

NO. 64219-7-I

COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION I

STATE OF WASHINGTON,

Respondent,

v.

YOBACHI FRAZIER,

Appellant.

APPEAL FROM THE SUPERIOR COURT FOR KING COUNTY

THE HONORABLE MICHAEL C. HAYDEN

BRIEF OF RESPONDENT

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COURT OF APPEALS
DIVISION I
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I. ISSUES PRESENTED

1. Did the trial court abuse its discretion when, after monitoring a juror who was allegedly sleeping, it concluded the juror was not sleeping and declined to excuse the juror?
2. Given the trial court's finding that the juror was awake and not sleeping, was a hearing in which the juror would undergo *voir dire* by the court and counsel required?

II. STATEMENT OF THE CASE

A. PROCEDURAL BACKGROUND.

Yobachi Frazer was charged with first degree premeditated murder while armed with a firearm. CP 279-84. He was convicted by a jury as charged.¹ CP 345-46. Frazier received a standard range sentence. CP 39-96. Frazier has now filed a timely appeal. CP 400.

B. FACTUAL BACKGROUND.

1. Overview of shooting.

On July 4th, 2007, at roughly 11:14 p.m., defendant Yobachi Frazier shot Don Dowlen nine times. Dowlen died at the scene.

¹ The State adopts the method of referring to the report of proceedings employed in appellant's opening brief. Frazier's first trial ended in a mistrial when a witness referenced the fact that Frazier had just "got out." 8RP 26-29. The transcript of the second trial begins with Volume 9 of the report of proceedings.

Don Dowlen had gone to the parking lot of Ezell's Chicken in Skyway to celebrate Fourth of July with friends and family. 11RP 29-30; 12RP 160-62. The parking lot of Ezell's was a gathering place for firework vendors and many people from the community. 11RP 30-31; 13RP 28. The area was filled with people enjoying themselves and setting off fireworks. 11RP 30-31, 94; 12RP 162; 13RP 28; 15RP 126.

Dowlen went to Ezell's with Rena Carpenter. 11RP 29-30. Dowlen and Carpenter have a child in common, Don Dowlen III. 11RP 24-26, 91. Other people with Dowlen included: Anthony Godine (his brother-in-law), Deon Dowlen (his brother), Latica Menesse (his cousin), Don Dowlen III (his son), Linda Jackson (Dowlen's fiancée), l'lea Willis (Jackson's daughter), and Ophelia Whitfield (a friend). 11RP 31-33, 35-36, 45; 12RP 4-5, 132-33, 160-62; 14RP 47-49; 15RP 151-53.

Defendant Yobachi Frazier was also at Ezell's. 11RP 37, 42, 92-93; 13RP 30. Frazier set off fireworks near the car of Dowlen's girlfriend, Linda Jackson. 13RP 34-35. Dowlen, upset that the fireworks were too close to Jackson's car, kicked them away. 12RP 142-43, 45, 165; 13RP 35, 39-40; 14RP 57-58. Dowlen and Frazier began to argue verbally, but did not physically fight. 11RP 48, 50-51;

13RP 35, 39-40; 14RP 58-60. Dowlen was “really mad.” 14RP 57. Anthony Godine, Dowlen’s brother-in-law, started to lead Dowlen away from Frazier. 11RP 50-51; 14RP 58-59.

Dowlen did not have a weapon. 11RP 87. Frazier, however, drew a handgun and shot Dowlen multiple times from almost point-blank (two to three foot) range. 11RP 51; 12RP 143; 13RP 38-39, 41-42; 14RP 59; 15RP 130. One of the first shots struck Dowlen in the chest. Frazier kept firing even when Dowlen was on the ground. 11RP 51-52; 13RP 41-43. The autopsy revealed that Dowlen was shot nine times.² 15RP 45-47. Three of the wounds were to the front of Dowlen, three to one side, and three to the back and buttocks. 15RP 60-61.

The Ezell’s parking lot erupted in chaos. 12RP 143; 13RP 43. Carpenter and other friends and family rushed to Dowlen’s side. 12RP 26. King County Sheriff’s deputies arrived and, despite a hostile crowd, controlled the scene. 11RP 123-27; 12RP 96-99, 110-11. Paramedics arrived and attempted to revive Dowlen.

² Nine casings were subsequently recovered by police at the scene and sent to the Washington State Patrol Crime Lab. A tool mark examination was conducted and it was determined that all nine casings had been fired from the same forty caliber Smith and Wesson semi-automatic handgun. 14RP 185-200.

No DNA testing was conducted on the shell casings because the tool mark analysis was inadvertently conducted before the DNA testing. 13RP 146-53.

11RP 127; 12RP 151. They transported Dowlen to a nearby fire station, but Dowlen was already dead. 14RP 131-32.

2. Eye-witness identification of Frazier.

Rena Carpenter knew both Dowlen and Frazier. 11RP 29-30, 37. Carpenter and Frazier had lived in the same neighborhood and she had known Frazier as a casual acquaintance since the 1990's. 11RP 38-40. In 2006, the two became closer, and would frequently see each other at clubs. 11RP 40-41. Carpenter's cousin, Tanielle Jackson, has a child with Frazier. 11RP 37-38; 15RP 182.

At the Ezell's parking lot, prior to the shooting, Carpenter saw Frazier and tried to talk to him. 11RP 42-43. When she called Frazier's name to get his attention, he scolded her for saying his name out loud. 11RP 41-42.

Carpenter was next to Dowlen when the shooting started, but was initially facing away from the shooter. She turned back and saw Frazier shooting Dowlen as he fell to the ground; she could see the "flickering" of the handgun in Frazier's hand. 11RP 51. At the scene, Carpenter told Sheriff's Deputy Hall that "Yobachi" was the shooter. 12RP 112-13. She described Frazier as wearing a Michael Jordan basketball jersey. 11RP 82, 85-86; 12RP 113-14.

After the shooting Carpenter, upset at seeing the father of her child shot and killed before her eyes, was transported to a nearby hospital for treatment for anxiety. 11RP 54; 12RP 114-15; 17RP 37-40. At the hospital, Carpenter was interviewed by King County Sheriff's Detective Mike Mellis. 11RP 54-55, 144-48. Carpenter acknowledged she had been drinking earlier in the day, but did not appear to the detective to be intoxicated.³ 11RP 34-35, 146-47. Carpenter identified the shooter as Yobachi Frazier. 11RP 55.

While still at the hospital, Detective Mike Mellis was sent a montage that should have included a photograph of Frazier, but mistakenly included a photo of Frazier's brother, Chidi Fletcher. 11RP 148-50. Carpenter looked at the montage and stated that Frazier was not among the photos. 11RP 55-56, 151. Later that day, at Carpenter's house, Detective Mellis showed Carpenter a photograph of Frazier. 11RP 59-60, 151-55. Carpenter recognized the photo as that of Frazier and told Detective Mellis that he was the person that shot Dowlen.⁴ 11R 59-60, 77, 151-55.

