

**COURT OF APPEALS
DECISION
DATED AND FILED**

November 17, 2009

David R. Schanker
Clerk of Court of Appeals

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. See WIS. STAT. § 808.10 and RULE 809.62.

Appeal No. 2008AP1764

Cir. Ct. No. 1998CF4706

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT I**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

MANUEL CUCUTA,

DEFENDANT-APPELLANT.

APPEAL from an order of the circuit court for Milwaukee County:
JEFFREY A. WAGNER, Judge. *Affirmed.*

Before Curley, P.J., Fine and Kessler, JJ.

¶1 PER CURIAM. Manuel Cucuta appeals from an order following an evidentiary hearing on remand denying his petition for a writ of habeas corpus seeking a new trial. The issue is whether the reconstructed record was adequate to deny Cucuta's petition, or whether the inadequacy of the record entitles him to a

new trial. We conclude that the reconstructed record was adequate; however, from that record Cucuta has not demonstrated that a juror was sleeping during his trial, much less that that allegedly sleeping juror prejudiced his right to a fair trial. Therefore, we affirm.

¶2 A jury found Cucuta guilty of two counts of first-degree intentional homicide. At sentencing, Cucuta's stepfather Frederick James Berg addressed the trial court, and in the course of his sentencing remarks, Berg expressed frustration that a female juror had slept during the testimony. The trial court responded that it would not address the sleeping juror accusation. The trial court imposed two life sentences without the possibility of parole. Cucuta sought postconviction relief on an unrelated issue, which the trial court denied. This court affirmed the judgment of conviction and the postconviction order on direct appeal. *See State v. Cucuta*, No. 2000AP2874-CR, unpublished slip op. at 16 (WI App Sept. 11, 2001).

¶3 Cucuta then petitioned for a writ of habeas corpus. For the first time since Berg's sentencing remark and the trial court's refusal to address that remark, Cucuta raised the issue of the sleeping juror. The trial court summarily denied the petition. Cucuta appealed, and we reversed and remanded the cause for an evidentiary hearing to determine the necessity and feasibility of reconstructing a particular part of the record involving the allegedly sleeping juror to determine whether that juror deprived Cucuta of his right to a fair trial. *See State v. Cucuta*, No. 2005AP777, unpublished slip op. at 2 (WI App Feb. 12, 2007). Our reversal and remand on the sleeping juror issue was guided by *State v. Hampton*, 201 Wis.2d 662, 673, 549 N.W.2d 756 (Ct. App. 1996). *See Cucuta*, No. 2005AP777, unpublished slip op. at 3-4. The trial court conducted that evidentiary hearing and issued its findings of fact and conclusions of law denying the habeas corpus petition. Cucuta appeals, now contending that it was no longer

feasible to adequately reconstruct the record to demonstrate that a juror was sleeping, and that that sleeping juror deprived him of a fair trial.

¶4 In support of his habeas corpus petition, Cucuta averred that he “personally observed a female juror, seated in the back row of the jury box, sleeping during the testimony of Alejandro Vallejo, one of Cucuta’s alleged accomplices and a principal witness for the State. Cucuta told his trial counsel, who alerted the trial court with a note. The trial court then directed the bailiff to wake that juror and offer her a glass of water.” *Cucuta*, No. 2005AP777, unpublished slip op. at 2.

¶5 At the evidentiary hearing on remand (“remand hearing”), all of the women who had served as jurors for Cucuta’s trial were subpoenaed because Cucuta identified the sleeping juror as “a female juror.” Each former juror was questioned by the trial court and by Cucuta’s postconviction counsel.¹ Each juror was asked whether they recalled serving as a juror for Cucuta’s trial, whether anything distracted them during that trial, specifically from listening to the testimony, whether they “nod[ded] off, in other words, g[o]t sleepy or ... observe[d] any other juror get sleepy,” and some were specifically asked if they “recall[ed] anybody getting a glass of water or anything of that nature during the course of the testimony.” Each recalled the trial, but none of them responded that they were distracted or remembered that they or any other juror “nod[ded] off ... or ... g[o]t sleepy.”

¹ When we refer to each juror we mean each female juror.

¶6 Cucuta then presented evidence from his trial counsel, his private investigator, and the man who served as the bailiff during the jury trial. Cucuta also testified himself. Berg did not testify.

