COURT OF APPEALS
DECISION
DATED AND FILED

March 17, 2015

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2013AP2768-CR **Cir. Ct. No. 2009CF2093**

STATE OF WISCONSIN **IN COURT OF APPEALS**
DISTRICT I

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

CHRISTOPHER D. JACKSON,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Milwaukee County: DENNIS R. CIMPL and STEPHANIE ROTHSTEIN, Judges. *Affirmed.*

Before Curley, P.J., Kessler, J. and Thomas Cane, Reserve Judge.

¶1 PER CURIAM. Appellant Christopher D. Jackson appeals a judgment convicting him of one count of second-degree sexual assault by use of force and one count of second-degree sexual assault by a correctional officer. He

also appeals an order denying his postconviction motion. He argues: (1) that his due process rights were violated by a sleeping or unconscious juror; and (2) that the circuit court misused its discretion when it inaccurately summarized the victim's testimony for the jury during deliberations. We affirm.

¶2 Jackson first contends that his federal and state constitutional rights were violated because a juror was either sleeping or unconscious during critical testimony by the victim. "Article I, § 7 of the Wisconsin Constitution, guaranteeing an impartial jury, and the Sixth and Fourteenth Amendments to the United States Constitution, guaranteeing an impartial jury and due process, require that a criminal not be tried by a juror who cannot comprehend the testimony." ***State v. Hampton***, 201 Wis. 2d 662, 668, 549 N.W.2d 756 (Ct. App. 1996). "'It is logical to conclude that implied in the concept of assuring an impartial jury is the presence of jurors who have heard all of the material testimony.'" ***State v. Kettner***, 2011 WI App 142, ¶23, 337 Wis. 2d 461, 805 N.W.2d 132 (citation omitted). "'The absence of this condition, whether it is due to a hearing deficiency or a state of semi-consciousness, could imperil the guarantees of impartiality and due process.'" ***Id.*** (citation omitted).

¶3 "Review of an allegation of juror inattentiveness involves a twofold inquiry: First, the circuit court must determine, as a question of fact, whether the juror was actually inattentive to the point of potentially undermining the fairness of trial." ***State v. Novy***, 2013 WI 23, ¶47, 346 Wis. 2d 289, 827 N.W.2d 610. "[W]e will uphold a circuit court's factual findings regarding the conduct and attentiveness of the jurors, unless those findings are clearly erroneous." ***Id.***, ¶48. "Second, if the circuit court finds that the juror was in fact sufficiently inattentive, the court must determine whether the defendant suffered prejudice as a result of the juror's inattentiveness." ***Id.***, ¶47. Whether the defendant suffered prejudice as

a result of the juror's inattentiveness is a question of law that we review *de novo*. ***Id.***, ¶48.

¶4 At trial late on the morning of September 9, 2010, the circuit court asked Assistant District Attorney Miriam Falk if she intended to continue questioning Clyde Maxwell, a prison guard captain, for much longer. Falk said that she did, so the circuit court decided to take a lunch break and continue Maxwell's testimony after lunch. After the jury left the courtroom, the following exchange occurred:

> THE COURT: I took the—the break a little bit earlier than I wanted to because I noticed two jurors nodding off.
>
> MS. FALK: Yes. That was what we wanted to make a record on. No. 17, according to Detective Carloni—and apparently one of your bailiffs—according to Carloni, he's pretty much been sleeping the whole morning.
>
> THE COURT: He has. I have been watching him. His eyelids—or his eyes are droopy eyes, so sometimes where you think he is sleeping he's not. The—
>
> MS. FALK: Detective Carloni described that he saw him—that he was doing the head bob thing?
>
> THE COURT: The head bob?
>
> MS. FALK: You know, going (demonstrating) and jerking back up, which is of some concern.
>
> THE COURT: We'll watch it. At this point—
>
> MS. FALK: That's all I've got for now.
>
> THE COURT: Anything from the defense?
>
> MR. TANZ: Just for the record, I guess my client, Mr. Jackson, noticed—noticed something about that juror, which is right when the lunch break—when you called the lunch break.

> THE COURT: That's when we noticed it, and we'll continue to watch it. If worse comes to worse, we can always agree that he will be the one struck as the alternate.

¶5 The circuit court held an evidentiary hearing on Jackson's postconviction motion alleging that his constitutional rights were violated by a sleeping or unconscious juror at which Martin Tanz, Jackson's trial lawyer, Police Lieutenant Justin Carloni and Jackson testified.[1] After the hearing, the circuit court made the following factual findings: (1) Attorney Tanz made no personal observations of a juror nodding off; (2) Attorney Tanz testified that Jackson was one of the most intelligent and articulate clients he's ever represented and said Jackson was very interested in participating in his own defense; (3) Attorney Tanz brought the issue of the juror to the court's attention as soon as his client brought it to his attention; (4) Assistant District Attorney Miriam Falk made no personal observations of a sleeping juror, but informed the court what Lieutenant Carloni, who sat next to Falk during the trial as the State's court officer, reported to her; (5) Lieutenant Carloni personally observed the juror's head bobbing up and down for a period of time shortly before the panel broke for lunch and characterized the juror's behavior as a struggle to stay awake, as opposed to overtly being asleep; (6) Assistant District Attorney Falk reported to the court, in her own words, what Carloni told her, using some hyperbole;[2] (7) Jackson testified that the juror was asleep with his head down for ten minutes during the testimony of J.T., the victim, and that the juror's head was down another time for between five and ten minutes;

[1] The Honorable Stephanie Rothstein decided the postconviction motion and made these factual findings. The Honorable Dennis R. Cimpl was the trial judge.