³ Carpenter admitted to drinking six vodka's earlier in the day, prior to arriving at the parking lot. 11RP 28-30, 33-34. At the hospital, she had a .17 blood alcohol content. 16RP 148-50.

⁴ Carpenter also said she saw a man named Paul Praise with Frazier. 11RP 164. Detectives learned that Paul Praise was an alias for Paul Nagen. 11RP 164. Detective Mellis created a montage including Paul Nagen and showed Carpenter. 11RP 57, 165-66. She correctly identified Nagen. 11RP 166.

Serwa Ashford knew who Yobachi Frazier was (her former boyfriend was friends with Frazier), but had never spoken with him. 13RP 18-21, 81-82. Prior to the shooting in the Ezell's parking lot, Ashford saw Rena Carpenter call out to Frazier and Frazier responded by saying "you shouldn't be calling me that." 13RP 30-31. Ashford also saw Frazier lighting fireworks by Dowlen's girlfriend's car. 13RP 34. Ashford saw Frazier shoot Dowlen. 13RP 15-16, 41-43. Ashford described Frazier as wearing a red and black Michael Jordan jersey.⁵ 13RP 32, 88.

Shortly after the shooting, Ashford told Deputy Hall that Yobachi was the shooter. 12RP 69-70, 115-16. Ashford was then taken for "one-one-one" show-up identification to see if an individual the police had detained was the shooter. But the individual they had detained was not Frazier and Ashford told police they had the wrong person. 13RP 49-51. Ashford was interviewed by Detective Mellis on July 9 and told him that the shooter was "Yobachi." 11RP 159. Detective Mellis showed her a Department of Licensing photograph of Frazier, and she identified him as being the person who shot Dowlen. 11RP 159-63.

⁵ Ashford had consumed vodka and a wine cooler earlier in the day, before coming to Ezell's parking lot. 11RP 67.

Anthony Godine, Dowlen's brother-in-law, was standing right next to Dowlen when he was shot. 14RP 43, 52. Godine did not know Frazier. 14RP 51. Godine had seen a brief interaction between Carpenter and someone prior to the shooting. 14RP 49-51. The person Carpenter spoke to was the same person who shot Dowlen. 14RP 53. Godine told police the shooter was wearing a Michael Jordan jersey. 14RP 53-55. Godine was shown a montage that included Frazier but did not make a pick because he wanted to take care of the matter himself. 14RP 65, 70-71, 130. Godine identified Frazier in court as the shooter. 14RP 65-66.

3. Other witnesses at the scene.

Several witnesses saw the shooting, but could not identify the shooter. All these witnesses, however, remember that the shooter was wearing a Michael Jordan or Chicago Bulls jersey. Other witnesses, who did not see the shooting, saw Frazier earlier in the evening at Ezell's wearing a Chicago Bulls jersey.

Ahmed Harris, visiting from Oregon, witnessed the shooting but could not identify the shooter. 15RP 126-28. Moments later he saw the person he believed was the shooter running past him. He identified this individual as wearing a red Chicago Bulls jersey with Michael Jordan's number (twenty-three) on it. 15RP 147-48.

Ophelia Whitfield saw the shooting but could not identify the shooter. She testified that the shooter was wearing a red and white jersey with the number 23 on it. 12RP 14. She had seen an individual earlier in the evening wearing that jersey. 12RP 7-10.

Latica Menesse knew Frazier, having friends in common with him. 15RP 154-55. Menesse did not see the shooting. 15RP 159. Prior to the shooting, Menesse saw Frazier at Ezell's and asked him to stop lighting fireworks near her car. 15RP 156-58, 179. She saw Frazier wearing a red and white Michael Jordan Chicago Bulls jersey, with a white t-shirt underneath it. 15RP 162-63.

Ophelia Whitfield, who did not know Frazier, was next to Dowlen when he was shot, but did not get a good look at the shooter's face. 12RP 12-14. When the shooting began, Whitfield started to run away, then she turned back toward Dowlen. 12RP 22-23. As she did so, she saw the same individual firing more shots at Dowlen. 12RP 24-26.

Don Dowlen III, Dowlen's son, did not see the shooting, but saw someone running away in a red and black Chicago Bulls Michael Jordan jersey (number 23). 11RP 97-98, 188.

4. Frazier's flight from Seattle to Anchorage.

On July 5, the day after the shooting, an individual made a telephone reservation to fly from Portland to Alaska on Alaska Airlines.⁶ 13RP 172-74. The ticket was a one-way ticket to Alaska leaving the following morning (July 6). 13RP 177. The individual used the name "Troy Taylor" to reserve the ticket. 13RP 174. An individual paid for the ticket the next day in Portland and took the flight in question to Anchorage, Alaska. 13RP 174-79. The flight left Portland at 11:00 a.m. on July 6 and arrived at the gate in Anchorage at 1:39 p.m. 13RP 184.

Cell phone records established that Frazier's cell phone was used at least three times in the vicinity of Ezell's Chicken on the evening of July 4, 2007. 15RP 69-99. The next day, cell phone records established that Frazier's phone was used in Kent, Tacoma, and then Chehalis, Washington. 15RP 99-101.

Detectives subsequently learned that Frazier had been in telephone contact with his daughter. They obtained a search warrant for the daughter's cell phone records and learned that the calls had

⁶ The reservation was made on a phone registered to Manuel Garrett. 13RP 183.

originated from a telephone number with an Anchorage area code.
14RP 140-44.

Frazier was located and arrested in Anchorage, Alaska, on July 31, 2007. 13RP 6-8. When confronted by a police officer prior to his arrest, Frazier gave the name "Troy Taylor." 14RP 11-12. On his person Frazier had identification in the name of Troy Taylor (Exhibit 46). 14RP 14. He also had an application for an Alaskan identification card in the name of Troy Taylor (Exhibit 44). 14RP 15. Frazier also was carrying a cell phone. This cell phone was obtained under the name of Troy Taylor and registered to the same address where Frazier was arrested in Anchorage. 14RP 17-21. Frazier had \$3,180.65 in cash. 13RP 15-16.

III. ARGUMENT

A. **FRAZIER HAS FAILED TO ESTABLISH REVERSIBLE ERROR BASED ON AN ALLEGATION THAT A JUROR WAS SLEEPING.**

The only issue raised by Frazier on appeal is that the trial court failed to conduct an adequate inquiry as to whether a juror was sleeping during portions of the trial. This claim is without merit. A careful review of the record demonstrates that the trial court carefully monitored this issue and concluded that the juror was not sleeping. Accordingly, there was no requirement that the juror be

questioned individually. The court's decision was not an abuse of discretion and Frazier has failed to establish any violation of his due process rights.

