2019

# State of Utah, Plaintiff/Appellee, v. Joseph Crescencio Granados, Defendant/Appellant : Brief of Appellee

Utah Court of Appeals

Case No. 20180055-CA

IN THE

# UTAH COURT OF APPEALS

STATE OF UTAH,
*Plaintiff/Appellee,*

*v.*

JOSEPH CRESCENCIO GRANADOS,
*Defendant/Appellant.*

## Brief of Appellee

Appeal from convictions for attempted murder, a first-degree felony; possession of a dangerous weapon by a restricted person, a second-degree felony; failure to stop at command of police and criminal mischief, both third-degree felonies; possession of a controlled substance, a class-A misdemeanor; and possession of drug paraphernalia, a class-B misdemeanor; in the Third Judicial District, Salt Lake County, the Honorable Paul B. Parker presiding


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## INTRODUCTION

Defendant followed the victim—a stranger—in his car, rammed the victim's car, and then shot at the victim 10 times. One bullet grazed the victim's neck, another went into a nearby house, and eight more went into the victim's car. Defendant then led police on a 22-mile car chase. Defendant was convicted of attempted murder, criminal mischief, and possession of a firearm by a restricted person.[1]

During the first and second days of trial, the trial court observed that a juror missed a significant amount of testimony because she was sleeping.

[1] Defendant does not challenge his failure to stop at the command of police, possession of a controlled substance, and possession of drug paraphernalia convictions. Br.Aplt.10.

Although Defendant asked the trial court to question the juror first, the court *sua sponte* dismissed the sleeping juror and replaced her with an alternate. The jury convicted Defendant.

Defendant challenges his attempted murder and criminal mischief jury convictions. He also challenges his possession-of-a-firearm-by-a-restricted-person bench-trial conviction. Defendant argues that the evidence was insufficient to prove that he was the shooter.

But ample evidence demonstrated that Defendant was the shooter. The evidence showed that Defendant stole his girlfriend's red Chevy Malibu, that the Malibu was involved in the shooting, and that only one person was driving that car—a person that matched Defendant's description. Inside the Malibu police found 10 spent shell casings from a 40-caliber handgun—the same number of bullet holes found at the scene and the same type of gun used in the shooting. And Defendant's DNA was found on at least one of those spent casings.

Defendant also argues that the trial court erred when it *sua sponte* dismissed a sleeping juror without first questioning her. But the trial court was not required to question the sleeping juror before dismissing her, even though Defendant requested it. The trial court had broad discretion in handling the sleeping juror and nothing required the court to question her

before dismissing her. Moreover, Defendant cannot show prejudice because he has not—and cannot show that a bias or incompetent juror sat.

## STATEMENT OF THE ISSUES

*Issue 1*. Was the evidence sufficient to support Defendant's attempted murder, criminal mischief, and possession of a firearm by a restricted person convictions?

*Standard of Review*. When reviewing the sufficiency of the evidence, this Court will "review the evidence and all reasonable inferences in the light most favorable to the jury's verdict" and will reverse a conviction only if it determines "that the evidence is so inconclusive or inherently improbable that reasonable minds must have entertained a reasonable doubt as to [the defendant's guilt]." *State v. Kennedy*, 2015 UT App 152, ¶39, 354 P.3d 775. When reviewing the sufficiency of the evidence at a bench trial, this Court must affirm unless, in light of the whole record, it is convinced that the verdict is "against the clear weight of the evidence, or if [it] otherwise reaches a definite and firm conviction that a mistake has been made" *State v. Walker*, 743 P.2d 191, 193 (Utah 1987).

*Issue* 2. Did the trial court clearly abuse its discretion by *sua sponte* dismissing a sleeping juror and replacing that juror with the alternate without first questioning the juror?

*Standard of Review*. "Granting or refusing a new trial" based upon a sleeping juror "is something so peculiarly within the observation, province, and discretion of the trial court that" an appellate court will not reverse "except upon a clear abuse of discretion." *State v. Mellor*, 272 P. 635, 639 (Utah 1929).

## STATEMENT OF THE CASE

### A. Summary of relevant facts.

Stephen Mecham was driving home from work on June 6, 2016, when Defendant—a stranger—followed Stephen, rammed his car, and then shot at him ten times. R571-81; *see* State's Exhibit (SE)5-9,41,61.

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**The day before the shooting.** Defendant's girlfriend reported that Defendant had stolen her 2002 red Chevy Malibu with a yellow baby-on-board sign in the back window, Utah license plate number E824JR. R627-29; SE20,21. Later that day, an officer saw Defendant driving the Malibu with no one else in the car. R629. When the officer tried to pull Defendant over, Defendant fled. R632.

**The shooting.** The next afternoon, around 3:45 pm, Stephen Mecham was driving his silver Chrysler 300 home from work. R422-23. As Stephen drove, he noticed Defendant erratically driving front of him. R569-70.

Initially, Stephen was relieved when Defendant pulled over so he could pass, but he quickly became alarmed when Defendant "jumped in right behind [him] and aggressively" followed him. R569-573. Stephen was so concerned that he did not drive home. R574. Instead, Stephen knew that a highway patrolman lived nearby and turned into the highway patrolman's neighborhood. *Id.* As Stephen drove down the residential streets, Defendant pulled alongside Stephen and pointed a gun at him. R575. Stephen slammed on the brakes and reversed. R576. Defendant chased Stephen. *Id*. Stephen called 911. SE53.

As Stephen spoke to the 911 operator, Defendant rammed Stephen's car. R578; SE53. Stephen's car skidded, hit a parked SUV, and rolled onto a lawn. R578-79; SE1b-1e. Defendant opened fire, repeatedly shooting at Stephen's car. R579; SE53 (gunfire audible). Defendant backed up, changed the angle of his car, then continued to shoot, firing ten rounds in total. R579-81. Defendant then fled in the Malibu. R589.

One bullet grazed Stephen's neck. R581; SE40-41. Another went into a house. SE9. Eight bullets went into Stephen's car. R818; SE2,5-8.

After the shooting stopped, Stephen "pried" his car door open and got out. R851. Police arrived soon after and began immediately looking for

Defendant. R666-68 (incident occurred at 4:13, officer arrived near scene at 4:21). Stephen was transported to the hospital. R582.

**Police investigation**. Stephan could not identify the Malibu's driver, but saw only one person in the car—a Hispanic male with a heavily tattooed arm. R571-73.

A neighbor, Jennifer Wood, heard four consecutive gun shots and went outside. R586-87. Wood saw that the gunfire was coming from a "red car." R587. She saw the red car back up and then she heard "four or five more shots." R587-89. Wood saw the red car make a U-turn, speed past her, and "bl[o]w through" an intersection. R589. Wood identified Defendant's girlfriend's car as the car involved in the shooting. R590; SE21. She described the car as "crushed in" on the front passenger side, with a white Utah license plate, and a baby-on-board sign in the back window. *Id.*

Celia Tafoya was driving in the area at the time of the shooting. R637-38. Tafoya saw the Malibu intentionally hit Stephen's car, and the Malibu's driver shoot at Stephen's car. R640-42. Tafoya could not see who was driving because she ducked down inside her car and covered her daughter when the gunfire erupted. R640. Tafoya did see that only one person was in the Malibu—the driver. *Id*.

