ADVANCE SHEET HEADNOTE
January 30, 2023

2023 CO 4

No. 21SC236, *Forgette v. People*—Whether Defendant Preserved and Waived Objection to Sleeping Juror.

In this case, the supreme court considers whether (1) an objection to an allegedly sleeping juror is preserved when the parties note that the juror was sleeping but request no action from the court; (2) there is a distinction between the waiver of the right to a jury trial and the waiver of the right to a jury of twelve, which could possibly implicate whether counsel could waive the number of jurors on behalf of her client; and (3) the right to a jury of twelve is waived when counsel notes that a juror was asleep but does not object or request action from the court.

The court now concludes that because the defendant was tried by a jury of twelve, this case does not implicate the second and third issues on which the court granted certiorari, and the court need not decide those questions. The court further concludes that defense counsel does not properly preserve an objection to an allegedly sleeping juror merely by noting that a juror was asleep without

objecting or otherwise requesting any action from the court and that, on the facts before the court, the defendant waived this issue, thereby precluding appellate review.

The court thus vacates in part and affirms in part the judgment of the division below.

The Supreme Court of the State of Colorado
2 East 14th Avenue • Denver, Colorado 80203

2023 CO 4

Supreme Court Case No. 21SC236
Certiorari to the Colorado Court of Appeals
Court of Appeals Case No. 16CA441

Petitioner:

Elliott J. Forgette,

v.

Respondent:

The People of the State of Colorado.

Judgment Vacated in Part and Affirmed in Part
en banc
January 30, 2023

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JUSTICE GABRIEL delivered the Opinion of the Court, in which **CHIEF JUSTICE BOATRIGHT**, **JUSTICE MÁRQUEZ**, **JUSTICE HOOD**, **JUSTICE HART**, **JUSTICE SAMOUR**, and **JUSTICE BERKENKOTTER** joined.

JUSTICE GABRIEL delivered the Opinion of the Court.

¶1 We granted certiorari to consider whether (1) an objection to an allegedly sleeping juror is preserved when the parties note that the juror was sleeping but request no action from the court; (2) there is a distinction between the waiver of the right to a jury trial and the waiver of the right to a jury of twelve, which could possibly implicate whether counsel could waive the number of jurors on behalf of her client; and (3) the right to a jury of twelve is waived when counsel notes that a juror was asleep but does not object or request action from the court.[1]

¶2 Because defendant Elliott J. Forgette was tried by a jury of twelve, this case does not implicate the second and third issues on which we granted certiorari, and we need not decide those questions. We conclude, however, that defense counsel does not properly preserve an objection to an allegedly sleeping juror merely by

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[1] Specifically, we granted certiorari to review the following issues:

1. Whether a sleeping-juror issue is preserved where the prosecutor and defense counsel alert the trial court that a juror is sleeping.
2. Whether there is, as the division held, "a distinction between the waiver of the right to a jury trial and the waiver of the right to a jury of twelve," such that defense counsel can waive the number of jurors without her client's approval.
3. Whether a defendant's right to a jury of twelve is waived when defense counsel alerts the judge to a sleeping juror at trial but does not raise an objection.

noting that a juror was asleep without objecting or otherwise requesting any action from the court. We further conclude that when counsel is aware of all of the pertinent facts and does not preserve an objection to an allegedly sleeping juror, that objection is waived, thereby precluding appellate review.

¶3 Accordingly, we vacate the portions of the division's opinion expressly opining on matters related to Forgette's right to a jury of twelve and otherwise affirm the division's judgment.

I. Facts and Procedural History

¶4 The occupants of a residence returned home one day to find an unknown man walking around their house. One of the occupants saw a package that had been delivered to her porch in the man's pocket. When the occupants asked the man about the package, he threw it at them, ran to a nearby car, and drove away. The occupants then found their back door open, and on entering their home, they discovered a number of items that were missing and called the police.

