what you think.”² 2 RP 250.

The judge imposed an indeterminate sentence of 360 years to life. 2 RP 251.

² It appears there may be an error in the transcript, which reads, “I did nod off during the trial...” It would be more consistent with the context and grammatical structure of the judge’s comment if he had said, “I **didn’t** nod off ... no matter what you think.”

4. Argument

4.1 A bench trial in which the judge falls asleep is no trial at all. It is structural error in violation of Miller’s constitutional right to a fair trial. This Court should reverse the convictions and remand for a new trial.

“It is well established that a criminal defendant has a right to a public trial as guaranteed by our state and federal constitutions.” *State v. Paumier*, 176 Wn.2d 29, 34, 288 P.3d 1126 (2012) (citing U.S. Const. amend. VI; Wash. Const. art. I, § 22). “The accused shall have the right ... to have a speedy public trial.” Wash. Const. art. I, § 22. There is no more fundamental right in the United States. *State v. Johnson*, 53 Kan. App. 2d 734, 735, 391 P.3d 711 (2017).

“Some fundamental constitutional errors so intrinsically harm the accused as to require automatic reversal. The law labels such errors as ‘structural errors.’ Constitutional principles deem an error ‘structural’ when the mistake ‘affect[s] the framework within which the trial proceeds, rather than simply an error in the trial process itself.’ A structural error prevents a criminal trial from reliably serving its function as a vehicle for determination of guilt or innocence, and no [resulting] criminal punishment may be regarded as fundamentally fair.” *State v. Winborne*, 4 Wn. App. 2d 147, 170-71, 420 P.3d 707 (2018)

(quoting *Arizona v. Fulminante*, 499 U.S. 279, 310, 111 S.Ct. 1246, 113 L.Ed.2d 302 (1991)).

Structural error, including deprivation of the public trial right, is not subject to harmless error analysis. *State v. Wise*, 176 Wn.2d 1, 14, 288 P.3d 1113 (2012). “A defendant should not be required to prove specific prejudice in order to obtain relief.” *Id.* The remedy for a structural error is reversal and remand for a new, fair trial. *Id.* at 19.

An error that denies a defendant his right to an impartial adjudicator, “be it judge or jury,” is structural error. *Winborne*, 4 Wn. App. 2d at 171 (citing *Gomez v. United States*, 490 U.S. 858, 876, 109 S.Ct. 2237, 104 L.Ed.2d 923 (1989)).

Structural error, including violation of the right to a fair trial, is per se prejudicial, even where the defendant failed to object at trial. *Wise*, 176 Wn.2d at 18. Structural error is a special category of “manifest error affecting a constitutional right,” which a defendant can raise for the first time on appeal under RAP 2.5(a). *Paumier*, 176 Wn.2d at 36.

“Deprivation of the public trial right may not appear to cause prejudice to any one defendant; in fact, it may not prejudice a single defendant at all. ... We recognize that any one deprivation of the public trial right will not likely devastate our system of justice or even necessarily cause a particular trial to be unfair (though of this latter part we can never be sure). But

letting a deprivation of the public trial right go unchecked ... would erode our open, public system of justice... It is the framework of our system of justice that we must protect against erosion of the public trial right.” *Wise*, 176 Wn.2d at 17.

Miller has not been able to locate any Washington precedent addressing the structural error of a trial judge falling asleep during the trial, but a recent opinion of the Kansas Court of Appeals provides persuasive authority. *See State v. Johnson*, 53 Kan. App. 2d 734, 391 P.3d 711 (2017).³

The *Johnson* court, addressing the issue of a judge who fell asleep during a criminal jury trial, observed, “a trial by jury is a trial ‘in the presence and under the superintendence of a judge empowered to instruct [the jury] on the law and to advise them on the facts, and ... to set aside their verdict, if, in his opinion, it is against the law or the evidence.’” *Johnson*, 53 Kan. App. 2d at 738 (quoting *Capital Traction Co. v. Hof*, 174 U.S. 1, 13–14, 19 S.Ct. 580, 43 L.Ed. 873 (1899)).

The court then reasoned, “How can a sleeping judge supervise anything other than his or her dreams? Is the trial really ‘in the presence’ of a sleeping judge? Obviously, this issue defies harmless error analysis.” *Johnson*, 53 Kan. App. 2d at 738. “There can be no court without a judge, and he cannot even

³ The Kansas Supreme Court granted review of the case on Sept. 29, 2017, but Miller is unable to locate any resulting opinion.

temporarily relinquish control of the court or the conduct of the trial. It is necessary that he should hear all that transpires in the trial in order that he may intelligently review the proceedings upon the motion for a new trial. It is especially important that he should be visibly present every moment of the actual progress of a criminal trial where the highest penalty of the law may be imposed. The defendant is entitled to be tried in a court duly constituted, and if the presiding judge abandons the trial or relinquishes control over the proceedings the accused has good cause to complain.” *Id.*

The *Johnson* court agreed with Johnson that “a sleeping judge is an absent judge” because “a sleeping judge does not and cannot preside over a trial.” *Johnson*, 53 Kan. App. 2d at 739. The structural error found in *Johnson* is even more egregious here, where there was no jury and the trial court judge was charged with the duty of finding the facts from the evidence presented. It cannot be said that Miller received a fair trial where the sole fact-finder fell asleep during the presentation of evidence.

The decision of the Third Circuit in *United States v. Mortimer*, 161 F.3d 240 (3d Cir. 1998), is also instructive. In *Mortimer*, the trial court judge disappeared from the courtroom during the defendant’s closing argument. *Mortimer*, 161 F.3d at 241. The Third Circuit held that the judge’s absence was

structural error requiring a new trial. *Id.* The court reasoned, “A trial consists of a contest between litigants before a judge. When the judge is absent at a ‘critical stage’ the forum is destroyed. There is no trial. The structure has been removed. There is no way of repairing it. The framework within which the trial proceeds has been eliminated. The verdict is a nullity.” *Mortimer*, 161 F.3d at 241 (citing *Gomez v. United States*, 490 U.S. 858, 873, 109 S.Ct. 2237, 104 L.Ed.2d 923 (1989); *Arizona v. Fulminante*, 499 U.S. 279, 309-10, 111 S.Ct. 1246, 113 L.Ed.2d 302 (1991)).

Here, the judge’s absence, by sleeping through portions of the central testimony in the case, was structural error. Especially where the judge was also the sole fact-finder, it must be said, as in *Mortimer*, that there was no trial. There is no way to repair the judge’s absence from such a critical stage of the trial. The trial is a nullity. The convictions must be reversed and the case remanded for a new, fair trial.

5. Conclusion

A bench trial in which the judge falls asleep is no trial at all. It is structural error requiring remand for a new, fair trial. This Court should reverse the convictions and remand for a new trial.

Respectfully submitted this 20th day of September, 2019.

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Certificate of Service

I certify, under penalty of perjury under the laws of the State of Washington, that on September 20, 2019, I caused the foregoing document to be filed with the Court and served on counsel listed below by way of the Washington State Appellate Courts' Portal.

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I further certify that on September 20, 2019, I served the Brief of Appellant and a copy of RAP 10.10 on the Appellant, Johnny Miller, by depositing a copy in the U.S. mail, postage paid, to the following address:

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SIGNED at Lacey, Washington, this 20th day of September, 2019.

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