1. Relevant facts: allegedly sleeping juror.

The question of whether a juror was sleeping was discussed by counsel and the court several times during the trial. Because these discussions are crucial to a full understanding of this issue on appeal, they are quoted in full here. In addition, it is important to consider when this issue was raised in the context of the testimony in its entirety.

Presentation of the evidence in this case lasted nine days. On June 23, 2009, the jury was selected and opening arguments were made by both sides. There is no allegation that the juror was sleeping on this day. 9RP 1-28.

The morning session on June 24 consisted of the testimony of Rena Carpenter and Don Dowlen III. 11RP 3-107. There was no allegation that the juror was sleeping during this testimony.

The afternoon session on June 24 began with the testimony of Sheriff's Deputy David Mendez and Detective Mike Mellis. 11RP 117-80. During a break in the detective's testimony, the following exchange occurred outside the presence of the jury.

MR. COE: Your Honor, I have one other issue. I apologize. It appears as though one of the jurors is having some difficulty staying awake.

THE COURT: I didn't notice that, but it was a good time to take a break, wasn't it?

MR. COE: Well it seems to me like it's been going on for the (inaudible).

THE COURT: Well, Counsel, I didn't see it, and I can't very – I can't – I don't know which juror it is. I don't know if they're – you know, people close their eyes sometimes and they're still listening. I don't know. Was she – was the juror dropping their head on their stomach and falling asleep, I don't know.

MR. COE: Dropping the pen, I think.

THE COURT: Dropping a pen?

MR. COE: Dropping a pen.

THE COURT: Well, dropping a pen is a good indication that they're not holding onto their pen very well. Whether or not they're not listening, I don't know.

MR. COE: Okay.

THE COURT: But I'll keep an eye on it.

MR. COE: Right. It's the older gentleman in the front row, near the witness stand.

THE COURT: Well, I think he's 77, isn't he? Well, I mean, when you took your – when you exercised your challenges you knew the age of the people you were dealing with, and, you know, at that age people will nod off sometimes. But I will keep an eye on it and I will – you know, if it looks like it's happening, do you want me to drop a book? Some judges I've heard doing that make a real loud sound, they wake up the jury.

Other than that, I'll just try to take more breaks or I will ask them to stand up and stretch. I don't particularly

want to pick on him for falling asleep. I'll probably – at that age I'll probably fall asleep too.

11RP 186-87.

Detective Mellis's testimony then resumed. At its conclusion the following exchange occurred outside the presence of the jury:

THE COURT: . . . Mr. Coe, I kept an eye on –.

MR. COE: Number 9.

THE COURT: Mr. Coe, during the afternoon session he seemed fine. I mean, he tends to – he has some facial expressions that suggest he's getting on in years, but I – he seems as alert as anybody else on the jury.

MR. COE: Right. I did notice him appear to be sleeping at one brief point, but I think he also maintains a – when he's thinking his eye – he's actually looking down and his eyelids appear to be –.

THE COURT: Yeah, I – I couldn't see that he was paying any less attention than any of the other jurors.

MR. COE: Okay. Well, I appreciate you taking notice of that, Your Honor. And if you could continue –.

THE COURT: Yeah. Anyway, if you notice it, let me know. I will tell you that I didn't see him before because he's kind of right behind my computer screen, is I had to look around my computer screen in order to see him.

MR. COE: Right. But we did notice what – him – what appeared to be sleeping at one point, but it was a brief – brief moment.

THE COURT: Yeah, I'll keep an eye on him. But it seemed like he was taking all the evidence in.

MR. COE: Thank you, Your Honor.

11RP 217-18.

On the next day, June 25, the jury heard testimony from the following individuals: Whitfield, Curry, Zarelli, Miller, Hall, Willis, Jackson, and Gross. 12RP 1-187. There was no suggestion during any of this testimony that the juror was sleeping.

Trial resumed on June 29 and the jury heard testimony from the following witnesses: Ashford, Holland, Inslee, Minor, and Mahar. 13RP 1-205. There was no suggestion during any of this testimony that the juror was sleeping. However, the next morning, defense counsel put the following on the record:

MR. COE: Your Honor, we're just addressing I believe it's juror number nine.

THE COURT: Once more, it's [juror named].

MR. COE: Right. And, Your Honor, it's been brought to my attention by my client, and I've observed it myself, that this person has been dozing during the trial and, as my client indicates, this is a murder trial. He's a fact-finder in a murder trial, and he needs to be awake.

THE COURT: Counsel, I fully agree that he should be awake. But I suggest that you bring it to my attention when you see he's asleep, rather than when he's not even here.

MR. COE: Okay.

THE COURT: I told you before, O.A.C. provides us these computers for our bench top. Unfortunately, he's sitting directly behind my computer screen, so right there.

MR. COE: Okay.

THE COURT: So unless somebody draws to my attention the fact that I should look around my computer screen to notice that he is sleeping, I don't see it.

MR. COE: Your Honor, I'll raise my right hand.

MR. DERNBACH: And I'll, just for the record, just put my observations; since this was raised early in the trial, I've tried to keep -- I mean, obviously, I'm not watching him all the time, but trying to keep an eye on the juror, and there have been three occasions yesterday that I saw that I'd initially thought that he was asleep, but I don't think he was.

On one occasion, it looked like he had his eyes closed for about a minute, but this was during one of the rather long pauses we had while Mr. Coe was going through his notes.

And two, two occasions where I had seen what appeared to be his eyes closed, he was then -- as I observed him behind this the bar of the jury box, his notebook came up which made it appear as though it looked like his eyes were closed, but then he was just looking and reading over the notes that he'd been taking.

THE DEFENDANT: I'd like to say for the record that that guy has been asleep several times during this trial. It is not appropriate to sleep.

THE COURT: All right.

THE DEFENDANT: Being a fact-finder in a murder trial, he's been asleep several times. Nobody's paying attention no one's saying anything about it, so I'm bringing it to the attention --

THE COURT: Mr. Frazier --

THE DEFENDANT: -- can't be asleep.

THE COURT: -- everybody agrees with you that --

THE DEFENDANT: We been through this before, though, and nothing has happened. He's been asleep several times since we addressed this last time.

THE COURT: Then number one, I don't know if he's been asleep or not. He may have his eyes closed. That does not mean he's asleep.

If you have a concern at the moment, you -- he apparently seems to be sleeping, I'm suggesting you then bring it to my attention.

I've told you, the times I've observed him, even though he looks like he is not keenly awake, when I've seen him, he appears to be awake.