Kathleen Henry was also driving in the area at the time. R601. She first heard a "great big ka-bang" or "screech" then saw the driver of a "red car" shooting at Stephan's car. R601,607. She saw that the red car's driver "just kept firing" at Stephen, about five to seven shots. R604. Henry drove past the red car and in her rear-view mirror saw the red car make a U-turn, then saw it drive past her. R605. Henry saw the red car run the red light at the intersection and a piece of it fly off. *Id*.

Henry called 911 and followed the red car. *Id.* As she followed, she relayed the red car's location to the 911 operator. R606. She also saw the red car's driver stop in the middle of the street, pick up the car's bumper that had fallen off, and put the bumper in the backseat. *Id*.

Officer Smith interviewed Henry about thirty minutes after the shooting. R653; *see* R668. Based on his interview, Officer Smith recovered a headlight at the intersection. R653; SE10,11.

Henry described the red car's driver as having a "round face," "really dark eyes," "short, really dark hair," and a moustache. R604. Two days later, police asked Henry to view a photo array. R608; SE50; *Cf*. R567; SE50 (shooting occurred two days before lineup shown). The photo array contained six photos; photo five was Defendant. R1009. Henry picked photo two out of the array but was not positive that the photo was the driver. R609.

She explained that photo two "resembles the offender in this case but I am not positive." R609; SE50.

Almost immediately after the shooting, Officer Benjamin Watson was dispatched to the scene and began looking for Defendant. R703-04; *see* 666-68,995 (officers dispatched minutes after shooting). Officer Watson saw Defendant—a Hispanic male with the word "eighteen" tattooed on his upper lip—driving the red Chevy Malibu with a missing bumper and headlight and a baby-on-board sign in the back window. R703-044; SE35-37,55. Officer Watson followed Defendant, radioing other officers to set up a containment area. R705. A containment area involves "surround[ing] the suspect in an organized manner so that [officers can] effectively apprehend the suspect." *Id*. Officer Watson followed Defendant for approximately 14 and a-half miles as Defendant sped along I-215and surface streets, then ran a red light and drove through a neighborhood. R705-718; SE46,47,55. Watson eventually lost Defendant. R718; SE55.

About the time that Watson lost Defendant, Detective Tan saw Defendant—a Hispanic male with a moustache—drive the Malibu "right by [him]." R733. Tan followed Defendant for approximately 8 miles as Defendant sped through neighborhoods, drove on the median, drove into on-coming traffic, and onto the freeway—reaching speeds of 95 miles per hour.

R726-50; SE49,56. Defendant eventually exited the freeway and drove to the Harmony Apartment Complex where his aunt lived. R750-51; *see* R447. At the Harmony Apartments, Defendant abandoned the Malibu in the middle of the road and led officers on a short foot chase through the complex. R751-56; SE56.

Sergeant Gray, who had also been pursuing Defendant in a separate marked police car, cut Defendant off in the apartment complex and arrested him. R751-56; SE56.

The entire incident—from Stephan's 911 call until Defendant's arrest—lasted approximately two hours. R668.

During a search incident to arrest, officers found methamphetamine in Defendant's sock and drug paraphernalia in Defendant's pocket. R556.

Officers also searched the car Defendant was driving—the red or maroon Chevy Malibu with the yellow baby-on-board sign hanging in the back window, Utah license plate E824JR. R780. The exterior of the Malibu had extensive damage. SE35-37. It was missing the front bumper and a headlight. R780; SE23,32-37. It was crushed in on one side with silver paint transfer and had a broken back window. *Id*. Officers found the Malibu's front bumper in the backseat. R780. They also found glass shards on the backseat floor. SE32a. Officers found a 32-caliber bullet, a 40-caliber bullet, and 10 spent shell

casings from a 40-caliber gun on the driver's side floorboard. R781, 835-37; SE28-32(a).

Crime scene technicians recovered 5 slugs from the shooting scene. R819-25,876; SE12-16. A slug is "a bullet that has been fired." R819. Two slugs were found in the front of Stephen's car and two were found in the back of the car on the driver's side. R819-21; SE14A-16. One slug was recovered from the porch of a nearby house. R876. The slugs were all fired from a 40-caliber gun. R843,872.

The crime scene technician also recovered glass shards from the shooting scene. R825. Those shards matched glass shards recovered from the Malibu's backseat floorboard. R833,838.

The crime scene technician also tested the detached bumper for fingerprints. R844. A partial palm print was recovered from the bumper, but it did not match Defendant. *Id*.

The shell casings and live ammunition recovered from the Malibu were tested for touch DNA. R880-89; 940-65; SE51-52. The crime scene technician processed the shell casings and live ammunition by individually rinsing the casing or bullet in a buffer solution and running that buffer solution through an M-Vac filter. R880-90. The M-Vac filter is a designed to "catch a cell where the DNA is stored" and filter out the other cells. R887. One filter was used for

all the shell casings and ammunition. R891. That M-Vac filter was then sent to Sorenson Labs for analysis. R892; SE51,52. The DNA analyst found that the DNA collected by the M-Vac filter from the casing and bullets matched Defendant's DNA profile. R965,975; SE51-52.

As Defendant awaited trial, he called his girlfriend, the Malibu's owner, from jail. R994. In their conversations, Defendant never said that he loaned Malibu to someone else, misplaced the Malibu, or that someone else was driving the car. *Id*.

**B. Summary of proceedings and disposition of the court.**

Defendant was initially charged with seventeen counts: attempted murder, a first-degree felony; felony discharge of a firearm and possession of a firearm by a restricted person; both second-degree felonies; failure to respond to an officer's signal to stop, criminal mischief, and ten counts of felony discharge of a firearm, all third-degree felonies; failure to stop at command of an officer and possession of a controlled substance, both class-A misdemeanors; criminal mischief and possession of drug paraphernalia, both class-B misdemeanors, and violation of operator duties for an accident involving property damages, a class-C misdemeanor. R1-6.

**Directed verdict motion.** At the close of the State's case, Defendant moved for a directed verdict. R1026. Defendant argued that the State had not proven that he was the shooter. R1027-29.

The trial court denied Defendant's motion. R1030. The trial court found that the State had presented "quite substantial evidence . . . [from] which the jury could infer the defendant is the one who did this." *Id*. The court explained that the eyewitness testimony combined with the testimony that Defendant evaded police the day before in the same car involved in the shooting and led officers on an "extraordinary chase" led to the inference that Defendant fired the shots. R1032.

**The defense.** Defendant did not testify. He argued that he was not the shooter and that the State's evidence was insufficient to identify him as the shooter. R1114-29.

**Sleeping juror**. On the second day of trial, the trial court *sua sponte* dismissed Juror 16. R789-90.

On the second day of trial in the middle of the second witness, the trial court informed the parties that it was taking break. R742. After the jury left the courtroom, the court explained that it took the break because "Juror No.16 keeps falling asleep." R743. The court explained that it had observed Juror 16 repeatedly fall asleep on the first day of trial and that was the reason the court

took some breaks. *Id.* The court explained that it was "a little concerned [that] right in the middle of [a] presentation that usually would take someone's attention," Juror 16 is "noticeably falling asleep." *Id*.

After the break, the court informed the parties outside the jury's presence that it was "going to dismiss Juror No. 16" at the end of that day's testimony. R744. The court explained that it had thought about the issue more and the clerk and bailiff informed the court that Juror 16 was sleeping for "a significant period of time." *Id*.

