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Court of Appeals
Division II
State of Washington
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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.

Reply Brief of Appellant

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Table of Contents

1. Reply Argument	1
1.1 The video record of the trial contains evidence that the judge fell asleep or was otherwise inattentive during key portions of the bench trial. This Court should reverse the convictions and remand for a new trial.....	1
2. Conclusion	4

Table of Authorities

Cases

<i>In re Restraint of Caldellis</i> , 187 Wn.2d 127, 385 P.3d 135 (2016)	1
<i>State v. Bugai</i> , 30 Wn. App. 156, 632 P.2d 917 (1981)	3
<i>State v. Jackson</i> , 145 Wn. App. 814, 187 P.3d 321 (2008)	3
<i>State v. Johnson</i> , 53 Kan. App. 2d 734, 391 P.3d 711 (2017)	1

1. Reply Argument

1.1 The video record of the trial contains evidence that the judge fell asleep or was otherwise inattentive during key portions of the bench trial. This Court should reverse the convictions and remand for a new trial.

In his opening brief, Miller described and cited to numerous portions of the video record where the trial judge could be seen showing signs of falling asleep, waking from sleep, shifting during sleep, dozing off, or otherwise being inattentive during the presentation of evidence in his bench trial. Br. of App. at 3-4. Miller set forth authority that the absence of a judge from trial—whether physically absent or simply not paying attention, particularly by dozing off—is structural error requiring reversal and remand for a new trial. Br. of App. at 6-10 (citing, *e.g.*, *State v. Johnson*, 53 Kan. App. 2d 734, 391 P.3d 711 (2017)).

The State does not take issue with Miller’s argument but only with his evidence. *See, e.g.*, Br. of Resp. at 2 (“a sleeping judge may be structural error”). The State refers to *In re Restraint of Caldellis*, 187 Wn.2d 127, 385 P.3d 135 (2016), in which the court denied an evidentiary hearing because Caldellis failed to demonstrate “how the judge’s alleged sleeping caused specific error or what specific testimony was missed [by the jury].” *Caldellis*, 187 Wn.2d at 146. Here, Miller has

demonstrated the specific error and the testimony that was missed: In a bench trial, the trial judge fell asleep or was otherwise inattentive during the testimony of A.G. on the first day of trial and during playback of the forensic interview with A.G. on the second day of trial.

Acting as the sole finder of fact at Miller's trial, the trial judge missed key portions of the testimony of the victim—the only witness who testified to the acts Miller was convicted of committing. The judge could not possibly determine Miller's guilt beyond a reasonable doubt after having missed key portions of the victim's testimony. The error is structural and requires remand for a new trial.

The State faults Miller's evidence for failing to show the judge in a state of being fully asleep. This is, of course, because of the technical limitations of the trial court's video recording system, which the State acknowledges. *See* Br. of Resp. at 1. Because, as the State concedes, the judge only appears on video when he made sound loud enough to be picked up on the microphone near his bench, the direct evidence is limited.

But just as circumstantial evidence must often be used to prove a criminal defendant's mental state, this Court can view the short snippets of the judge yawning, closing his eyes, rubbing his face, and appearing to wake up from sleep as circumstantial evidence that the judge was, in fact, asleep

during key portions of the testimony when the judge does not appear on camera.

“Circumstantial evidence is as reliable as direct evidence. ‘Circumstantial evidence is evidence of facts or circumstances from which the existence or nonexistence of other facts may be reasonably inferred from common experience.’ A trier of fact may rely exclusively upon circumstantial evidence to support its decision.” *State v. Jackson*, 145 Wn. App. 814, 818, 187 P.3d 321 (2008) (quoting WPIC 5.01).

There need not be direct evidence before this Court can consider whether the trial judge caused structural error requiring a retrial. In this regard, the State’s reliance on *State v. Bugai* is misplaced. The court in *Bugai* said only that evidence that is not in the record will not be considered. *State v. Bugai*, 30 Wn. App. 156, 158, 632 P.2d 917 (1981). Here, in contrast to *Bugai*, the evidence **is in the record**. The video record of the trial, though unfortunately limited by the features of the recording system used, contains ample circumstantial evidence from which this Court can infer that the trial judge was, in fact, asleep or otherwise inattentive during key portions of the trial.

As noted in *Jackson*, this Court may rely exclusively on the circumstantial evidence presented in the video record to reasonably infer from common experience that the judge was, in

fact, asleep. Circumstantial evidence is as reliable as direct evidence.

2. Conclusion

This Court should review the video record and reasonably infer that the trial judge was asleep or otherwise inattentive during key portions of the trial testimony. The Court should hold that the trial judge's inattentiveness was structural error requiring remand for a new, fair trial. The Court should reverse the convictions and remand for a new trial.

Respectfully submitted this 3rd day of February, 2020.

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I certify, under penalty of perjury under the laws of the State of Washington, that on February 3, 2020, 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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