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Court of Appeals
Division II
State of Washington
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NO. 53157-7-II

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

STATE OF WASHINGTON, Respondent

v.

JOHNNY WESLEY MILLER, Appellant

FROM THE SUPERIOR COURT FOR CLARK COUNTY
CLARK COUNTY SUPERIOR COURT CAUSE NO.17-1-02391-4

BRIEF OF RESPONDENT

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RESPONSE TO ASSIGNMENTS OF ERROR

I. There is no evidence the trial judge slept during the trial and thus Miller cannot prove there was error.

STATEMENT OF THE CASE

Johnny Miller (hereafter 'Miller') was charged by information with three counts of Rape of a Child in the First Degree and two counts of Child Molestation in the First Degree, all against victim A.G., between the time period of September 19, 2014 and November 6, 2017. A bench trial was held on December 17, 2018 and December 18, 2018 in Clark County Superior Court before the Honorable Judge Robert Lewis. The Clark County Superior Court video records the proceedings using microphones that are connected to multiple cameras throughout the courtroom; the microphones picking up noise tell the cameras which one to record at any given moment. The judge was videotaped therefore when he made sound from the bench, or sound was picked up on a microphone near his bench, that caused the multi-camera unit to switch to the camera that captures the judge. Thus the judge was not continuously videotaped during the trial.

The judge convicted Miller of all five counts after hearing the testimony of the witnesses and the evidence presented. CP 20. At sentencing, Miller accused the judge of “doz[ing]” during the trial, but the Judge responded that he had not nodded off during the trial. *See* Tape of

Proceedings, 1/23/19 at 3:48:31pm to 3:48:35pm. In the instant appeal Miller alleges the trial judge was sleeping during the trial and thus created structural error which requires reversal. The State hereby submits its response.

ARGUMENT

I. There is no evidence the trial judge slept during the trial and thus Miller cannot prove there was error.

Miller claims the trial judge slept during parts of his trial and thus created structural error which requires reversal. The trial judge was not asleep at all during his trial and therefore there was no error. Miller's claim fails.

While a sleeping judge *may* be structural error, Miller has failed to show from the record below that the trial judge was sleeping. *See In re Personal Restraint of Caldellis*, 187 Wn.2d 127, 145-46, 385 P.3d 135 (2016). Thus Miller has failed to show any error. Miller cites to 19 instances during the trial in which he claims the judge was asleep or there is evidence that the judge is asleep. Each instance shows the judge is awake. Merely closing one's eyes, blinking, yawning, does not establish that a person was unconscious and thus absent from the proceedings.

Miller claims the judge was asleep based on multiple single second or a few seconds view of the judge on the bench during the trial. On

December 17, 2018 at 9:20:59am to 9:21:00am, one second, it appears the judge's eyes are closed. However, at that same exact moment, the judge is responding to an issue in the trial court, speaking clearly and appropriately in direct response to an issue raised. It is clear that despite the fact that during part of the one second time frame the judge's eyes were closed, he was not asleep. Miller next claims the judge was asleep at 9:33:38am to 9:33:40am; during this time the judge is seen folding his hands, another voluntary act which is not accomplished when one is asleep. At 10:34:35am to 10:34:36am, one second of time, Miller claims the judge is yawning. However, the judge is putting down a coffee cup and then quickly opens his mouth, but the camera pans away before it's clear whether the judge is yawning or doing something else. Furthermore, a yawn is not evidence of unconsciousness, but may be evidence of fatigue, boredom, or may simply be a yawn in response to another person yawning nearby.¹ In two seconds at 10:39:13am to 10:39:15am, Miller claims the judge yawns with closed eyes. However, during those two seconds we first see the judge with his eyes open, hand on cheek, then he quickly opens his mouth, closes his eyes, and then opens them again. Scientists have shown

¹ It is recognized that yawning can be contagious and induce a person to yawn even when they are not themselves tired. *See* ScienceDaily, "Yawning: Why is it so contagious and why should it matter?" Available at: www.sciencedaily.com/releases/2017/08/170831123031.htm.

that the average person blinks 15 to 20 times per minute.² The judge having his eyes open, then closed, then open again, suggests the judge was merely blinking and not sleeping. At 10:56:27am to 10:56:28am Miller claims the judge yawned. What we see is the judge quickly covering his mouth. While it may be yawn, once again, that is not evidence that the judge was sleeping during the trial.