Defense counsel objected, informing the court that they had not noticed that Juror 16 was sleeping. R744-45. The court explained that it and its staff had watched Juror 16 sleep during both days of trial "over a significant period of time." R745.

At the end of testimony for the day, defense counsel asked the court to question Juror 16 to see if she missed any testimony before dismissing her. R789. The State did not object. *Id*. The court nevertheless denied the request. *Id.*

The court then dismissed Juror 16, explaining that it had watched her "fall asleep a couple of times." R789-90. The court explained that it wanted to be cautious and not have an error in the trial. *Id*. When the court told Juror 16 the reason for her dismissal, she nodded in affirmance. R792.

After Juror 16 left, defense counsel renewed their objection. R789. The court again explained that it decided to dismiss Juror 16 because she fell asleep multiple times on the first and second days of trial. R790. The court also explained that it was concerned about continuing the trial because the juror was clearly missing information, both the clerk and bailiff had observed Juror 16 sleeping, and the court timed its breaks try to keep Juror 16 awake. *Id*. The court explained that this was not a situation where Juror 16 fell asleep once where she "kind of dozed off for a minute." R791. Instead, the court explained that Juror 16 missed "significant parts of the trial." *Id*. The court explained that "it doesn't matter" if Juror 16 knew that she missed parts of the trial or not, the "fact is that" both the court and the court's staff "observed her miss[] significant parts of the trial." *Id*.

Defense counsel explained that they did not want Juror 16 released because she was "strategically selected." R791-92. The court explained again that questioning Juror 16 would not be persuasive because it was so obvious that she had been sleeping and had missed a "significant amount" of the trial. R792.

Juror 16 was replaced with the alternate, Juror 22. R1199. Juror 22 was present for the entire trial.

Thereafter, the jury returned a verdict of on all counts. R308.

**Bench trial**. A separate bench trial was held on Defendant's possession-of-a-dangerous-weapon-by-a-restricted-person charge. R1145-47. After the prosecutor presented evidence that Defendant was a restricted person, the court found him guilty on that charge. R1146-47.

Following his jury and bench trials, Defendant moved to merge his eleven felony-discharge-of-a-firearm convictions with his attempted-murder conviction. R347-357. Over the State's objection, the court granted Defendant's motion. R370-376,1174.

**Sentencing.** The court then sentenced Defendant. For his attempted murder conviction, the court sentenced Defendant to three years to life in prison. R388. For his failure to stop at the command of a police officer, the court sentenced Defendant to zero to five years in prison. *Id*. For his criminal mischief conviction, the court sentenced Defendant to zero to five years in prison. *Id*. For his possession of a dangerous weapon by a restricted person, the court sentenced Defendant to one to fifteen years in prison. *Id*. For his possession of a controlled substance and possession of drug paraphernalia convictions, the court sentenced Defendant to 180 days in jail. R389. The court ordered that Defendant's sentences run consecutively. *Id*.

Defendant timely appeals. R397.

## SUMMARY OF ARGUMENT

**Point I.** Defendant argues that insufficient evidence supports his attempted-murder and criminal-mischief jury convictions and possession-of-a-dangerous-weapon-by-a-restricted-person bench-trial conviction. Defendant specifically argues that the evidence was insufficient to prove that he was the shooter.

Defendant's claim fails. The evidence showed that Defendant had stolen his girlfriend's red Chevy Malibu, the same Malibu was involved in the shooting, and only one person was driving the car—a person that matched Defendant's description. Inside the Malibu, police found 10 spent shell casings from a 40-caliber handgun—the same number of bullets holes found at the scene and the same type of gun used in the shooting. And Defendant's DNA was found on at least one of those spent casings. This was sufficient evidence to support his convictions.

**Point II.** Defendant argues that the trial court abused its discretion when it *sua sponte* dismissed a sleeping juror without first questioning her about what she believed she missed while sleeping. Defendant argues that a an outcome-determinative standard applies and that he was prejudiced under that standard. Defendant's claim fails.

Defendant relies on the wrong prejudice standard. To prevail, Defendant must show that a biased or incompetent juror sat. On this record, Defendant cannot show that the alternate juror was biased or incompetent.

Defendant also cannot show that the trial court clearly abused its discretion by *sua sponte* dismissing the sleeping juror after it observed the juror sleep through the first two days of trial, missing material information that would prevent her from being able to render a verdict.

## ARGUMENT

### I.

### The State produced ample evidence to link Defendant to the shooting.

Defendant challenges the sufficiency of the evidence to support his attempted-murder, criminal-mischief, and possession-of-a-dangerous weapon-by-a-restricted-person convictions. Br.Aplt.10-16. He specifically argues that his matching a "general description" of the car's driver, his connection to the car, his DNA found on bullet casings inside the car, and his flight from police were not sufficient evidence to prove that he was the shooter. Br.Aplt.11-14.

Defendant's claim fails. The evidence showed, among other things, that Defendant had stolen his girlfriend's red Chevy Malibu, the Malibu was involved in the shooting, and only one person was driving the car—a person

that matched Defendant's description. Inside the Malibu, police found 10 spent shell casings from a 40-caliber handgun—the same number of bullets holes found at the scene and the same type of gun used in the shooting. And Defendant's DNA was found on at least one of those spent casings.

### A. Ample evidence supported the jury's attempted-murder and criminal-mischief verdicts.

When reviewing the sufficiency of the evidence, this Court gives "substantial deference to the jury." *State v. Ashcraft*, 2015 UT 5, ¶18, 349 P.3d 664 (quotation and citation omitted). This Court "review[s] the evidence and all reasonable inferences drawn therefrom in a light most favorable to the verdict." *State v. Maestas*, 2012 UT 46, ¶177, 299 P.3d 892 (quotation and citation omitted). The existence of "contradictory evidence or of conflicting inferences does not warrant disturbing the jury's verdict." *State v. Howell*, 649 P.2d 91, 97 (Utah 1982). So reviewed, evidence will not support a jury verdict only when it "is sufficiently inconclusive or inherently improbable that reasonable minds must have entertained a reasonable doubt that the defendant committed the crime." *State v. Brown*, 948 P.2d 337, 343 (Utah 1997) (quotation and citation omitted). Thus, this Court must affirm if "*some* evidence exists from which a reasonable jury could find that the elements of the crime had been proven beyond a reasonable doubt." *Maestas*, 2012 UT 46, ¶177 (citation omitted) (emphasis added).

It makes no difference whether the evidence is solely circumstantial. It is "well-settled" that circumstantial evidence alone is sufficient to establish guilt. *State v. MacNeill*, 2017 UT App 48, ¶57, 397 P.3d 626 (citation and quotation omitted). The State may present "a mosaic of circumstantial evidence that considered as a whole constitutes proof beyond a reasonable doubt." *Id.* (quotation and citation omitted). "Circumstantial evidence may even be more convincing than direct testimony." *State v. Housekeeper*, 588 P.2d 139, 140 (Utah 1978).