You've seen him, obviously, at moments I haven't. I've told you that I have an obstruction in my view between me and him.

Every once in a while, I'll look up, look around the screen; when I see him, he looks fine.

So if there's an issue, bring it to me at the moment it happens.

MR. COE: Your Honor, at this time, I'm going to --

THE COURT: I saw it, you said you're going to raise your hand.

MR. COE: Right hand.

THE COURT: That's fine.

MR. COE: That's going to be my signal.

THE COURT: That's fine, and if you do that, I will jump right in and deal with it.

MR. COE: Thank you, Your Honor.

THE COURT: But I cannot solve things that I do not see.

MR. COE: Understood.

THE COURT: All right, bring the jury in.

14RP 1-4.

On that day, the morning testimony consisted of witnesses Mitchell, Spromberg, Godine, and Lamas. 14RP 5-104. At the conclusion of the morning testimony, the following discussion was placed on the record outside the presence of the jury:

THE COURT: Mr. Coe, during that last witness, I saw your hand go in the air.

MR. COE: That's right, Your Honor.

THE COURT: I looked over to Mr. See and he was awake.

MR. COE: He --

THE COURT: Now, he may have been nodding off before I looked over, but when I looked over, he was awake and listening.

MR. COE: That's right, he was nodding off for a short period, and I raised my hand and you looked over, and I did note that he was snapped to attention.

THE COURT: Well, I didn't say anything, so I don't think he snapped to attention from anything I did.

MR. DERNBACH: I think he saw Mr. Coe. I don't think he's sleeping.

THE COURT: Yeah, I will tell you that I have -- this is -- I don't know how this would show up on any appeal, but I communicated with my court reporter who sits there and looks straight at Mr. See the entire time, or has the opportunity, and she's closer to him than I am, and she hasn't noticed him falling asleep.

Now, had he had his eyes closed, perhaps, but other than what we're doing now, I can't see anything else to do.

MR. COE: And, Your Honor, I would just indicate for the record that it's -- indeed, his eyes have been closed for periods of this trial.

THE COURT: Okay. What do you want me to do?

MR. COE: Well –

THE COURT: Do you want me to drop a book every time he closes his eyes? Do you want me to ask the jury to stand up every time you think he's got his eyes closed and appears to be nodding off?

MR. COE: I think –

THE COURT: I can't be sure he's asleep. People close their eyes for -- when they're listening.

Some people concentrate when they're closing their eyes. Sometimes from the bench, I'll close my eyes in order to not be distracted and just hear the testimony and not be see[ing] anything visual. I don't know what he's doing.

MR. COE: Right. Well, Your Honor, it does appear -- he does appear to have been sleeping during the proceedings.

MR. DERNBACH: I –

THE COURT: I don't know what appear to be sleeping means. If you –

MR. COE: Well –

THE COURT: If he drops his head into his lap and falls out of his chair, I'll know he's sleeping.

But if he's got his eyes closed, I don't know if he's asleep or not. If he's got his head -- eyes closed and his head's down on his chest, I would assume he's sleeping.

MR. COE: I think he's had his eyes closed, his head off to the side.

MR. DERNBACH: I haven't seen -- I don't think –

THE COURT: Somebody could have their eyes closed and their head off to the side and they could be concentrating. What do you want me to do?

MR. COE: Well, I think Mr. Frazier would like a new jury.

THE COURT: He doesn't get a new jury. We got thirteen of them here. Does he -- so the only thing would be -- you don't dismiss the whole jury if one juror is sleeping.

(Discussions between defendant and defense counsel not reported)

THE COURT: And, frankly, I haven't seen that that one juror is sleeping, but one juror -- even if one juror is sleeping doesn't -- doesn't dismiss the other twelve.

MR. COE: Well, we would ask then that, if the pattern continues, that that juror be dismissed.

THE COURT: I will continue. You continue raising your hand when you think he's asleep but, you know, I don't have an E.E.G. running on my computer up here that shows what his brain wave patterns are.

MR. COE: Right.

THE COURT: And whether he's getting nice REM patterns when you're asleep and dreaming, I don't know.

MR. COE: Well, you know, Your Honor, I have a pretty good line-of-sight for this particular juror, and it appears that he's been sleeping during parts of this proceeding.

THE COURT: All right. Well, I haven't -- I've not seen him sleeping and --

MR. COE: But you've also said that you have a computer screen --

THE COURT: I do.

MR. COE: -- obstructing --

THE COURT: I do, and when you -- when you've pointed it out, I've looked over, and every time I've looked over, he has had his eyes open.

MR. DERNBACH: And so our record is clear, since this issue's been raised, I've been watching that juror as well and, as I said earlier, I've seen him on occasion close his eyes.

But it also appears that when it appears that way when he has his -- he's reading from his notes beneath this bar, I've seen him -- what appears to be his eyes closed, but then seen him raise his notepad as though he's reading from his notepad.

I haven't seen this juror fall asleep, and I think it's important for our record to reflect that, even when Mr. Coe thought this man was asleep today, as soon as he raised his hand, nobody said anything, but just raising his hand, the juror looked immediately at Mr. Coe.

THE COURT: All right. Mr. Coe, you know, I don't know what you want me to do. You say you want a new jury.

If you want a whole new jury, that's denied. You don't get a whole new jury because one juror nods off.

And, frankly, unless truly the pattern is repetitive and the juror is missing testimony, I don't know there's any rule that says every juror has to be keenly awake at every point during the trial.

If it did, we'd probably have a lot of trials that didn't survive conclusion. I'll keep an eye on it.

MR. COE: Thank you. And I'd also note that the screen -- projector screen has been moved, that's oftentimes been directly in front of the State's --

MR. DERNBACH: I have a line-of-sight to this witness when the T.V. is right here, and I usually move my chair so I can see at least some of our jurors. I don't like to be completely out of sight.

THE COURT: All I can do is, if I see him asleep, I'll wake him up. I haven't. You keep raising your hand --

MR. COE: Thank you, Your Honor.

THE COURT: -- when you think he's sleeping and I will check on it.

MR. COE: Thank you, Your Honor.

THE COURT: But I've -- you know, when I move my head, I can see around this computer screen, and every time I've done it and looked at this juror, he's been awake.

But I also pay attention to other things during the trial and don't devote my entire attention to one juror.

14RP 104-10.

The rest of the day on June 30 consisted of testimony from Crenshaw and Wyant. 14RP 108-212. There is no indication that during this testimony the juror was having trouble staying awake or that defense counsel raised his hand to indicate that he thought a juror was sleeping.

Trial resumed the next day, July 1, and in the morning the jury heard the testimony of Mazrim and Lehman. 15RP 38-116. At the conclusion of this testimony, the following exchange occurred:

MR. COE: Your Honor, there is the issue of a sleeping juror.

