

**IN THE SUPERIOR COURT OF THE STATE OF DELAWARE**

**IN AND FOR KENT COUNTY**

**STATE OF DELAWARE**                    )  
  )  
                  v .                            )     ID N o . 0 2 0 8 0 1 9 5 2 4 A  
  )  
**MICHAEL DURHAM**                    )  
  )  
                  D e f e n d a n t .        )

Submitted: January 30, 2004  
Decided: March 8, 2004

James J. Kriner, Esq., Deputy Attorney General for the  
State of Delaware.

Sandra W. Dean, Esq., Dover, Delaware for the  
Defendant.

**OPINION**

**Upon Defendant's Motion for New Trial**  
***DENIED***

R I D G E L Y , President Judge

Defendant Michael Durham has been convicted by a jury of four counts of Possession of a Firearm During the Commission of a Felony, 11 *Del. C.* § 1447A, Burglary in the First Degree, 11 *Del. C.* § 826, Attempted Robbery in the First Degree, 11 *Del. C.* § 531, Reckless Endangering in the First Degree, 11 *Del. C.* § 604, Conspiracy in the Second Degree, *Del. C.* § 512 , Terroristic Threatening, 11 *Del. C.* § 621, Assault in the Third Degree, 11 *Del. C.* § 613, Endangering the Welfare of a Child, 11 *Del. C.* § 1102, Criminal Mischief, 11 *Del. C.* § 811, and Aggravated Menacing, 11 *Del. C.* § 602. The charges arose from a home invasion in Dover, Delaware on August 27, 2002. Durham has moved for a new trial based on alleged juror misconduct. He contends that Juror Nine was either sleeping or dozing during the trial. After an evidentiary hearing on the motion, I conclude that Durham's motion is without merit.

**I.**

The Court has heard testimony from witnesses present during the trial and from Juror Nine herself. Superior Court Bailiff Joseph Sanchez was a Bailiff for the entire trial. He noticed on the first day of trial that Juror Nine tended to close her eyes. He circled her name on his juror sheet so that he knew to watch her. As a Bailiff he had been told not just to look at a juror's eyes but to look for movement of hands or feet. When Juror Nine did close her eyes he observed her moving her hands and feet or swiveling her chair back and forth. He never saw her sleeping.

Beth Savitz, Esq. testified that Juror Nine would put her head down and appeared to be dozing, but she could not tell for sure that she was. She observed Juror Nine with her eyes closed and her chin to her chest, but did not have an estimate for how long that lasted.

William Mizell was a spectator at the trial. He testified that he observed Juror Nine fighting sleep “hard” during closing statements and during the jury charge. He testified that she did not actually go to sleep.

Juror Nine testified she is 67 years old and considered herself attentive at the trial. She has no sleeping disorder of any kind. She testified that she was not sleeping although there were times during the trial that she listened with her eyes closed. She remembered the jury instructions and noted the instructions were also in writing and that she read them. She said she understood and comprehended all the evidence, the arguments and the Court’s instructions.

## II.

To warrant a new trial based upon juror misconduct, Durham must show actual prejudice or that the circumstances surrounding the misconduct were so egregious and inherently prejudicial as to raise a presumption of prejudice.<sup>1</sup>

Conclusory allegations are too vague to establish prejudice.<sup>2</sup> Based upon the evidence presented, I find no actual prejudice. Nor do I find circumstances so

---

<sup>1</sup> *Massey v. State*, 541 A.2d 1254, 1257 (Del. 1988) (citing *Hughes v. State*, 490 A.2d 1034 (Del. 1985)).

<sup>2</sup> *United States v. Tierney*, 947 F.2d 854, 868-869 (8<sup>th</sup> Cir. 1991).

**State v. Durham**  
**ID No. 0208019524A**  
March 8, 2004

egregious and inherently prejudicial which raise a presumption of prejudice. Juror Nine did not sleep during this trial nor did she ignore essential portions of the trial. Even if Juror Nine was fighting sleep at times, that circumstance is not so egregious and inherently prejudicial as to raise any presumption of prejudice. A new trial is not warranted in this case.<sup>3</sup>

Accordingly, Defendant's Motion for a New Trial is ***DENIED***.

**IT IS SO ORDERED.**

/s/ Henry duPont Ridgely

---

President Judge

ds

oc: Prothonotary

xc: Order distribution

---

<sup>3</sup> See generally George L. Blum, Annotation, *Inattention of Juror from Sleepiness or Other Cause as Ground for Reversal or New Trial*, 59 A.L.R. 5<sup>th</sup> 1 (2003).