It is also "well-established" that identification can be proven from circumstantial evidence. *State v. Isom*, 2015 UT App 160, ¶23 n.2, 354 P.3d 791. A "direct, in-court identification is not required." *Id.* A "witness need not physically point out a defendant so long as the evidence is sufficient to permit the inference that the person on trial was the person who committed the crime." *Id.* (quotations and citation omitted); *see also United States v. Smith*, 134 F.3d 384, *3, 1998 WL 33862 (10th Cir. 1998) ("[T]here is no requirement of an in-court identification when other evidence permits the inference that the defendant is the person who committed the offense."); *United States v. Weed*, 689 F.2d 752, 754 (7thCir.1982) ("[I]dentification can be inferred from all the facts and circumstances that are in evidence.").

Here, there was significantly more than "*some* evidence" to establish that Defendant shot at Stephen. *See Maestas*, 2012 UT 46, ¶177 (emphasis added). Defendant was seen driving his girlfriend's stolen car—a red Chevy Malibu, Utah license plate number E824JR with a yellow baby-on-board sign in the back window—the day before. R627-29. When the officer tried to pull Defendant over, he fled. R632.

The next day, multiple witnesses watched that same car—a red Chevy Malibu with the yellow baby-on-board sign in the back window—ram Stephen's silver Chrysler 300 and then saw the Malibu's driver open fire at Stephen. R576,578-79,586-89,640-42,604. Witnesses watched the Malibu flee the scene. R589, 605. One witness followed the fleeing Malibu and reported its location to 911 dispatch. *Id*. That witness also saw one of the Malibu's headlights fly off and the Malibu's driver stop to retrieve the car's front bumper after it fell off, and place it in the backseat. R605-06.

Soon after the shooting, Officer Watson found Defendant driving the Malibu with extensive front-end damage. R703-04. Defendant then fled from officers, leading them on a 22-mile car chase. R705-18,726-50; SE46-49,55-56; *see also* R668 (time from 911 call to arrest was 2 hours). Defendant then abandoned the Malibu in the middle of the road and led officers on a short foot chase. R751-56; SE56.

The Malibu that Defendant left in the middle of the road was Defendant's girlfriend's car and matched the Malibu involved in shooting. Indeed, the Malibu stuck out. It was an "older model," red, with a baby-on-board yellow sign in the rear window. R703; SE20-22. It was missing a bumper and a headlight just like the damage that eyewitnesses to the shooting and chase described. SE22. The headlight was found at the intersection near the shooting and the bumper was in the backseat—just as eyewitness Henry observed and testified. R606,653,780. The Malibu's front end was crushed in with silver paint transfer. R779; SE23,33-37. Stephen's car was silver. R423. And Stephen's car had red paint transfer where it was rammed. R1107; SE1e. Additionally, glass shards found in the backseat of the Malibu matched glass shards recovered from the scene. R833,838.

Witnesses saw only one person in the Malibu during the shooting and subsequent chase, and all agreed that the person they saw matched Defendant's description—a heavily tattooed Hispanic male with very short hair, a moustache and the word "eighteen" tattooed on his upper lip. R572-73,,604,640,703. Officers positively identified the driver of that same Malibu as Defendant. R704,733. And no one saw any other person driving the Malibu.

The identification was not materially undermined when Henry did not choose Defendant's photo from the photo array. *See Howell*, 649 P.2d at 96 ("existence of contradictory evidence or of conflicting inferences does not warrant disturbing the jury's verdict") (quotation and citation omitted). Henry testified that she was not "100 percent" sure that the person she picked was the shooter. R608-09. Rather, she testified that the person she picked merely "resemble[d]" the shooter. R609. Henry was never face to face with Defendant. And nothing in the record undermined her testimony that the second photo at least resembled Defendant as he appeared on the day of the shooting.

Indeed, the photo lineup was not created using the latest photo of Defendant. It was created by a computer program that uses facial recognition software to generate a lineup from driver license photos. R1015-16. As the prosecutor explained, the photo Henry picked as the driver looked more like Defendant at the time of the shooting than the photo of Defendant in the photo array. R1136-37.

In any event, the jury saw Defendant, saw Defendant at the time of his arrest in the officer's body cam video, and saw the lineup. SE50a,55. The jury also heard that Henry did not identify Defendant in the photo lineup. R608-09. They could weigh that evidence themselves and choose to disregard it or

give it whatever weight they deemed appropriate. *State v. Mead*, 2001 UT 58, ¶67, 27 P.3d 1115 ("It is the exclusive function of the jury to weigh the evidence and to determine the credibility of the witnesses.").

Additionally, Defendant's DNA linked him to both the car and the shooting. R940-65; SE51-52. The shooter fired ten rounds from a 40-caliber gun at Stephen. R1110. On the driver's side floorboard of the Malibu that Defendant had stolen from his girlfriend, the crime scene technician found ten spent rounds and two bullets. R781,836-37; SE28-32a. The ten spent rounds and one of the live bullets all came from a 40-caliber gun—the same type of gun used to shoot Stephen. R781,836-37,1110.

The shell casings were tested for touch DNA. R940-65; SE51-52. Defendant's DNA was found on at least one of the casings. R965,975; SE51-52.

Defendant claims that the DNA evidence is unreliable because the test could not discern how Defendant's DNA got on the casings. Br.Aplt.15. Defendant argues that his DNA could have been on the casings simply because he was driving the car and the casing rolled around in the car, not because he loaded the gun. *Id.* But there was no evidence to support Defendant's theory that his DNA could end up on the spent casings simply

because he was in the car. Indeed, Defendant does not cite to any record evidence for that proposition. *See* Br.Aplt.15.

In any event, Defendant presented this theory to the jury. R504, 915,928,1121-23. The jury heard testimony about how touch DNA can be transferred and that Defendant's DNA would be in the car because he was driving it.. R904-928. The jury nevertheless rejected Defendant's theory. The jury was well-within its discretion to do so. *See Howell*, 649 P.2d at 97 (Utah 1982) (after trial court admits evidence, "[i]t is within the exclusive province of the jury to judge the ... weight of the evidence").

Additionally, Defendant's flight from police was further evidence that he was the one who shot at Stephen. *State v. Franklin*, 735 P.2d 34, 38-39 (Utah 1987), *overturned on other grounds by State v. Robertson,* 2017 UT 27, ---P.3d ---; *State v. Bales*, 675 P.2d 573, 574 (Utah 1983). Defendant offered no innocent explanation for running from police or possessing the Malibu. *See* R994.

Viewed in the light most favorable to the verdict, all of this evdience was more than sufficient to allow a reasonable juror to conclude that Defendant was the shooter. *See Maestas*, 2012 UT 46, ¶177.

Regardless, Defendant argues that the evidence "raises only a speculative possibility of guilt." Br. Aplt. 16. Citing evidence that another person's fingerprints were on the bumper, that Henry did not choose

Defendant's photo from the array, and that Defendantallegedly lacked any motive to attack the victim, Defendant argues that "stonger circumstantial evidence pointed to innocence." Br.Aplt.13-16.

But this argument misstates the sufficiency standard. Defendant views the evidence and its reasonable inferences in the light most favorable to him, not the verdict. Defendant's "personal view of events does not … render the State's evidence 'sufficiently inconclusive or inherently improbable' so as to warrant a reversal." *State v. Johnson*, 2015 UT App 312, ¶12, 365 P.3d 730 (cleaned up); s*ee Maestas*, 2012 UT 46, ¶177 (this Court "reviews the evidence and all reasonable inferences drawn therefrom in a light most favorable to the verdict").