THE COURT: I don't think he's been asleep. At least he's had -- he's been struggling. I've been watching him, and I've also watched the rest of the people in the courtroom. He's not the only one yawning through your testimony, believe me.

THE DEFENDANT: You've just seen it, though. You slammed your pen down. You've seen it.

THE COURT: I did, because he was --

THE DEFENDANT: He was asleep.

THE COURT: He immediately reacted.

THE DEFENDANT: But he's sleeping, though.

THE COURT: He -- I don't think he's sleeping. I think he's got his eyes shut. He certainly is having difficulty staying awake through all this thrilling testimony, and I use "thrilling" in quotes. But I can't guarantee that the lawyers are so inspiring and exciting that it can keep everyone on edge all the time.

MR. COE: We sure try.

THE COURT: It's my view that he has been paying attention. Yes, he's trying to -- he's struggling, as are other people in the courtroom.

MR. DERNBACH: And I would also just --

THE COURT: I can't -- I can't write up the questions for the lawyers and make them so that every question keeps everyone on the edge of their chairs. I wish I could. It would certainly make my life a lot easier if all the questions always kept me on the edge of my seat. If I could rewrite the questions, if I could speed up the testimony of both sides, I probably would.

But in my judgment this jury, given the nature of the testimony, is doing a very good job of paying attention. I've been watching this particular juror, he's taking copious notes. He is making a concerted effort to stay awake and occasionally his eyes shut. And when they do, I drop my pen and he immediately reacts. Not as if somebody's in a deep sleep, but somebody who's struggling to stay awake. That's my judgment. I don't think he's sleeping.

MR. COE: And Your Honor, I would indicate that during the direct examination by Mr. Kalish, I did observe the juror sleeping; however --

THE COURT: You don't know he's sleeping, Counsel.

MR. COE: Well, I know that when you dropped your pen, you definitely startled -- he awoke in a startling fashion.

THE COURT: He was startled.

MR. COE: I would note for the record --

THE COURT: Counsel, no one here knows he was sleeping. All you can do is look at him and say he's blinking his eyes. I think the impression is he's struggling to stay awake and occasionally he has his eyes shut. And when I made any kind of noise, his eyes immediately opened. Now, was it a startled opening? I'm not going to look into brain waves and say he was asleep or not. But I will tell you, Counsel, that I'm not the one asking the questions. I'm not the ones frequently looking down at my notes for long minutes at a time while the jury sits there doing nothing. Jurors can only bear so much. We ask them to do a lot. I think these jurors are doing a good job of staying awake during parts of the testimony that are not particularly designed to keep people awake.

MR. COE: And I would just note for the record, Your Honor, that my testimony and my cross-examination, I should say, is not designed to put any jurors to sleep. And along those lines, while I was doing my cross and recross, I did not have the occasion to observe the juror, as I was paying attention to the slides.

THE COURT: He was paying attention as far as I could to you. Now, can I say he was paying attention to Mr. Kalish through all the thrilling parts of that testimony, he may have been having his mind wander at moments.

MR. COE: And I think I addressed that previously.

THE COURT: But that's the State's problem. They've got the burden of proof. And if they're not keeping the rapt attention of the jury during their questioning, it hurts the State, not the defense. I can't guarantee rapt attention of all 12 jurors at every given moment. If I see a juror who is nodding off[f], I take steps. I did. I had the jurors stand up, and they looked at me like I was crazy. Halfway through the jury -- you know, we're 15 minutes to 12:00 and I'm asking them all to stand up, and they're looking at me like: Why?

That's all I can do. Make noise if I think they're not -- their attention's waning, drop my pen, make some motion. I do not think this juror has been sleeping through the testimony. Period.

MR. COE: Your Honor --

THE COURT: We're done.

15RP 117-21.

July 1 concluded with the testimony of Harris, Menesse, Hall, Noel, and Mellis. 15RP 123-97. There was no indication that the juror was having trouble staying awake during this portion of the proceedings.

Trial resumed on July 6, with the presentation of the defense case. At no time during the rest of the trial was there any indication that the juror was having trouble staying awake. On July 6, the witnesses were Loftus, Predmore, and Edgmon. 16RP 14-199. There is no discussion of a sleeping juror issue at any time during this testimony.

On July 7, the jury heard from Wolner, Jordan, and Horner. 17RP 28-109. Again, there was no indication that the jury was not awake. After the noon recess, the jury heard closing arguments. Again, there was not the slightest reference in the record that any juror was struggling to stay awake.

2. Legal standard: allegedly sleeping juror.

Pursuant to RCW 2.36.110, a judge has a 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 enables the court to seat alternate jurors when the jury is selected. CrR 6.5 also states that: “[i]f 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.” Together, RCW 2.36.110 and CrR 6.5 place a continuous obligation on the trial court to excuse any juror who is unfit and unable to perform the duties of a juror.⁷ State v. Jordan, 103 Wn. App. 221, 226-27, 11 P.3d 866 (2000). There is

⁷ CrR 6.5 states in part:

“. . . . 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 juror's place on the jury.

Alternate jurors who do not replace a regular juror may be discharged or temporarily excused after the jury retires to consider its verdict. When jurors are temporarily excused but not discharged, the trial judge shall take appropriate steps to protect alternate jurors from influence, interference or publicity, which might affect that juror's ability to remain impartial and the trial judge may conduct brief voir dire before seating such alternate juror for any trial or deliberations. Such alternate juror may be recalled at any time that a regular juror is unable to serve, including a second phase of any trial that is bifurcated. If the jury has commenced deliberations prior to replacement of an initial juror with an alternate juror, the jury shall be instructed to disregard all previous deliberations and begin deliberations anew.”

no dispute that if a juror is truly sleeping during the trial he or she should be dismissed. Jorden, 103 Wn. App. at 226-27.

A trial court's decision to excuse or not excuse a juror is reviewed for abuse of discretion. State v. Hughes, 106 Wn.2d 176, 204, 721 P.2d 902 (1986); State v. Ashcraft, 71 Wn. App. 444, 461, 859 P.2d 60 (1993); Jorden, 103 Wn. App. at 226-27. Likewise, the determination as to whether the jury was so inattentive that the defendant was prejudiced is another matter addressed to the trial court's discretion, and is reviewable only for abuse. Hughes, 106 Wn.2d at 204 (citing Annot., Inattention of Juror From Sleepiness or Other Cause as Ground for Reversal or New Trial, 88 A.L.R.2d 1275, 1276 (1963)).

The test to be applied on appeal is whether the record establishes that the juror engaged in misconduct. Jorden, 103 Wn. App. at 226-27. The court in Jorden was clear that it was “unwilling to impose on the trial court a mandatory format for establishing such a record. Instead the trial judge *has discretion to hear and resolve the misconduct issue in a way that avoids tainting the juror and, thus, avoids creating prejudice against either party.*” Jorden, 103 Wn. App. at 226-27 (emphasis added).