¶5 The police subsequently arrested Forgette in connection with these events, and the State charged him with second degree burglary of a dwelling, a class 3 felony. The case then proceeded to trial.

¶6 On the morning of the second day of trial, during a side bar to address the day's schedule, the prosecutor mentioned that a juror was asleep:

THE COURT: Can counsel approach about the schedule.

(The following proceedings were conducted at the bench out of the hearing of the jury:)

THE COURT: We're really at morning break point. I don't know how long you have to finish this witness.

[Defense Counsel K.]: I'm about five to ten minutes away from being done, probably closer to five.

THE COURT: Then we have redirect.

[Prosecutor G.]: [Juror Number Seven] is now asleep, Judge, and has been for about the last five minutes.

THE COURT: Let's take a break.

(The following proceedings were conducted in the presence and hearing of the jury:)

THE COURT: We're going to take our morning break at this time because it's midmorning.

¶7 That afternoon, after defense counsel's re-cross examination of a prosecution witness, the following colloquy occurred at the bench:

THE COURT: All right. Any juror questions for [the witness]? Please send those to my bailiff. If counsel will approach.

(The following proceedings were held at the bench out of the hearing of the jury:)

[Defense Counsel C.]: Juror Number Seven is asleep, or I think next to your front—

[Defense Counsel K.]: We've lost him again.

THE COURT: Yes. He does appear to be dozing off. I have been checking periodically, and he had been fine. I also would note that in the first time this was mentioned, he actually asked a question of that juror [sic]—I noticed he passed one of the notes. So, I think he is with us sometimes. I've been trying to keep an eye on him, and I certainly

have tapped the microphone, which usually works. I noticed as soon as we started to speak after that last break, he was attentive. He does seem to be eyes closed and being on sand at the moment.

[Defense Counsel C.]: I'm just concerned because I don't know if the Court observed how long he's been asleep.

THE COURT: Well, it's probably been 15 minutes since I looked over at him.

[Defense Counsel C.]: Okay.

THE COURT: My law clerk indicates he keeps perking up, but he saw him watching five minutes ago. So, that's as much as we can tell you. We are trying to keep an eye on him.

[Defense Counsel K.]: Can we try to rouse him now?

THE COURT: Well, we might as well do it when we're done with this discussion of jury questions.

[Defense Counsel C.]: Of course.

(The following proceedings were held in open court:)

THE COURT: I understand the jury would like to take a break, so why don't we do that now, and we'll take up these questions.

¶8 At no time during either of these bench conferences did any party actually object to the sleeping juror. Nor did any party request that the court take any action with respect to the juror, other than the request during the second bench conference to "try to rouse him now." And when the court explained all of the things that it had been doing to ensure that this juror remained attentive, no one objected or asked the court to take any further action. Neither the parties nor the court mentioned Juror Number Seven again after the above-described bench

conferences, and nothing in the record suggests that this juror fell asleep at any other point during the trial.

¶9 The jury ultimately convicted Forgette of second degree burglary, with Juror Number Seven voting to convict along with the other jurors. After the court announced the verdict, at defense counsel's request, the court polled the jurors, and Juror Number Seven confirmed his verdict. The court subsequently sentenced Forgette to twelve years in the Department of Corrections.

¶10 Forgette appealed, arguing, in pertinent part, that Juror Number Seven's sleeping during the presentation of at least some of the evidence deprived Forgette of his right to a twelve-person jury and mandated reversal. *People v. Forgette*, 2021 COA 21, ¶ 5, 491 P.3d 457, 460. Forgette further contended that he had properly preserved his objection to the sleeping juror because the matter "was brought to the court's attention." *Id.* at ¶ 13, 491 P.3d at 461.

¶11 In a unanimous, published opinion, a division of the court of appeals affirmed Forgette's conviction and sentence, concluding that Forgette had waived his right to challenge the juror's inattentiveness on appeal. *Id.* at ¶ 1, 491 P.3d at 460.