None of the evidence that Defendant relies on is so significant, either individually or collectively, to counter the substantial evidence identifying Defendant as the shooter. *See State v. Lyman*, 966 P.2d 278 (Utah App 1998)("[T]he existence of one or more alternate reasonable hypotheses does not necessarily prevent the jury from concluding that Defendant is guilty beyond a reasonable doubt."); *see also United States v. Mains*, 33 F.3d 1222, 1228 (10th Cir. 1994) ("Although it is possible to hypothesize from circumstantial evidence that another individual may have possessed the cocaine found at the apartment, the evidence required to support a verdict

need not conclusively exclude every other reasonable hypothesis and need not negate all possibilities except guilt.").

Thus, Defendant's claim fails because ample evidence supported the jury's conclusion that he was the shooter.

### B. Ample evidence supported the trial court's possession-of-a dangerous-weapon-by-a-restricted-person verdict.

When reviewing the sufficiency of the evidence for a bench trial, this Court must affirm unless, in light of the whole record, it is convinced that the verdict is "against the clear weight of the evidence, or if [it] otherwise reaches a definite and firm conviction that a mistake has been made" *State v. Walker*, 743 P.2d 191, 193 (Utah 1987). A finding is against the clear weight of the evidence if it is "without adequate evidentiary support,'" and a mistake has been made if the trial court's finding is "'induced by an erroneous view of the law." *Id.* (cleaned up). Although an appellate court does not view the evidence and all inferences that can be drawn therefrom in the light most favorable to the verdict, *id.*, it does owe a "duty of deference to findings of fact" and must forbear "disturbing the 'close call.'" *In re Z.D.*, 2006 UT 54, ¶33, 147 P.3d 401. Thus, "in those instances in which the trial court's findings include inferences drawn from the evidence," this Court must "not take issue with those inferences unless the logic upon which their extrapolation from

the evidence is based is so flawed as to render the inference clearly erroneous." *Glew v. Ohio Sav. Bank*, 2007 UT 56, ¶18, 181 P.3d 791.

Defendant has failed to show clear error in the trial court's verdict. As explained above, the State provided sufficient evidence to prove that Defendant was the person who shot at Stephen, and thus, that he possessed a dangerous weapon as a restricted person. *See* Supra I.A.

**II.**

**The trial court did not clearly abuse its discretion by sua sponte dismissing the sleeping juror.**

Defendant argues that the trial court erred by *sua sponte* dismissing the sleeping juror without first questioning her. Br.Aplt.16-22. He also argues that dismissal of the juror prejudiced him. *Id*.

Defendant's claim fails. On this record, Defendant cannot show prejudice. Nor can he show that the trial court clearly abused its discretion because the trial court was not required to question the juror before dismissing her.

**A. Defendant has not shown prejudice.**

Relying on *State v. Knight*, 734 P.2d 913, 919 (Utah 1987), Defendant argues that the proper prejudice standard is an outcome-determinative standard: whether "without the error there was a reasonable likelihood of a more favorable result." Br.Aplt.20. Defendant is wrong.

*Knight* is wholly inapplicable. *Knight* applies its outcome-determinative prejudice standard to a prosecutor's discovery duties—an entirely different question. 734 P.2d at 913-23. Indeed, Defendant cites to no case involving sleeping jurors, or a trial court dismissing a juror, that uses his proposed prejudice standard.

And for good reason. Both the United States Supreme Court and the Utah Supreme Court have rejected the prejudice standard Defendant proposes.

In *Ross v. Oklahoma*, the United States Supreme Court held that a Defendant who claims that his right to an impartial jury was denied must show that a juror was either biased or incompetent. 487 U.S. 81, 88 (1988). The Court explained that a defendant's Sixth- Amendment right to be tried by an impartial jury is not infringed merely because, absent the removal of a particular juror, he would have been tried by a different jury panel. *See id.* 87. ("Although … failure to remove [a juror] may have resulted in a jury panel different from that which would otherwise have decided the case, we do not accept the argument that this possibility mandates reversal."). Indeed, the Supreme Court recognized that a defendant does not have the right to a jury of any particular composition, but the right only to an impartial jury. *Taylor v. Louisiana*, 419 U.S. 522, 538 (1975); *see also United States v. Taylor*, 663

F.Supp.2d 1157, 1162-63 (D.N.M. 2009). "[T]he Constitution presupposes that a jury selected from a fair cross section of the community is impartial, regardless of the mix of individual viewpoints actually represented on the jury, so long as the jurors can conscientiously and properly carry out their sworn duty to apply the law to the facts of the particular case." *Lockhart v. McCree*, 476 U.S. 162, 184 (1986).

Our supreme court agrees. In *State v. Menzies,* Menzies argued that the trial court erred when it did not remove jurors for cause and forced him to exercise his peremptory challenges. 889 P.2d 393, 398 (Utah 1994) *superseded on other grounds by* constitutional amendment, UTAH CONST. art. I, § 12, as recognized in *State v. Goins*, 2017 UT 61, 423 P.3d 1236. The supreme court held that to prove prejudice Menzies had to show that a biased or incompetent juror sat. *Id*. 400.

Thus, to prevail on his claim that the trial court erroneously dismissed the sleeping juror, Defendant must show that a biased or incompetent juror sat. *Ross,* 487 U.S. at 88; *Menzies*, 889 P.2d at 398. On this record, he cannot.

Nothing in the record supports that the alternate juror, Juror 22, was biased or incompetent. During voir dire, Juror 22 stated that he had a high school education, worked as project engineer completing contracts, quality control, and construction management, read cooking magazines, outdoor

magazines like American Rifleman, and Fox News, and was a "pretty talented barbecue chef." R489-90.

Juror 22 did not know anyone associated with the case or anyone in law enforcement. R496-500,503-04. He had not heard anything about the case before becoming a juror. R511. He did not have any hardships that prevented him from serving as a juror. R507-12. He said that he could follow the jury rules and the law. *Id.* And he said that he would base his verdict on the evidence presented. R511-12.

No record evidence shows that Juror 22 did not uphold his duties as a juror. Indeed, it is presumed that he did. *See Weeks v. Angelone*, 528 U.S. 225, 234-35 (2000) (jurors presumed to follow instructions) *Richardson v. Marsh*, 481 U.S. 200 , 211 (1987) (same); *see also* ROGER J. TRAYNOR, THE RIDDLE OF HARMLESS ERROR 73-74 (1970) (footnote omitted), quoted in *Connecticut v. Johnson*, 460 U.S. 73, 85, n. 14 (1983) ("[W]e must assume that juries for the most part understand and faithfully follow instructions. The concept of a fair trial encompasses a decision by a tribunal that has understood and applied the law to all material issues in the case.").

At bottom, Defendant's quarrel is not that Juror 22 was biased or incompetent. His quarrel is that Juror 22 was not as educated as Juror 16 and read different materials than Juror 16. Br.Aplt.22. But that does not prove that

Juror 22 was biased or incompetent. Indeed, if Defendant was so concerned about Juror 22 he should have challenged Juror 22 for cause or exercised one of his preemptory challenges. He did not. *See* R1199.

Because no record evidence proves that Juror 22 was biased or incompetent, Defendant's claim fails.