Miller claims there is evidence the following day that the judge was sleeping as well. At 9:18:58am to 9:19:00am on December 18, 2018 the judge has his eyes open, then closed, then open again in the span of two seconds. Additional evidence that the judge blinks, not that the judge was asleep. At 9:24:05am to 9:24:07am the judge, though he has his eyes closed, is physically moving around in his seat, suggesting he is not asleep. At 9:24:42 to 9:24:46 he has his eyes closed; however many people think and process what they're hearing more easily with their eyes closed.³ At 9:25:35am to 9:25:39am, the judge is moving around in his seat, evidencing the fact that he is not asleep. While Miller claims the judge was asleep at 9:27:42am to 9:27:45am, the judge opens his eyes right in the middle of that three second time span, showing again he was

² HuffPost, "Why do we blink so much? Blinking Provides Mental Rest, New Research Suggests" available at: www.huffpost.com/entry/why-do-we-blink-so-much-mental-rest_n_2377720.

³ Closing one's eyes can boost one's memory or help one retain information better. *See* ScienceDaily, "Closing your eyes boosts memory recall, new study finds." Available at: www.sciencedaily.com/releases/2015/01/150116085606.htm.

not asleep. At 9:28:32am to 9:28:36am, the judge puts a coffee cup down, again showing he was not asleep. At 9:29:08 to 9:29:18, what Miller characterizes as the judge rubbing sleep from his eyes, shows the judge first rubbing his eyes, then scratching his nose as his eyes are open. Once again this shows the judge was not asleep. At 9:30:08am to 9:30:10am the judge moves around, showing he is not asleep. At 9:39:08am to 9:39:11am, the judge's eyes are open and then they close, showing he is not asleep. At 9:39:54am to 9:39:57am the judge rubs an eye as if there is something in it and then is shown with his eyes open, thus showing he is not asleep. Miller claims the judge was asleep between 9:44:04am to 9:44:08am, however, the judge's eyes are open during part of this time, again showing he is not asleep. At 9:54:41am to 9:54:46am the judge rubs an eye and opens his eyes, showing he is not asleep.

Miller's claim the judge is asleep is based on the judge blinking, rubbing his eyes, possibly yawning a time or two, over the course of a couple days. It can be presumed that Miller scoured the record for signs the judge was sleeping and these time allegations contained in his brief are the most or best he could come up with. These times simply do not show what Miller claims they show.

Additionally, the judge denied that he was asleep during the trial at the defendant's sentencing. The judge stated, "Okay. Mr. Miller, first of

all I didn't nod off during the trial no matter what you think." Video of Proceedings 1/23/19 at 3:48:31pm to 3:48:35pm. Thus if this were a personal restraint petition, the State would anticipate having affidavits from the parties involved, possibly including the trial judge, showing that the judge was not asleep. Miller would also likely have an affidavit from himself describing what he observed which made him conclude that the judge was asleep. However, this is not a personal restraint petition and Miller has to show from the record before this Court that the judge was asleep, something he has failed to do. A few times of the judge blinking, yawning, or appearing for a second or two with his eyes closed, between these times during which the judge was also ruling on issues, moving about, and making deliberate movements with his body simply does not show that the judge was asleep. Miller makes a factual allegation that is not supported by the record of the direct appeal. Therefore the issue may not be addressed in the appeal. *See State v. Bugai*, 30 Wn.App. 156, 158, 632 P.2d 917, *review denied*, 96 Wn.2d 1023 (1981). Perhaps this issue is better brought forth in a personal restraint petition wherein the parties could produce additional evidence for the Court to consider, but simply upon the record below, there is an insufficient factual basis to find the trial judge was asleep. Accordingly, Miller's claim fails.

CONCLUSION

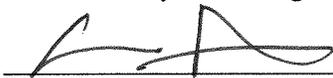
The trial court should be affirmed in all respects.

DATED this 19th day of December, 2019.

Respectfully submitted:

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