The Court of Appeals emphasized in Jorden, that when determining whether a juror should be dismissed, the trial court has “fact-finding” discretion and is acting as both an observer and decision-maker:

In doing so, it is also inevitable that the judge will act as both an observer and decision-maker. Here, the judge's function was similar to his function in a challenge for cause; i.e., he was a witness and a decision-maker. In deciding whether to grant or deny a challenge for cause based on bias, the trial judge has “fact-finding discretion.” Ottis v. Stevenson-Carson Sch. Dist. No. 303, 61 Wn. App. 747, 753, 812 P.2d 133 (1991); see also State v. Rupe, 108 Wn.2d 734, 749, 743 P.2d 210 (1987). This discretion allows the judge to weigh the credibility of the prospective juror based on his or her observations. Rupe, 108 Wn.2d at 749, 743 P.2d 210; Ottis, 61 Wn. App. at 753-54, 812 P.2d 133. As with other factual determinations made by the trial court, we defer to the judge's decision. State v. Noltie, 116 Wn.2d 831, 839-40, 809 P.2d 190 (1991); Ottis, 61 Wn. App. at 755, 812 P.2d 133.

Jorden, 103 Wn. App. at 229.

Contrary to Frazier’s suggestion on appeal, a hearing is not required every time an issue of juror inattentiveness is raised.

Jorden, 103 Wn. App. at 226-27. As the Court of Appeals in Jorden observed:

. . . CrR 6.5 does not explicitly require a hearing even after the case has been given to the jury. Ashcraft, 71 Wn. App. at 462, 859 P.2d 60. While this court has stated that “CrR 6.5 contemplates a formal

proceeding, which *may* include brief voir dire” before substituting a juror, this statement applies where the case has already gone to the jury and the alternates have been temporarily excused. State v. Johnson, 90 Wn. App. 54, 72, 950 P.2d 981 (1998); see also Ashcraft, 71 Wn. App. at 462, 859 P.2d 60. The purpose of a “formal proceeding” is twofold. First, it verifies that the juror is unable to serve. Johnson, 90 Wn. App. at 73, 950 P.2d 981. Second, it demonstrates that the alternate has remained impartial after being temporarily dismissed. Ashcraft, 71 Wn. App. at 462, 859 P.2d 60.

Jorden, 103 Wn. App. at 226-27 (emphasis in original).

Finally, unless counsel objects to the jurors' inattentiveness during trial, the error is waived on appeal. Hughes, 106 Wn.2d at 204 (citing Casey v. Williams, 47 Wn.2d 255, 257, 287 P.2d 343 (1955)).

3. Defense counsel has failed to preserve his claim of alleged juror misconduct.

Unless counsel objects to the jurors' inattentiveness during trial, the error is waived on appeal. Hughes, 106 Wn.2d at 204. In the present case, while defense counsel brought the issue of the allegedly sleeping juror to the court's attention, he often did so in an untimely fashion so that the court was not in a position to address the issue. Indeed, only once did defense counsel signal to the court that a juror was sleeping at the moment the alleged activity was observed (and, the court, when it then looked at the juror, did

not see him sleeping). In every other instance, counsel waited until a subsequent break in the proceedings to raise the issue.

Moreover, when asked directly by the court how the defendant wished to handle the allegedly sleeping juror, defense counsel (after consulting with his client) did not request that the juror be dismissed. Instead, counsel asked that the juror be dismissed "if the pattern continued." There was only one more complaint about the juror and no "pattern" of sleeping was ever established. Significantly, at no point in the trial did counsel ever request that the juror in question be excused.

Finally, defense counsel never requested that the juror be questioned individually about whether he was able to stay awake during the testimony of the various witnesses. That is, counsel never asked for an opportunity to voir dire the juror and never requested that the court do so.

For these reasons, Frazier has not adequately preserved his claims that the juror was inattentive, asleep, or otherwise unfit to remain on the jury. This Court should decline to consider this issue on appeal.

4. The trial court did not abuse its discretion in concluding that the juror was not sleeping.

A review of the record in this case demonstrates that the trial court carefully monitored the allegation that a juror was sleeping and conclude that the juror was attentive and awake. This decision was not an abuse of discretion.

Defense counsel first raised the sleeping juror issue on June 24. 11RP 186. Counsel did not raise the issue at the time the juror was allegedly sleeping, but waited until a break in the testimony. 11RP 186. The trial court agreed to keep an eye on the juror, indicating that it would take more breaks or have the jury stand and stretch if there appeared to be a problem. 11RP 187. At the end of the day, the court stated on the record that he had been watching the juror and “he seemed fine.” 11RP 217. Significantly, defense counsel agreed, stating: “Right. I did notice him appear to be sleeping at one brief point, but I think he also maintains a – when he’s thinking, his eye – he’s actually looking down and his eyelids appear to be – ” 11RP 217. Defense counsel didn’t finish his sentence, but he was clearly saying that when the juror was thinking he looked down and his eyelids appeared closed. In short,

nothing on this day of testimony suggests that the juror was not attentive to the testimony presented.

Two full days of testimony passed before the issue was raised again. Then, on the morning of June 30, defense counsel asserted that the juror had been sleeping at times during the previous day. As discussed above, unless counsel objects to the jurors' inattentiveness during trial, the error is waived on appeal. Hughes, 106 Wn.2d at 204. Counsel's failure to object when the alleged misconduct actually was observed precluded the trial court from effectively addressing the issue and any complaints in this regard should be deemed waived. As the trial court told defense counsel, "I suggest you bring this problem to my attention when you see he's asleep, rather than when he's not even here." 14RP 1.

In any event, the court stated that during the times he had observed the juror, "even though he looks like he is not keenly awake, when I've seen him, he appears to be awake." 11RP 4. Similarly, the prosecutor also stated that he had observed the juror and that he appeared to be awake. The prosecutor noted that the juror may have dozed off for a minute during a long break – while defense counsel consulted his notes – in the cross-examination of one of the witnesses. 14RP 2. The prosecutor stated that on the

other two times that the juror appeared to have been sleeping it turned out that the juror was simply bringing his notebook up to his eyes to read his notes. 14RP 2-3. At the conclusion of this discussion, defense counsel agreed that if he saw the juror sleeping he would raise his hand to bring the issue to the court's attention. 14RP 4.