¶12 As pertinent to the issues before us, the division initially concluded that defense counsel's comment that a juror was asleep during trial, without a specific objection or a request for a remedy, did not present the trial court with anything

to rule on and was therefore insufficient to preserve the issue. *Id.* at ¶ 14, 491 P.3d at 461. The question thus became whether Forgette had waived this unpreserved issue, rendering it unreviewable on appeal. *Id.* at ¶ 15, 491 P.3d at 461. To decide this question, the division noted that it first had to determine whether the issue was a personal right that Forgette himself was required to waive, or whether defense counsel could waive the issue on his behalf. *Id.* Drawing a distinction between the right to a jury trial (which the division concluded was not implicated in this case) and the right to a jury of twelve (which the division suggested was implicated), the division concluded that the right to a jury trial is personal to the defendant and therefore only the defendant could waive that right. *Id.* at ¶¶ 18–19, 491 P.3d at 462. The right to a jury of twelve, in contrast, could be waived by either the defendant or his counsel. *Id.* at ¶ 19, 491 P.3d at 462. The division then opined that, on the facts presented, when defense counsel had requested no relief for "the known defect of a sleeping juror," counsel had waived Forgette's right to appellate review of the question of whether Forgette was deprived of his right to a twelve-person jury. *Id.* at ¶¶ 19–20, 32–33, 491 P.3d at 462, 464.

¶13 Forgette petitioned for certiorari, and we granted his petition.

II. Analysis

¶14 We begin by addressing the applicable standard of review. We then turn to Forgette's arguments that his counsel could not properly waive his right to a jury

of twelve and that Forgette did not waive that right, and we conclude that the right to a twelve-person jury is not, in fact, implicated in this case and that we need not decide those issues. Finally, we consider whether Forgette properly preserved any objection to the sleeping juror, and we conclude that he did not and, in fact, waived any such objection.

A. Standard of Review

¶15 "[A]n appellate court has an independent, affirmative duty to determine whether a claim is preserved and what standard of review should apply, regardless of the positions taken by the parties." *People v. Tallent*, 2021 CO 68, ¶ 11, 495 P.3d 944, 948. Whether a claim is waived presents a question of law that we review de novo. *Richardson v. People*, 2020 CO 46, ¶ 21, 481 P.3d 1, 5.

B. Right to a Jury of Twelve

¶16 The Colorado Constitution affords felony defendants in Colorado a right to a twelve-person jury. *People v. Rodriguez*, 112 P.3d 693, 709 (Colo. 2005); Colo. Const. art. II, § 23.

¶17 Because Forgette was charged with a felony here, he had such a constitutional right. He argues, however, that (1) the sleeping juror deprived him of this right; (2) because this right is personal to him, only he, and not his counsel, could waive that right; and (3) he did not do so.

¶18 Notwithstanding Forgette's suggestion to the contrary, however, Forgette was tried by a jury of twelve, and those twelve jurors, including Juror Number Seven, unanimously voted to convict him of the felony with which he was charged. As a result, we conclude that Forgette's right to a twelve-person jury is not implicated in this case. *See State v. Williams*, 235 S.E.2d 86, 87 (N.C. Ct. App. 1977) ("The 'sleeping juror' had been duly impaneled along with the other eleven and the twelve duly returned a verdict of guilty in open court. Defendant, therefore, was convicted by a jury of twelve as required by law."). Accordingly, we need not address—and we express no opinion on—the second and third issues on which we granted certiorari, and we therefore vacate the portions of the division's opinion below opining that (1) there is a distinction between the waiver of the right to a jury trial and the waiver of the right to a jury of twelve and (2) defense counsel can waive a defendant's right to a jury of twelve on the defendant's behalf.

¶19 The question thus becomes whether Forgette properly objected to the sleeping juror and, if not, whether he waived any objection in that regard. We turn next to those issues.

C. Waiver of Objection to the Sleeping Juror

¶20 Forgette contends that his objection to the sleeping juror was properly preserved for review when both the prosecutor and defense counsel mentioned to the trial court that a juror was sleeping during the presentation of certain evidence.