[2] This finding refers to Assistant District Attorney Falk's statement, recounted previously in this opinion, that "according to Carloni, he's pretty much been sleeping the whole morning."

(8) The trial judge was watching the jurors during trial and decided to break for lunch early because he noticed a juror or two "nodding off," but the judge did not make a finding that a juror had been asleep; (9) The trial judge stated that the juror's "eyelids or his eyes are droopy eyes ... [s]o sometimes whe[n] you think he's sleeping, he's not"; (10) The trial judge stated that he noticed the behavior right before the lunch break, as did Jackson; (11) The trial judge said he would continue to watch the juror and if the situation worsened, the juror could be struck as the alternate; (12) The judge did not strike the juror as an alternate even though the trial judge was aware of a potential issue with that juror and his lack of attentiveness; (13) There is no other mention of that particular juror as being a problem any other time during the trial; (14) Between the morning recess and the lunch break, three witnesses testified; (15) J.T., one of the victims, testified directly after the morning recess, Tina Kurth testified after J.T., and Captain Clyde Maxwell testified right before lunch; (16) Maxwell was a minor witness in the context of the trial. Based on these findings, the circuit court made factual findings that the juror had not been inattentive to the point of potentially undermining the fairness of the trial, and that the incident with the juror occurred just before lunch during Maxwell's testimony, which was not critical testimony in the trial. *See* ***Novy***, 346 Wis. 2d 289, ¶47.

¶6 We reject Jackson's argument that we should overturn the circuit court's factual findings because they are clearly erroneous. To the contrary, the findings are well supported by the record. The circuit court reasonably inferred that Jackson would have alerted his lawyer immediately if he noticed a juror asleep because he was, according to Attorney Tanz, very intelligent and engaged in his defense. The circuit court found Jackson's testimony that the juror had been sleeping during J.T.'s testimony earlier in the morning less credible than

Lieutenant Carloni's testimony that the juror was struggling to stay awake just before lunch because Lieutenant Carloni's testimony was consistent with the observations of the trial judge and with the timeframe during which Attorney Tanz brought the problem to the court's attention. The court also reasoned that there is a difference between struggling to stay awake and being asleep in concluding that the juror had not been inattentive to the point of undermining the fairness of the trial. *See* ***id.*** ("the circuit court must [first] determine, as a question of fact, whether the juror was actually inattentive to the point of potentially undermining the fairness of the trial"). The circuit court properly concluded that Jackson was not deprived of his right to an impartial jury and due process based on juror inattentiveness during material testimony.[3]

¶7 Jackson next argues that the circuit court misused its discretion because it inaccurately read back portions of trial testimony to the jury. He contends he was prejudiced because the jury reached a verdict before the mistake was corrected. During deliberations, the judge may read trial testimony back to the jury at their request or "[t]he judge may choose to summarize the testimony for the jury in lieu of having it read." ***Kohlhoff v. State***, 85 Wis. 2d 148, 159, 270 N.W.2d 63 (1978). "Any such summary must be fair and accurate." ***Id.*** We will uphold the circuit court's action in response to a jury request for testimony unless the circuit court misuses its discretion. ***Id.***

¶8 While it was deliberating, the jury sent a note to the circuit court that stated:

[3] Jackson's appellate attorney contends that the circuit court's statement to the jury that it should go home and get a good night's rest after deliberating was further evidence that the jury was struggling to stay awake. This admonition was routine. We reject this argument.

> We need to hear the testimony and cross of [J.T.] regarding the finger to vagina count. We also would like to hear Pamela Young's testimony and cross regarding the red substance in the van. And then the third one is, we would like to hear [V.W.]'s testimony on the mouth-to-penis count.

At the court's request, the court reporters prepared seven trial excerpts in response to the jury's note, which the court reviewed with the prosecutor and defense counsel, who approved them. After the circuit court read the excerpts to the jurors and excused them for lunch, the prosecutor and the circuit court discussed another section of J.T.'s testimony, which had not been read but fit the jury's description of testimony it wanted to hear. The circuit court asked the court reporter to prepare it. About twenty minutes after lunch, but before the circuit court read the jury the additional testimony from J.T., the jury informed the court it had reached a verdict on two counts, but was deadlocked on the remaining eight counts. The circuit court instructed the jury to continue deliberating, and read them the additional portion of J.T.'s testimony. Three hours later, the jury again told the court that it had reached a verdict on only two of the counts, but could not reach a verdict on the remaining eight counts. The circuit court accepted the verdict.

¶9 The circuit court complied with the jury's request as best as it was able in consultation with the lawyers, initially providing some of the testimony, and providing the additional excerpt a short time later. We reject Jackson's contention that he was prejudiced because the jury reached a verdict before the mistake was corrected. The circuit court *did not accept the verdict* after lunch because the jury reached agreement on only two of the ten counts, an important

point omitted by Jackson's brief.[4] The circuit court instructed the jury to continue deliberating to try to reach a verdict on all of the counts, and read it the additional portions that were prepared before the jury continued their deliberations. So the jurors did, in fact, hear the testimony they requested before they reached a final verdict. We reject Jackson's claim that the circuit court misused its discretion.

By the Court.—Judgment and order affirmed.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)5.

[4] Jackson asserts in his brief that, after instructing the jury to continue deliberating, "the court forged ahead and read the missing [J.T.] testimony concerning the finger-to-vagina incident anyway, even though the jury had indicated that they had already found Jackson guilty of that charge." This assertion is inaccurate. The jury did not inform the court it found Jackson guilty of that count after lunch. The jury did not tell the court which counts it had decided.