At the end of the morning testimony, the court put on the record that defense counsel had raised his hand once during the testimony of the previous witness (Lamas, a records custodian for AT&T). 14RP 104. The court stated that it immediately looked at the juror and he was awake. 14RP 104. Significantly, defense counsel agreed that when he raised his hand the juror, "snapped to attention." 14RP 104. This observation contradicts the suggestion that the juror was asleep at all. As the prosecutor stated: "I think he saw Mr. Coe. I don't think he's sleeping." 14RP 105.

Further, the court stated that it had asked the court reporter – "who sits there and looks straight at the [juror] the entire time" – to observe the juror and let the court know if he was sleeping. 14RP 105. The court reporter had not noticed the juror falling asleep. 14RP 105.

The court then asked defense counsel what further steps it wanted the court to take. 14RP 107. Defense counsel stated that he wanted a new jury. This request was denied, as it was clear that the allegation that a single juror might have fallen asleep was not a basis to excuse all the jurors. 14RP 107.

At this point, an off-the-record discussion occurred between defense counsel and defendant Frazier. 14RP 107. After this attorney-client conference, the defendant did not ask that the juror be excused. Instead, defense counsel stated: “we would ask that, if the pattern continues, that the juror be dismissed.” 14RP 107. Interestingly, defense counsel had a strong and valid strategic reason for not wishing the juror to be excused. At this point in the trial there were thirteen jurors remaining. 13RP 2. One juror had indicated that his spouse’s father was very sick and he might need to be excused. 13RP 1-6. If the alleged sleeping juror had been excused at this time, there would be twelve jurors remaining and the court might have compelled the juror with the sick father-in-law to remain and hear the case. Defense counsel may well have preferred to keep the allegedly sleeping juror instead. Defense counsel might also have reasoned that he had a better chance for a mistrial if he waited to see if the other juror was excused for cause

(as he eventually was), and then attempt to dismiss the allegedly sleeping juror and, with only eleven jurors remaining, get a mistrial. In any event, the defendant did not move to excuse the sleeping juror unless the alleged pattern of falling asleep continued.

In sum, during the entire day of testimony on June 30, defense counsel only noted a single instance when the juror allegedly fell asleep (during the testimony of a records custodian). The court immediately looked at the juror and he appeared to be awake. Nor did the court reporter (who was directly in front of the juror) alert the court that the juror was sleeping.

The issue was raised one final time, at the conclusion of the testimony of Mark Lehman, an engineer with AT&T Wireless.

15RP 117. Defense counsel alleged that the juror was sleeping.

15RP 119. The court rejected this claim, stating: "It's my view that he's been paying attention. Yes, he's trying to – he's struggling, as are other people in the courtroom." 15RP 118. The judge noted that when he dropped his pen, the juror had immediately reacted.

15RP 117. The Court made specific verbal findings about the juror in question: "But in my judgment this jury, given the nature of the testimony, is doing a very good job of paying attention. I've been watching this particular juror, he's taking copious notes. He is

making a concerted effort to stay awake and occasionally his eyes shut. And when they do, I drop my pen and he immediately reacts. Not as somebody's in a deep sleep, but somebody who's struggling to stay awake. That's my judgment. I don't think he's sleeping."

15RP 118. In addition, the court noted that at certain points in the trial it had the jurors stand and stretch, to give them a break through what the court characterized as sometimes tedious testimony concerning cell phones, cell phone towers, and locating cell phone calls. 15RP 90-120.

In the remaining two-and-a-half days of trial, there were no complaints by defense counsel that the juror was having trouble staying awake.

Ultimately, the record establishes that the trial court was fully aware of the allegation that the juror was sleeping. The court carefully monitored the situation and saw no evidence to suggest that juror was in fact sleeping, was not able to pay attention to the evidence that was being presented, or was otherwise unable to perform his duty as a juror. Under these circumstances, the court did not abuse its discretion in electing not to excuse this juror from service.

On appeal, Frazier asserts that the court should have conducted a hearing and questioned the juror who was allegedly sleeping. As discussed above, such an evidentiary hearing is not required pursuant to Washington case law, which gives the trial court discretion in establishing an appropriate record before deciding to excuse or not excuse a juror. But even assuming that such a hearing might be required, the record below does establish the level of juror misconduct that would justify holding such a hearing. Indeed, even the out-of-jurisdiction cases relied upon by Frazier on appeal require a greater showing of juror inattentiveness before a fact-finding hearing is required.

For example, in State v. Hampton, 201 Wis.2d 662, 671, 549 N.W.2d 756, 759 (1996), the trial court agreed that the juror had been “dozing” and, given this fact, a hearing was required. Id. (“The contents of the colloquy between the trial court and defense counsel when the motions for mistrial and voir dire of the juror were made leave little room for disagreement. The juror was sleeping, the extent of which, however, is unknown.”).

Likewise, in Commonwealth v. Braun, 74 Mass. App. Ct. 904, 905, 905 N.E.2d 124, 126 (2009), it was an abuse of discretion not to conduct *voir dire* because there was a “very real basis” to

conclude a juror had been sleeping. Id. (“Contemporaneous observations from three separate sources – a court officer, defense counsel, and the judge himself – alerted the judge to the very real likelihood that the juror was sleeping through the trial and the judge's instructions to the jury upon departure for the day. The juror's inattentiveness was not a momentary lapse, but an inattention that spanned all or portions of the testimony of two witnesses and the judge's instructions to the departing jury.”).

In subsequent case out of Massachusetts, also relied upon by Frazier, the Court of Appeals reaffirmed this statement. Com. v. Dancy, 75 Mass. App. Ct. 175, 180, 912 N.E.2d 525, 531 (2009). The Court summarized holdings from other jurisdictions which also establish that there needs to be an actual or “very real” basis to conclude that a jury was sleeping before an inquiry is required:

In making that statement [i.e., the holding in Braun], we were being faithful to our own well-established law, see Commonwealth v. Stokes, 440 Mass. 741, 751, 802 N.E.2d 88 (2004), and to well-considered decisions elsewhere. See, e.g., United States v. Bradley, 173 F.3d 225, 230 (3d Cir.), cert. denied sub nom. Mattison v. United States, 528 U.S. 963, 120 S. Ct. 397, 145 L.Ed.2d 310 (1999) (judge “had a legitimate basis to dismiss [snoring juror] ... [and] had sufficient information to support the dismissal and so did not have to voir dire her”); People v. Evans, 710 P.2d 1167, 1168 (Colo.Ct.App.1985); Samad v. United States, 812 A.2d 226, 230-231

(D.C.2002), cert. denied, 538 U.S. 934, 123 S. Ct. 1600, 155 L.Ed.2d 333 (2003), quoting from Golsun v. United States, 592 A.2d 1054, 1056 (D.C.1991) (“[i]f ... the court notices, or is [reliably] informed, that a juror is asleep during trial, the court has a responsibility to inquire and to take further action if necessary to rectify the situation.... The trial court should begin, for example, with a hearing to determine whether the juror had been asleep and, if so, whether the juror had missed essential portions of the trial On the basis of its findings the court should then determine whether the juror's conduct had resulted in substantial prejudice to the accused”); People v. South, 177 A.D.2d 607, 608, 576 N.Y.S.2d 314 (N.Y.App.Div.1991) (judge “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”); People v. Simpkins, 16 A.D.3d 601, 601-602, 792 N.Y.S.2d 170 (N.Y.App.Div.2005) (court “should have dismissed as grossly unqualified the juror who was repeatedly observed sleeping during the trial ... [and w]here discharge of the juror would have made it impossible to continue with the trial, the court should have declared a mistrial”).