¶21 To preserve an issue for appellate review, a party must make a timely objection on the record, *People v. Turner*, 2022 CO 50, ¶ 11, 519 P.3d 353, 357, and that objection must be "specific enough to draw the trial court's attention to the asserted error," *Tallent*, ¶ 12, 495 P.3d at 948 (quoting *Martinez v. People*, 2015 CO 16, ¶ 14, 344 P.3d 862, 868); *see also People v. Ujaama*, 2012 COA 36, ¶ 37, 302 P.3d 296, 304 ("An issue is unpreserved for review when, among other things, . . . no objection or request was made in the trial court . . . ."). Although we do not require that parties use talismanic language to preserve an argument for appeal, a party must present the trial court with "an adequate opportunity to make findings of fact and conclusions of law on any issue before we will review it." *People v. Melendez*, 102 P.3d 315, 322 (Colo. 2004).

¶22 As the foregoing authorities make clear, the purpose of an objection is not merely to express disagreement with a proposed course of action. *Martinez v. People*, 244 P.3d 135, 139 (Colo. 2010). Rather, an objection must afford the trial court "an opportunity to focus on the issue and hopefully avoid the error." *Id.* (quoting *Am. Fam. Mut. Ins. Co. v. DeWitt*, 218 P.3d 318, 325 (Colo. 2009)); *see also People v. Jimenez*, 434 N.Y.S.2d 251, 252 (N.Y. App. Div. 1981) (noting that the "purpose of an objection is to provide the court with an opportunity to cure the defect at a time when the error may readily be corrected," and concluding that the defendant did not preserve an objection to the trial court's inadvertent omission

of a requested jury instruction because the defendant did not raise a timely objection that would have afforded the court an opportunity to remedy the omission), *aff'd as modified on other grounds*, 433 N.E.2d 1270 (N.Y. 1982).

¶23 Accordingly, as many courts in this jurisdiction and elsewhere have recognized, merely calling an issue or fact to the court's attention, without asking for any relief, is insufficient to preserve an issue for review. For example, in *Vanderpool v. Loftness*, 2012 COA 115, ¶ 25, 300 P.3d 953, 960–61, Vanderpool had moved to compel production of documents from one of Loftness's expert witnesses or to prohibit the witness from testifying at trial. The parties and the court discussed the motion to compel, but the court deferred ruling on it. *Id.* at ¶ 26, 300 P.3d at 961. The case proceeded to trial, and Loftness called the witness to testify, but Vanderpool did not request rulings on his previous motions or object to the witness's testimony or qualifications as an expert witness when the witness was called to the stand. *Id.* at ¶ 27, 300 P.3d at 961. On these facts, the division concluded that Vanderpool had abandoned any objection to the witness's testimony and thus did not preserve the issue for appellate review. *Id.* at ¶ 28, 300 P.3d at 961; *see also Littlefield v. Bamberger*, 32 P.3d 615, 620 (Colo. App. 2001) (concluding that the defendants did not preserve an issue for appellate review when they presented an argument to the trial court in one sentence of their trial brief but never asked the court to rule on that argument); *People v. Jones*,

570 N.Y.S.2d 4, 5 (N.Y. App. Div. 1991) (concluding that the defendant did not preserve for appellate review an objection to an allegedly sleeping juror when the defendant did not request an *in camera* interview with the juror or object to the trial court's apparent inquiry by means of personally observing the jurors).