**B. The trial court did not clearly abuse its discretion by not questioning the sleeping juror before dismissing her.**

"One principle predominates" Utah appellate cases discussing sleeping jurors: "discretion." *State v. Marquina*, 2018 UT App 219, ¶29, --- P.3d ---. In *Marquina*, ¶26, Marquina argued that the trial court plainly erred when it did not *sua sponte* question a sleeping juror. *See id.* ¶26. This Court rejected Marquina's claim, recognizing that "Utah law does not require a court to conduct *sua sponte* a voir dire after a report of a sleepy juror." *Id*. ¶34. This Court explained that "[h]andling a sleeping juror is 'so peculiarly within the observation, province, and discretion of the trial court'" that this Court "'should not interfere" with a trial court's ruling unless there is a clear abuse of discretion. *Id.* ¶29 (quoting *Mellor*, 272 P. at 639). And this Court recognized that the trial judge is in the best position to "gauge" a juror's capacity to serve. *Id*. ¶29 (quoting *State v. Lesley*, 672 P.2d 79, 82 (Utah 1983)).

Defendant has not shown that the trial court abused its broad discretion. The trial court was in the best position to determine that Juror 16

was not capable of serving as a juror. *See* Utah R. Crim. Proc. 17(g) ("[I[f a juror become disqualified during trial … the case shall proceed using the alternate juror."). The trial court and its staff observed Juror 16 sleep through significant parts of the first two days of a four-day trial. R743-44,790-91. On the first two days of trial, both parties presented opening statements and the State presented most of its case-in-chief, including testimony from the victim, the civilian eye-witnesses, and four police officers. R555-793.

The trial court observed that Juror 16 did not merely "doze[] off for a minute." R791; *cf. Mellor*, 272 P.at 639 (trial court did not err when it did not grant a new trial after a juror "several times dozed off at short or brief intervals" but was "not unconscious"). Instead, the trial court observed Juror 16 miss "significant parts of the trial" and "sleep through testimony that ordinarily would keep a person's attention." R743-44,790. Juror 16, therefore, missed material testimony that would have affected her ability to render a verdict.

Given this, the trial court choose to dismiss Juror 16 without first questioning her about what she believed she missed while sleeping, as defense counsel had requested. The court explained that because Juror 16 missed material information, "it doesn't matter" if she knew that she missed parts of the trial or not, the "fact is that" both the court and the court's staff

"observed her miss[] significant parts of the trial." R791. And the trial court acted well-within its discretion to dismiss the juror on this basis. Nothing requires the trial court to question a juror, especially when, as here, the trial court saw, and its staff confirmed, that the juror had slept through significant parts of the trial. *See Marquina*, 2018 UT App 219, ¶29. Thus, the trial court did not err when it dismissed Juror 16 without first questioning her.

Relying on *Mellor* and *State v. Pace*, 527 P.2d 658 (Utah 1974), Defendant argues that because counsel asked the trial court to question Juror 16 before dismissing her, the trial court was duty bound to question her. Br.Aplt.20.

In *Mellor*, the supreme court held the trial court did not abuse its discretion by not dismissing a juror who "at brief intervals, did doze off, or fall asleep," but who nevertheless heard and "fully comprehended the substance of the testimony of the witness." 272 P. at 639. And in *Pace*, the supreme court held that the trial court did not error when it did not dismiss a sleeping juror because the trial court personally "observed the whole jury" and saw the sleeping juror wake up before it "had a chance to call it to the [juror's] attention." 527 P.2d at 659. Thus, neither *Mellor* or *Pace* requires that the trial court question a juror that it observes sleeping before dismissing her.

This Court has agreed. In *Marquina,* this Court rejected Defendant's interpretation that *Mellor* and *Pace* required a trial court to question a sleeping juror before dismissing her. 2018 UT App 219, ¶¶30-31. This Court explained that *Mellor* and *Pace* "established that trial courts, when presented with reports of sleeping jurors, are given wide discretion in how to respond" and the "supreme court did not announce a rule or template trial courts must follow whenever they are confronted with reports of a sleeping juror." *Id*. ¶31.

Defendant's reliance on out-of-jurisdiction authority that purports to require questioning a sleeping juror is no more persuasive. *See* Br.Aplt.19-22. As this Court recognized in *Marquina*, such authorities are non-binding and "Utah law does not require a court to conduct *sua sponte* a voir dire after a report of a sleepy juror." 2018 UT App 219, ¶34. And even though defense counsel asked the trial court to question the juror here, that questioning would have been fruitless where the trial court saw, and its staff confirmed, that the juror had missed significant portions of the trial.

The trial court therefore had no duty to question the sleeping juror before dismissing her even though defense counsel requested it. *See Marquina*, 2018 UT App 219, ¶29; *Mellor*, 272 P. at 639. Thus, the trial court

did not clearly abuse its discretion when it *sua sponte* dismissed her without questioning her.

## CONCLUSION

For the forgoing reasons, the State asks that this Court affirm Defendant's convictions.

Respectfully submitted on February 28, 2019.

SEAN D. REYES
Utah Attorney General

*/s/ Lindsey Wheeler*
LINDSEY WHEELER
Assistant Solicitor General
Counsel for Appellee

## CERTIFICATE OF COMPLIANCE

I certify that in compliance with rule 24(g), Utah Rules of Appellate Procedure, this brief contains 7,320 words, excluding the table of contents, table of authorities, addenda, and certificate of counsel. I also certify that in compliance with rule 21(g), Utah Rules of Appellate Procedure, this brief, including the addenda:

☑ does not contain private, controlled, protected, safeguarded, sealed, juvenile court legal, juvenile court social, or any other information to which the right of public access is restricted by statute, rule, order, or case law (non-public information).

☐ contains non-public information and is marked accordingly, and that a public copy of the brief has been filed with all non-public information removed.

*/s/ Lindsey Wheeler*
LINDSEY WHEELER
Assistant Solicitor General

## CERTIFICATE OF SERVICE

I certify that on February 28, 2019, the Brief of Appellee was served upon appellant's counsel of record by ☐ mail ☑ email ☐ hand-delivery at:

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I further certify that an electronic copy of the brief in searchable portable document format (pdf):

☑ was filed with the Court and served on appellant by email, and the appropriate number of hard copies have been or will be mailed or hand-delivered upon the Court and counsel within 7 days.

☐ was filed with the Court on a CD or by email and served on appellant.

☐ will be filed with the Court on a CD or by email and served on appellant within 14 days.

*/s/ Melanie Kendrick*

# Addenda

# Addendum A

**Utah R. Crim. P. 17. The Trial**

**(a)** In all cases the defendant shall have the right to appear and defend in person and by counsel. The defendant shall be personally present at the trial with the following exceptions:

(1) In prosecutions of misdemeanors and infractions, defendant may consent in writing to trial in his absence;

(2) In prosecutions for offenses not punishable by death, the defendant's voluntary absence from the trial after notice to defendant of the time for trial shall not prevent the case from being tried and a verdict or judgment entered therein shall have the same effect as if defendant had been present; and

(3) The court may exclude or excuse a defendant from trial for good cause shown which may include tumultuous, riotous, or obstreperous conduct.

Upon application of the prosecution, the court may require the personal attendance of the defendant at the trial.

**(b)** Cases shall be set on the trial calendar to be tried in the following order:

(1) misdemeanor cases when defendant is in custody;

(2) felony cases when defendant is in custody;

(3) felony cases when defendant is on bail or recognizance; and

(4) misdemeanor cases when defendant is on bail or recognizance.

