IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,	)	
	)	No. 64219-7-I
Respondent,	)	
	)	DIVISION ONE
v.	)	
	)	UNPUBLISHED OPINION
YOBACHI AYO FRAZIER, AKA CHIDI FLETCHER,	)	
	)	
Appellant.	)	FILED: November 1, 2010

Grosse, J. — A trial court is not required to conduct an evidentiary hearing every time there is an allegation of juror misconduct. This is particularly true here, where, after being alerted to a purportedly sleeping juror, the trial court indicated that it would carefully observe the juror, did so, and found no evidence that the juror was sleeping. We affirm.

FACTS

On July 4, 2007, a crowd of approximately 100 people gathered in the parking lot of Ezell's Chicken in Skyway to celebrate the Fourth of July by lighting fireworks. Don Dowlen confronted Yobachi Frazier for lighting fireworks too close to his girlfriend's car. An argument ensued and Dowlen knocked over Frazier's fireworks. Rena Carpenter testified that she stepped in between the two of them and urged Dowlen to walk away. The next thing she saw was Dowlen twitching on the ground as Frazier repeatedly shot him. Dowlen was shot nine times and died at the scene.

When police arrived at the scene, Carpenter identified Frazier, whom she had known for years, as the shooter. Serwa Ashford also knew Frazier and saw

him shoot Dowlen. Anthony Godine, Dowlen's brother-in-law, was standing next to Dowlen when he was shot. He told the police the shooter was wearing a Michael Jordan jersey. Godine identified Frazier in court. Several others who witnessed the shooting could not identify Frazier but remembered that the shooter was wearing a Michael Jordan or Chicago Bulls jersey.

The police arrested Frazier in Alaska on July 31, 2007, where he was living under an assumed name. Frazier was charged with first degree premeditated murder while armed with a firearm.[1] After a nine day trial, Frazier was convicted as charged.

Four times during the trial, defense counsel raised concerns regarding an elderly juror, aged 77, whom he thought was sleeping. The first day of jury selection and opening arguments was held without any allegations of the juror being asleep. On the afternoon of the second day of the trial, June 24, during the cross-examination of the second police detective, the court recessed and held a sidebar. Defense counsel informed the court that one of the jurors was having difficulty staying awake. Counsel's assertion was based on the juror's having dropped a pen. The court noted that it had not observed the juror sleeping and further that dropping a pen was not indicative that the juror was not paying attention. But the court noted that it would take more breaks or have the jurors stand and stretch. Informed of which juror it was, the court said he would keep an eye on Juror No. 9. At the conclusion of the testimony that day, the

[1] The first trial ended in a mistrial on day two of the trial when the State's first witness commented that Frazier had just "got out" when the shooting occurred. The witness's reference to Frazier's previous incarceration was in violation of motion in limine orders and the court granted a mistrial.

court informed counsel that he had observed Juror No. 9 as being "as alert as anybody else on the jury." Defense counsel observed that Juror No. 9 appeared "to be sleeping at one brief point, but . . . when he's thinking, his eye—he's actually looking down."

On the following day, June 25, the jury heard testimony from eight witnesses and no one indicated that Juror No. 9 was doing anything other than paying attention. Trial resumed on June 29 with five witnesses testifying. The next day, however, defense counsel voiced his concerns that his client had observed Juror No. 9 dozing the previous day. The defendant himself addressed the court complaining that the court was failing to address the issue. At the end of the colloquy, it was agreed that defense counsel would bring it to the court's attention by raising his hand if he observed Juror No. 9 sleeping.

The jury returned for the morning and heard the testimony of four witnesses. During the testimony of one of these witnesses, defense counsel raised his hand. Outside the presence of the jury a colloquy ensued regarding defense counsel's raising his hand to signify that he had observed Juror No. 9 sleeping during the last witness's testimony. The court looked over at the juror and saw that he was awake. The prosecutor also saw Juror No. 9's reaction, commenting that he did not think Juror No. 9 was asleep because the juror noticed defense counsel raising his hand. The court also noted for the record that he had communicated with the court reporter who had a direct line of sight with Juror No. 9. The court reporter had not seen any evidence of Juror No. 9 sleeping. The court queried defense counsel as to what he wanted the court to

do. In response, defense counsel stated that his client would like a new jury. The court pointed out that thirteen jurors were present and Frazier would not be entitled to a new jury. Defense counsel then stated that "we would ask then that, if the pattern continues, that that juror be dismissed." The prosecutor noted that he also had been observing Juror No. 9 and when it appeared that his eyes were closed, he was actually raising his notepad as though he were reading from it. The afternoon session continued without incident.