¶24 Other courts have similarly concluded that when a court takes curative action after a party brings an issue to the court's attention and the party fails to object or ask for further relief, any complaint that the court neglected to do more is unpreserved. *See, e.g.*, *People v. Seabrooks*, 918 N.Y.S.2d 797, 800 (N.Y. App. Div. 2011) (concluding that the trial court's curative instruction "must be deemed to have corrected any errors to the defendant's satisfaction" and that any further assertion of error was unpreserved when the defendant brought to the court's attention a witness's improper conduct, the court admonished the witness and issued a curative instruction, and the defendant did not object or request further action from the court); *People v. Hamm*, 839 N.Y.S.2d 807, 808 (N.Y. App. Div. 2007) (concluding that a defendant's objection to the admission of a hearsay statement must be deemed to have been cured and that the issue was thus unpreserved for appellate review when defense counsel called the issue to the court's attention, the court instructed the jury that the statement was "not offered for its truth," and defense counsel did not object to this limiting instruction or request any additional

relief). We are persuaded by the reasoning employed by these courts, and we adopt that reasoning here.

¶25 Turning then to the facts before us, as noted above, Forgette did not specifically object to the sleeping juror. Nor did he ask the trial court to take any action regarding the sleeping juror, either before or after the court explained what it had been doing to ensure the juror's attentiveness. Specifically, Forgette's counsel said nothing at all after one of the prosecutors first noted that Juror Number Seven appeared to be asleep. And when the issue came up a second time, defense counsel asked the court to try to rouse the juror "now," but the court responded that it might as well do so when the bench conference was completed, to which defense counsel responded, "Of course." The issue of Juror Number Seven's being asleep never arose again during the trial.

¶26 On these facts, we cannot conclude that Forgette preserved any objection to the sleeping juror. At no point did he request any action from the court, other than to try to rouse the juror, and when the court indicated that it would do so at the proper time, Forgette acquiesced. Forgette then sought no further action from the court, including after the court explained what it had done to ensure Juror Number Seven's attentiveness. Nor did Forgette at any point suggest that his right to a fair trial was denied because the juror had apparently dozed off briefly in two

instances. In light of the above-described authorities, we conclude that Forgette's actions were insufficient to preserve the sleeping-juror issue for appellate review.

¶27 This leaves the question of whether Forgette waived or forfeited any objection to the sleeping juror. *See Phillips v. People*, 2019 CO 72, ¶ 15, 443 P.3d 1016, 1022.

¶28 Waiver is "the *intentional* relinquishment of a *known* right or privilege." *People v. Rediger*, 2018 CO 32, ¶ 39, 416 P.3d 893, 902 (quoting *Dep't of Health v. Donahue*, 690 P.2d 243, 247 (Colo. 1984)). A waiver may be explicit, as, for example, when a party expressly abandons an existing right or privilege, or it may be implied, as when a party engages in conduct that manifests an intent to relinquish a right or privilege or acts inconsistently with its assertion. *Donahue*, 690 P.2d at 247. "We 'do not presume acquiescence in the loss of fundamental constitutional rights, and therefore indulge every reasonable presumption against waiver.'" *Rediger*, ¶ 39, 416 P.3d at 902 (quoting *People v. Curtis*, 681 P.2d 504, 514 (Colo. 1984)).

¶29 Forfeiture, in contrast, is "the failure to make the timely assertion of a right." *Id.* at ¶ 40, 416 P.3d at 902 (quoting *United States v. Olano*, 507 U.S. 725, 733 (1993)). Although a waiver requires intent, a forfeiture generally occurs through neglect. *Phillips*, ¶ 17, 443 P.3d at 1022.

¶30 The distinction between a waiver and a forfeiture is significant because "a waiver extinguishes error, and therefore appellate review, but a forfeiture does not." *Rediger*, ¶ 40, 416 P.3d at 902. Accordingly, unlike in the case of a waiver, an appellate court may review a forfeited error under the plain error standard. *Id.*

¶31 We have considered the concepts of waiver and forfeiture in a variety of contexts. For example, in *Stackhouse v. People*, 2015 CO 48, ¶ 1, 386 P.3d 440, 441, we considered whether the defendant had waived his public trial right by not objecting to the closure of a courtroom during jury selection. In that case, the trial court had required members of the public to leave the courtroom during jury selection because the large jury pool and limited courtroom space created a risk that family members and others would interact with and potentially bias the prospective jurors. *Id.* at ¶ 2, 386 P.3d at 441–42. After explaining his reasoning for the closure, the trial judge asked the parties if they had "anything further," and Stackhouse's counsel, knowing full well of the courtroom closure, did not object either at that time or at any other point during the trial. *Id.* at ¶ 2, 386 P.3d at 442. On these facts, we concluded that by not objecting to the known closure, Stackhouse had waived his public trial right. *Id.* at ¶ 17, 386 P.3d at 446.