¶7 Cucuta's trial counsel testified that he thought that Cucuta had alerted him that a juror was sleeping. Once alerted, trial counsel then alerted the trial court judge who directed the bailiff to give that juror a glass of water. Trial counsel testified that "[t]he only thing I truly recollect is watching what I think was a woman juror in the back row as the bailiff stood there and handed her a glass and [I watched her as] she drank it."

¶8 The defense investigator testified as to her previous interview of the bailiff, and the investigator recounted that the bailiff had told her that "during the trial that he was asked by the court to give a sleeping juror a glass of water." The bailiff testified that he "remember[ed] that [he] was alerted to give somebody some water and that's what [he] did" and that that was the totality of his recollection of Cucuta's trial.

¶9 Cucuta testified that Berg had alerted him during a recess that a juror had been sleeping during the trial. Cucuta further testified that he personally observed a Caucasian woman juror sleeping during the testimony of Alejandro Vallejo, and that he alerted trial counsel, who alerted the trial court, who directed the bailiff to take that juror a glass of water.

¶10 The trial court's factual findings on the subpoenaed jurors, defense counsel, the defense investigator, and the bailiff were consistent with their testimony. The trial court found Cucuta's testimony to be "evasive ... non-responsive" and "not credible." The trial court then found from Cucuta's testimony that if a juror had been sleeping during the trial, it would have had to

have been during the re-cross examination of Vallejo. Although the trial court found that “no juror was involved in any inattentiveness based upon either sleepiness or drowsiness,” it further found “that if any of the above re-cross examination testimony was missed, based upon the limited nature of that testimony as to issues covered during cross examination, no prejudice would have occurred to the defendant,” citing *Hampton*, 201 Wis. 2d at 673.

¶11 “The trial court must determine, in light of the whole proceeding, whether the claimed error is sufficiently prejudicial as to warrant a [new] trial.” *State v. Hampton*, 217 Wis. 2d 614, 621, 579 N.W.2d 260 (Ct. App. 1998). We apply a mixed standard of review to these types of determinations. *See id.* We will not reverse the trial court’s factual findings unless they are clearly erroneous, however, whether Cucuta received a fair trial is an independent determination we review as a matter of law. *See id.*

¶12 We conclude that the trial court’s findings of fact are not clearly erroneous. It is the trial court’s obligation to reconcile conflicting evidence and determine the witnesses’ credibility. *See Johnson v. Merta*, 95 Wis. 2d 141, 151-52, 289 N.W.2d 813 (1980). As we reasoned in *Hampton*, when the trial court found the testimony of the defendant and his counsel less credible than that of the bailiff and the juror, the “[credibility] determination [wa]s sound as both [the defendant] and his counsel had an interest in the outcome. The bailiff and the juror did not.” *See Hampton*, 217 Wis. 2d at 623. As we acknowledged in *Hampton*, “[w]e are not empowered to substitute our own credibility determinations for those made by the trial court.” *Id.* (citing *Merta*, 95 Wis. 2d at 152).

¶13 In *Hampton*, the remand hearing was to develop a record on whether the sleeping juror deprived Hampton of his right to a fair trial; the remand hearing in *Cucuta* was to also and preliminarily determine whether there was a juror who “nod[ded] off” or slept during the trial. Cucuta has not proven that preliminary fact on which the alleged deprivation of a fair trial depends. The trial court’s factual findings that “no juror was involved in any inattentiveness based upon either sleepiness or drowsiness” is not clearly erroneous. We cannot proceed to analyze prejudice without a sleeping or inattentive juror to cause that prejudice.

¶14 There was no contemporaneous record of the juror who was allegedly inattentive or sleeping during the trial. Without objecting to and making a record of that juror’s inattentiveness, there was no issue for appellate counsel to pursue in the original postconviction motion or on direct appeal. Notwithstanding the absence of an objection and a record on this issue, we ordered a remand and the appointment of counsel to permit Cucuta to reconstruct the record on this issue. Each woman who served on Cucuta’s jury was subpoenaed and questioned on the inattentiveness issue. Cucuta then presented those additional witnesses he deemed necessary to prove his claim that was dependent upon the preliminary and necessary proof that a juror had been inattentive or sleeping during the testimony. The trial court found that Cucuta did not meet that preliminary and necessary showing. That finding is not clearly erroneous. Without a showing of a juror’s inattentiveness there can be no showing of prejudice. Our affording Cucuta the opportunity to belatedly reconstruct the record does not negate his burden to prove that he is entitled to a new trial. He has not met that burden.

By the Court.—Order affirmed.

This opinion will not be published. See WIS. STAT. RULE
809.23(1)(b)5. (2007-08).