On July 1, after the testimony of two witnesses, defense counsel again raised the issue of the sleeping juror. The court disagreed. Five more witnesses testified that day. No further mention of Juror No. 9's inattentiveness was raised.

On July 6 and 7, defense presented its case. Closing arguments were held the afternoon of July 7 and no issue regarding Juror No. 9's demeanor was raised. The jury returned a guilty verdict as charged. Frazier appeals alleging the trial court abused its discretion by failing to investigate the allegations of juror misconduct.

ANALYSIS

Under RCW 2.36.110, the judge has a duty "to excuse from further jury service any juror, who <u>in the opinion of the judge</u>, has manifested unfitness as a juror by reason of . . . inattention . . . or by reason of conduct or practices incompatible with proper and efficient jury service."[2] CrR 6.5 enables the court to seat alternate jurors at the time the jury is selected. Under CrR 6.5, before a

[2] (Emphasis added.)

case is submitted to the jury, the court has authority to discharge a juror unable to perform the duties. As noted in State v. Jorden, 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 jury.[3]

Here, Frazier argues that his repeated allegations of a sleeping juror were sufficient to establish a record that the juror was engaged in misconduct. Those allegations, he argues, should have triggered a court inquiry of the juror in question. But here there was no misconduct. The issue was raised four times by counsel during the trial. When the issue was first raised, the court observed Juror No. 9 and concluded that he was not sleeping. All but one of the times, the issue was raised after the fact. Only once did defense counsel call the court's attention to the purportedly sleeping juror by raising his hand. But the record indicates Juror No. 9 was awake, as he observably noticed counsel raising his hand. No one other than the defense observed the juror sleeping.

Frazier argues that the court had a duty to conduct a voir dire of Juror No. 9 and the court's failure to do so was an abuse of discretion. Citing cases from other jurisdictions, Frazier contends that the appropriate remedy was to engage in a fact-finding process to determine whether Juror No. 9 was sleeping. The cases cited by Frazier all conclude that a further hearing is necessary when there is a "sufficient showing" or a "real basis" to believe that a juror is sleeping.[4] For example, in State v. Hampton, the Wisconsin Supreme Court concluded that

[3] 103 Wn. App. 221, 226-27, 11 P.3d 866 (2000).
[4] Com. v. Braun, 74 Mass. App. Ct. 904, 905 N.E.2d 124 (2009); State v. Hampton, 201 Wis.2d 662, 549 N.W.2d 756 (1996).

"if there is a sufficient showing of juror inattentiveness, the appropriate remedy is to engage in a fact-finding process to establish a basis for the exercise of discretion."[5] In Hampton, the fact that a juror was sleeping was conceded. No such concession is present here. In fact, quite the opposite, as here, no one else observed Juror No. 9 asleep. Frazier's observations of a sleeping juror were not substantiated by other sources. Indeed, observations by the court, the prosecutor, and the court reporter all indicated that the juror was not sleeping. A hearing is not required every time an issue of juror inattentiveness is raised.[6]

We review a trial court's decision whether to excuse a juror for abuse of discretion.[7] A court abuses its discretion when its ruling is "'manifestly unreasonable or exercised on untenable grounds, or for untenable reasons.'"[8] Frazier has not met this burden. Defense counsel's unsubstantiated observation did not require the court to conduct a voir dire of the juror and does not entitle Frazier to a new trial.[9]

The judgment and sentence is affirmed.

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[5] 201 Wis.2d 662, 672-73, 549 N.W.2d 756 (1996).
[6] Jorden, 103 Wn. App. at 226-27.
[7] Jorden, 103 Wn. App. at 226 (citing State v. Hughes, 106 Wn.2d 176, 204, 721 P.2d 902 (1986)).
[8] State v. Downing, 151 Wn.2d 265, 272-73, 87 P.3d 1169 (2004) (quoting State ex rel. Carroll v. Junker, 79 Wn.2d 12, 26, 482 P.2d 775 (1971)).
[9] Citing only to State v. Hughes, the State argues that Frazier failed to preserve his claim of alleged juror misconduct on appeal. Although the Hughes court stated that "[u]nless counsel objects to the jurors' inattentiveness during trial, the error is waived on appeal," it found no wavier because defense counsel brought the juror's drowsiness to the court's attention. 106 Wn.2d at 204. Similarly, Frazier preserved the issue by repeatedly calling it to the trial court's attention.

Grosse, J

WE CONCUR:

Leach, A.C.J.

Ellington, J.