**(c)** All felony cases shall be tried by jury unless the defendant waives a jury in open court with the approval of the court and the consent of the prosecution.

**(d)** All other cases shall be tried without a jury unless the defendant makes written demand at least ten days prior to trial, or the court orders otherwise. No jury shall be allowed in the trial of an infraction.

**(e)** In all cases, the number of members of a trial jury shall be as specified in Section 78-46-5, U.C.A. 1953.

**(f)** In all cases the prosecution and defense may, with the consent of the accused and the approval of the court, by stipulation in writing or made orally in open court, proceed to trial or complete a trial then in progress with any number of jurors less than otherwise required.

**(g)** After the jury has been impaneled and sworn, the trial shall proceed in the following order:

(1) The charge shall be read and the plea of the defendant stated;

(2) The prosecuting attorney may make an opening statement and the defense may make an opening statement or reserve it until the prosecution has rested;
(3) The prosecution shall offer evidence in support of the charge;
(4) When the prosecution has rested, the defense may present its case;
(5) Thereafter, the parties may offer only rebutting evidence unless the court, for good cause, otherwise permits;
(6) When the evidence is concluded and at any other appropriate time, the court shall instruct the jury; and
(7) Unless the cause is submitted to the jury on either side or on both sides without argument, the prosecution shall open the argument, the defense shall follow and the prosecution may close by responding to the defense argument. The court may set reasonable limits upon the argument of counsel for each party and the time to be allowed for argument.

**(h)** If a juror becomes ill, disabled or disqualified during trial and an alternate juror has been selected, the case shall proceed using the alternate juror. If no alternate has been selected, the parties may stipulate to proceed with the number of jurors remaining. Otherwise, the jury shall be discharged and a new trial ordered.

**(i) Questions by jurors.** A judge may invite jurors to submit written questions to a witness as provided in this section.
(1) If the judge permits jurors to submit questions, the judge shall control the process to ensure the jury maintains its role as the impartial finder of fact and does not become an investigative body. The judge may disallow any question from a juror and may discontinue questions from jurors at any time.
(2) If the judge permits jurors to submit questions, the judge should advise the jurors that they may write the question as it occurs to them and submit the question to the bailiff for transmittal to the judge. The judge should advise the jurors that some questions might not be allowed.
(3) The judge shall review the question with counsel and unrepresented parties and rule upon any objection to the question. The judge may disallow a question even though no objection is made. The judge shall preserve the written question in the court file. If the question is allowed, the judge shall ask the question or permit counsel or an unrepresented party to ask it. The question may be rephrased into proper form. The judge shall allow counsel and unrepresented parties to examine the witness after the juror's question.

**(j)** When in the opinion of the court it is proper for the jury to view the place in which the offense is alleged to have been committed, or in which any other

material fact occurred, it may order them to be conducted in a body under the charge of an officer to the place, which shall be shown to them by some person appointed by the court for that purpose. The officer shall be sworn that while the jury are thus conducted, he will suffer no person other than the person so appointed to speak to them nor to do so himself on any subject connected with the trial and to return them into court without unnecessary delay or at a specified time.

**(k)** At each recess of the court, whether the jurors are permitted to separate or are sequestered, they shall be admonished by the court that it is their duty not to converse among themselves or to converse with, or suffer themselves to be addressed by, any other person on any subject of the trial, and that it is their duty not to form or express an opinion thereon until the case is finally submitted to them.

**(l)** Upon retiring for deliberation, the jury may take with them the instructions of the court and all exhibits which have been received as evidence, except exhibits that should not, in the opinion of the court, be in the possession of the jury, such as exhibits of unusual size, weapons or contraband. The court shall permit the jury to view exhibits upon request. Jurors are entitled to take notes during the trial and to have those notes with them during deliberations. As necessary, the court shall provide jurors with writing materials and instruct the jury on taking and using notes.

**(m)** When the case is finally submitted to the jury, they shall be kept together in some convenient place under charge of an officer until they agree upon a verdict or are discharged, unless otherwise ordered by the court. Except by order of the court, the officer having them under his charge shall not allow any communication to be made to them, or make any himself, except to ask them if they have agreed upon their verdict, and he shall not, before the verdict is rendered, communicate to any person the state of their deliberations or the verdict agreed upon.

**(n)** After the jury has retired for deliberation, if they desire to be informed on any point of law arising in the cause, they shall inform the officer in charge of them, who shall communicate such request to the court. The court may then direct that the jury be brought before the court where, in the presence of the defendant and both counsel, the court shall respond to the inquiry or advise the jury that no further instructions shall be given. Such response shall be recorded. The court may in its discretion respond to the inquiry in writing without having the jury

brought before the court, in which case the inquiry and the response thereto shall be entered in the record.

**(o)** If the verdict rendered by a jury is incorrect on its face, it may be corrected by the jury under the advice of the court, or the jury may be sent out again.

**(p)** At the conclusion of the evidence by the prosecution, or at the conclusion of all the evidence, the court may issue an order dismissing any information or indictment, or any count thereof, upon the ground that the evidence is not legally sufficient to establish the offense charged therein or any lesser included offense.

# Addendum B

We'll take 15 minutes.

**THE BAILIFF:** All rise for the jury.

**THE COURT:** Have a seat, please.

You can just put that microphone -- you don't have to resume the stand.

The reason I did that is Juror No. 16 keeps falling asleep. And yesterday the same thing, is the reason I took some breaks. And I'm a little concerned right in the middle of the presentation that usually would take someone's attention, she's noticeably falling asleep.

**MR. MACK:** I got to say I'm getting tired of the videos too, but... Perhaps we can just agree that we have a new alternate rather than the last juror, assuming that everybody, everybody survives till --

**THE COURT:** Well, let's do this. You can talk about it. I just wanted to bring your attention now. And I'll keep trying to watch and take breaks. I did it yesterday to have them stand up and I'll continue to do it, but I just wanted to bring it to everyone's attention.

**MR. MACK:** Thank you. I hadn't noticed that honestly, but I will --

**THE COURT:** Well, it's probably your view. But I had my clerk tell me that yesterday and I watched her. And like I say, it's the reason I stopped and had them all stand up at one point yesterday. And like I say, today she just keeps closing

her eyes and her head rocks back and forth. She's clearly falling asleep.

**MR. MACK:** Is that -- I'm not sure who 16 is.

**THE COURT:** It's the older lady in the -- she has kind of white hair.

**MR. MACK:** Is she the one that asked for the people to speak up?

**THE COURT:** Yes.

**MR. MACK:** Okay.

**THE COURT:** Yes. All right. Let's take a break.

**MR. FALCONE:** Thank you, Judge.

(Recess taken by the court.)

**THE COURT:** For the record, let me tell you this. Again, the defendant is here. I am going to dismiss Juror No. 16. I'm going to do it at the end of the morning. Sitting here, I've sat there and thought about it. I've had input from both of my staff, Shane my clerk, as well as Shante, who has seen her sleeping for a significant period of time.

**MR. MACK:** Okay.

**THE COURT:** And she was obviously falling asleep here. I just don't know a way to survive that and have the trial go as it needs to go and have someone who is missing that amount of time.