¶32 In contrast, in *Rediger*, ¶ 8, 416 P.3d at 897, one of the elemental jury instructions tracked the wrong subsection of the statute under which Rediger had been charged and, as a result, the instruction did not match the charging document

in that case. Rediger's counsel did not object to this error or the alleged constructive amendment, and, in fact, he indicated at the close of the evidence that he was "satisfied with the instructions." *Id.* at ¶ 10, 416 P.3d at 898. The record, however, disclosed no evidence, either express or implied, that Rediger had intended to relinquish his right to be tried in conformity with the charges set forth in his charging document. *Id.* at ¶ 42, 416 P.3d at 902–03. Nor did we perceive any evidence that Rediger knew of the discrepancy between the prosecution's tendered jury instruction and the charging document. *Id.* at ¶ 43, 416 P.3d at 903. On such facts, we concluded that neglect, not intent, explained Rediger's lack of an objection, and thus, we determined that Rediger had forfeited, rather than waived, his objection to the erroneous instruction and alleged constructive amendment. *Id.* at ¶ 44, 416 P.3d at 903.

¶33 We reached a similar conclusion in *Turner*, ¶¶ 10–15, 519 P.3d at 357–58. There, the trial court had excluded from the courtroom the wife of Turner's co-defendant, who was also a friend of Turner's, for what turned out to be most of Turner's trial. *Id.* at ¶ 1, 519 P.3d at 356. When the court asked Turner's counsel for his position on the exclusion, counsel responded that he did not have sufficient information as to what had occurred to justify such an exclusion and that until he had further information, he had no position on the matter. *Id.* at ¶ 4, 519 P.3d at

356. On these facts, we concluded that Turner had not intentionally relinquished, and thus had not waived, his public trial right. *Id.* at ¶ 13, 519 P.3d at 358.

¶34 In our view, this case is closer to *Stackhouse* than to *Rediger* or *Turner*. Here, as in *Stackhouse*, Forgette's counsel was fully aware of the sleeping juror but did not object or ask the court to take any action to address the issue. On such facts, we conclude that Forgette intentionally relinquished his known right to object to the sleeping juror and therefore waived any such objection for appellate review.

¶35 In reaching this conclusion, we are not persuaded by Forgette's argument that regardless of whether he had properly preserved an objection to the sleeping juror, once the issue was brought to the trial court's attention, the court was obliged to investigate the matter and to take further action if necessary. As noted above, the court *did* follow up, and it explained to counsel all of the actions that it had taken to ensure the juror's attentiveness. Forgette raised no objection to the court's actions and sought no further relief during his trial. Accordingly, any assertion that the court neglected to do more is itself unpreserved. *See Seabrooks*, 918 N.Y.S.2d at 800; *Hamm*, 839 N.Y.S.2d at 808.

III. Conclusion

¶36 For these reasons, we conclude that the questions of whether there is a distinction between the waiver of the right to a jury trial and the waiver of the right to a jury of twelve, and whether Forgette's counsel could waive Forgette's

right to a twelve-person jury on his behalf, are not implicated in this case. As to the issue that is implicated here, namely, whether a sleeping-juror issue is preserved when the parties advise the trial court that a juror is sleeping but request no action or remedy from the court, we conclude that Forgette did not preserve this issue and, on the facts before us, waived it, thus precluding appellate review.

¶37 Accordingly, we vacate the portions of the division's opinion expressly opining on matters related to Forgette's right to a twelve-person jury and otherwise affirm the division's judgment.