Dancy, 75 Mass. App. Ct. at 180.⁸

Finally, People v. South, 177 A.D.2d 607, 607-08, 576

N.Y.S.2d 314, 314 (1991), is another case in which the defense

⁸ The Court in Dancy found that the appropriate remedy was remand for the trial court to conduct a hearing on this issue. 75 Mass. App. Ct. at 182 (“We recognize that counsel, like the judge, did not have the benefit of *Braun*. As such, it appears that the wiser course of action would be to allow him to address this issue, through a motion for a new trial, the result of which would be full findings, based on the judge's observations and any other available evidence, regarding the extent to which the juror was sleeping during the course of the trial.”).

counsel's complaint, combined with the court's observations of the juror, required a hearing:

During the cross-examination of the undercover officer, defense counsel reported at a sidebar conference that juror number 9 was sleeping. The court responded that it had observed the juror close her eyes, "however, not for a prolonged period of time". Consequently, the court advised the jurors to alert it if at any time they needed a recess. After the court's charge but before the jury retired to deliberate, defense counsel informed the court that juror number 9 had been asleep during the court's charge for about 10 minutes and was awakened by juror number 10, who elbowed her when she saw defense counsel watching. At this point, the court again acknowledged that it saw the juror with her eyes closed at certain points during the charge, though not for "an extended period of time."

Id.

These out-of-jurisdiction cases stand for the proposition that there must be a "sufficient showing" or a "very real basis" to believe a jury is sleeping before a fact-finding hearing is required. This requirement may well be satisfied by defense counsel's observations of a sleeping juror combined with other reliable observations by the court, the prosecutor, court personnel, or some other reliable source. An allegation by defense counsel, however, that is not supported by the observations of the trial court, does not satisfy this standard. To hold otherwise would open the door to

wasteful and time-consuming hearings that would unnecessarily antagonize and potentially prejudice the jurors.

In State v. Jordan, the Court of Appeals recognized that there is no “mandatory format” for establishing a record concerning alleged juror misconduct and that the trial court is not required to conduct a hearing as to whether a juror was sleeping before the juror is dismissed. Jordan, 103 Wn. App. at 229. On appeal, Frazier asserts that “he is not asking this Court to impose a mandatory format” for establishing juror misconduct. But, in reality, the rule that Frazier proposes is in fact a mandatory requirement that a hearing be conducted whenever defense counsel asserts that a juror is sleeping, even when the trial court disagrees with this observation. The requirement for a mandatory hearing should be rejected and the issue of whether to voir dire the juror left to the appropriate discretion of the trial court.

Frazier also argues that the concerns expressed in Jordan as to the consequences of holding a hearing in which a juror is interrogated by the trial court do not apply when the defense (as opposed to the State) is seeking to remove a juror. But the concerns expressed in Jordan were not driven by the fact that it was the State that sought the juror’s removal. Rather, the Court

made clear that the trial court “has discretion to hear and resolve the misconduct issue in a way that avoids tainting the juror and, thus, *avoids creating prejudice against either party.*” Jorden, 103 Wn. App. at 228 (emphasis added).

As a practical matter, all three of the concerns expressed in Jorden that mitigate against holding a hearing to question a juror are valid regardless of whether it is the State or the defense that is seeking to excuse the juror.

First, such questioning might be embarrassing to the juror. This is not to say that the potential for embarrassment outweighs a defendant’s right to a fair trial, but that there must be some threshold that has to be crossed before such questioning is justified. This concern is present regardless of which side, State or defense, is seeking to excuse the juror.

Second, when a juror was questioned, the parties would also be entitled to question the juror, which might put the juror in an adversarial position with the State. This concern applies both to the State and to the defense (which presumably would be inquiring with an eye toward dismissing the juror). Again, the question is whether running the risk of engendering an adversarial relationship with either party is justified on the record before the trial court. There

will certainly be some circumstances in which such a direct inquiry is necessary. But the trial court has discretion to decide whether the risk of adverse prejudice is justified.⁹

Third, if the juror denies sleeping, the State might call other jurors to report their observations, which might put the juror in an adversarial position to the other juror-witnesses. This argument applies with equal force to the defense or the State, either of whom might call other jurors to rebut the claim. This in turn would create the same inter-juror hostility that ought to be avoided absent a sound basis for doing so.

In the end, trial courts are appropriately vested with considerable discretion to resolve issues of juror misconduct. There is no requirement that a *voir dire* hearing of the juror be held when the court's own observations do not support the suggestion that misconduct has occurred. In this case, the trial court appropriately monitored the allegedly sleeping juror and concluded that he was not sleeping. This decision was supported by the record and is not an abuse of discretion.

⁹ It is not difficult to imagine the following scenario: Defense seeks to remove a juror for sleeping, the juror is questioned by the parties and denies sleeping, and the court declines to excuse the juror. On appeal, defense argues he was prejudiced by the fact that the juror remained on the panel after hostile questioning by defense counsel.

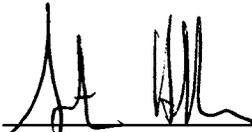
IV. CONCLUSION

The State of Washington respectfully requests that Frazier's conviction for one count of murder in the first degree be affirmed.

DATED this 25th day of June, 2010.

Respectfully submitted,

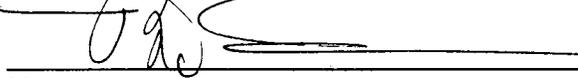
DANIEL T. SATTERBERG
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By: 
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Certificate of Service by Mail

Today I deposited in the mail of the United States of America, postage prepaid, a properly stamped and addressed envelope directed to CASEY GRANNIS, the attorney for the appellant, at Nielsen Broman & Koch, P.L.L.C., 1908 E. Madison Street, Seattle, WA 98122, containing a copy of the Brief of Respondent, in STATE V. YOBACHI FRAZIER, Cause No. 64219-7-I, in the Court of Appeals, Division I, for the State of Washington.

I certify under penalty of perjury of the laws of the State of Washington that the foregoing is true and correct.



Name
Done in Seattle, Washington

06/25/10
Date

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