**MR. MACK:** Judge, if I can make a record. We -- I haven't noticed this and I'm not saying those observations

aren't accurate, but I do know that in many of the trials that I've done, I've seen jurors nodding off on occasion. We would -- and I think -- and I don't know if this extends beyond today, but if it's just today --

**THE COURT:** Well --

**MR. MACK:** -- starting these videos, I don't know that's a crucial, critical thing --

**THE COURT:** An let me help you with that, because it happened yesterday. And again, talking to those people who were with me up on the stand, they saw her up to about five minutes asleep.

**MR. MACK:** Okay.

**THE COURT:** I saw her asleep yesterday as well. And that's the reason I had them stand yesterday because she was -- she was asleep.

**MR. MACK:** Okay.

**THE COURT:** So it's not just one day. It's two days. And it's over a significant period of time.

**MR. MACK:** Okay. And just for the record, we would object to it. But is your plan then -- I'm sorry. You said after today's session?

**THE COURT:** Yes, what I thought, we have about another hour today. And so what I thought we'd do is conclude the trial. I'll have her remain and then I'll excuse her. I didn't want to stick her on the spot.

**MR. MACK:** Yeah.

**THE COURT:** Okay.

**MR. MACK:** All right. Thank you.

**MR. COOLEY:** You said adjourn the trial. You mean adjourn for the day?

**THE COURT:** Adjourn for the day. Yeah. Okay.

Anything else? Can we bring the jury?

**MR. MACK:** I think we're ready.

**MR. COOLEY:** Yeah.

**THE COURT:** All right.

**THE BAILIFF:** All rise for the jury.

Please be seated.

**THE COURT:** All right. Let's have the witness resume the stand. Or standing where he was, either one.

I guess I need to ask the jury these questions, though, as you get up and get prepared.

Did anyone talk to anyone or let anyone talk to you about the case? If so, raise your hand.

And I need that TV moved for just a minute. Would you pull it toward you, Officer.

Did anyone send or receive electronic communications about the case? If so, raise your hand.

Did anyone seek or obtain or get outside information from the internet or other courses? If so, raise your hand.

Did anyone talk to parties, witnesses, show your

**THE WITNESS:** Thank you.

**THE COURT:** We have about eight more witnesses. Do we have a witness that is that short?

**MR. COOLEY:** No, Your Honor.

**THE COURT:** All right. We're going to have to break for the day. As I told you before, I do have a calendar this afternoon. Unfortunately, I can't move that around so we have to kind of move this around.

So let me give you this advice. Do not talk to anyone, let anyone talk to you about the case. Do not send or receive electronic communications about the case. Avoid outside information from the internet or other sources and do not talk to parties, witnesses or anyone else about the case. Do not share your notes or do not form an opinion about the case, but keep an open mind until all the evidence has been received and the case is finally turned over to you for your deliberations.

We will again start at 9:00 tomorrow. So I do realize we started a little later this morning. It's still my intent to start at 9:00. So if you'd be here at a quarter to and ask the attorneys to be here also at a quarter to nine, we'll see if we can get going.

Other than that, have a very nice afternoon and evening. We'll see you tomorrow. And No. 16, if you would remain in the courtroom. The rest of you are excused.

**THE BAILIFF:** All rise for the jury.

**THE COURT:** If you would remain in the courtroom. Stay here.

**JUROR:** I will.

**THE COURT:** All right.

**MR. MACK:** Judge, can we approach?

**THE COURT:** Yes. Please be seated.

(Following is discussion held at sidebar.)

**MR. MACK:** So I just wanted to embellish the record a little bit, but I'm wondering, though -- well, I just want -- I don't want her to necessarily go because I see her taking notes. I see her trying to pay attention. And I wonder if maybe an admonishment or a question, even a question of her if she feels like she hasn't -- she's missed some parts or something before she's just dismissed.

**MR. COOLEY:** I think it would be appropriate to ask her -- I'm sure she knows that she's been drifting off to engage. She feels whether it changes anybody's mind --

**THE COURT:** I'm still going to dismiss her. [inaudible]

**MR. MACK:** Okay.

**THE COURT:** [inaudible]

(End of sidebar discussion)

**THE COURT:** Ma'am, I am going to let you go from the jury. And I appreciate how hard you've tried and how diligent

you've been. I've seen that. Unfortunately, I've also watched you fall asleep a couple of times. And it is just so important that you see and hear all that occurs here. Rather than causing an error to be in this trial, I'm being a little more cautious and so I will relieve you of jury service. So you're done, but thank you very much for your efforts.

**JUROR:** Thank you.

**THE COURT:** All right.

**THE BAILIFF:** All rise for the jury.

**MR. MACK:** Judge, can we just at least make a inquiry? I think that needs to be done for the record.

**THE COURT:** Well --

**MR. MACK:** If she's -- I think it should also be pointed out when the Court asked her to remain back, she got up to leave with the rest of the jury and had to be told a couple of times by the juror seated next to her, no. He actually asked her to remain.

**THE COURT:** Well, let me tell you why I decided to go ahead and do it. You recall I brought that up before the break. At the break I timed it that way because she was -- she was falling asleep. And what I saw specifically is her look up, close her eyes, and then the head kind of nod forward, and it happened repeatedly. And finally, I was concerned about going any further because of what she was clearly missing.

The problem is I had that complaint from both of my

assistants, from my clerk and from Shante, both of whom watched her yesterday. In fact, I got a note about it yesterday that she was falling asleep. I tried to observe it and saw it myself. And again, I had to call and try to get them all up, to stand up and shake it off. I did that because -- for her.

This wasn't just one time where she just kind of dozed off for a minute. And I agree that she was trying to be a diligent juror, but all three of us saw it multiple times during significant parts of the trial. And it just got to be such a point that I cannot allow -- allow her to go forward. She has missed a significant amount. It doesn't matter at this point whether she knows that she missed it or not. The fact is that I observed her and my staff observed her missing significant parts of the trial. I just have to make the call on that. And that's the reason for my decision.

**MR. MACK:** I understand, Judge. If I could just add a little bit --

**THE COURT:** Go ahead.

**MR. MACK:** -- to our objection. Our objection previously was we did not necessarily -- we did not want to have her released. I mean, we strategically selected her. We wanted her to be on this jury.

And I would just note that at the bench conference, Mr. Cooley and I, before the juror was dismissed, suggested to the Court that you inquire of the juror whether or not she --

well, at least to ascertain how much she thought she maybe missed or how many times she maybe was asleep, if she was able to take notes or just to evaluate herself. That's all. I mean we made that request. I understand the Court's ruling, but that would be our objection.

**THE COURT:** All right. And thank you. And again, the reason as I didn't do that is because it hit the point that it was just obvious and that it was clear that she missed a significant amount. And frankly, it wasn't going to be very persuasive to me if she was aware that she missed, because she clearly missed it and because she was asleep.

I would note from the record, when I told her that it was because she was asleep, she just nodded in the affirmative and let it go at that. So anyway. We'll --

**MR. MACK:** If you see me sleeping this afternoon, will you just let me go -- tomorrow. Tomorrow.

**THE COURT:** I will have a crowded courtroom in an hour. So if you could take care of your things so they will not be disturbed. Again, I offer the use of the closet if anybody wants a briefcase or stack paper in there.

We'll be in recess and adjourned until 9:00 tomorrow morning.

**MR. FALCONE:** Thank you, Judge.

**MR. COOLEY:** Thank you.

(Court was adjourned at 11:55 a.m.)