DATE FILED: August 25, 2022 10:39 AM
FILING ID: ABDCE1CEC1609
CASE NUMBER: 2021SC236

SUPREME COURT
STATE OF COLORADO

2 East 14th Avenue
Denver, CO 80203

Certiorari to the Colorado Court of Appeals
Case No. 16CA441

ELLIOTT J. FORGETTE,

Petitioner,

v.

THE PEOPLE OF THE STATE OF COLORADO,

Respondent.

▲ **COURT USE ONLY** ▲

Case No. 21SC236

PHILIP. J. WEISER, Attorney General
WILLIAM G. KOZELISKI,
Senior Assistant Attorney General*
Ralph L. Carr Colorado Judicial Center
Denver, CO 80203
Telephone: 720-508-6000
E-Mail: william.kozeliski@coag.gov
Registration Number: 37824
*Counsel of Record

PEOPLE'S ANSWER BRIEF

CERTIFICATE OF COMPLIANCE

I hereby certify that this brief complies with all requirements of C.A.R. 28 or C.A.R. 28.1, and C.A.R. 32, including all formatting requirements set forth in these rules. Specifically, the undersigned certifies that:

The brief complies with the word limits set forth in C.A.R. 28(g) or C.A.R. 28.1(g).

It contains 9018 words.

The brief complies with the standard of review requirements set forth in C.A.R. 28(a)(7)(A) and/or C.A.R. 28(b).

In response to each issue raised, the appellee has provided under a separate heading before the discussion of the issue, a statement indicating whether appellee agrees with appellant's statements concerning the standard of review and preservation for appeal and, if not, why not.

I acknowledge that my brief may be stricken if it fails to comply with any of the requirements of C.A.R. 28 or 28.1, and C.A.R. 32.

/s/ William G. Kozeliski

TABLE OF CONTENTS

TABLE OF AUTHORITIES

PAGE

Cases

TABLE OF AUTHORITIES

PAGE

TABLE OF AUTHORITIES

ISSUES PRESENTED

Whether a sleeping-juror issue is preserved where the prosecutor and defense counsel alert the trial court that a juror is sleeping.

Whether there is, as the division held, "a distinction between the waiver of the right to a jury trial and the waiver of the right to a jury of twelve," such that defense counsel can waive the number of jurors without her client's approval.

[REFRAMED] Whether a defendant's right to a jury of twelve is waived when defense counsel alerts the judge to a sleeping juror at trial but does not raise an objection.

STATEMENT OF THE CASE AND FACTS

Colin Bailey and Natalia Reyes-Jenardy were returning to their Denver home with their mutual friend, Julia Bishop (TR 10/7/15AM, pp. 38-43). A white sedan was parked outside with a bungee cord holding the trunk shut (TR 10/7/15AM, pp. 40-43). They saw a man at the back door; after speaking with the man, Ms. Reyes-Jenardy noticed a package belonging to a neighbor in the man's pocket (TR 10/7/15PM, pp.

42-44). The man fled in the white sedan (TR 10/6/15PM, pp. 120-24). After the man fled, Mr. Bailey and Ms. Reyes-Jenardy noticed several items missing from their home (TR 10/7/15AM, pp. 26-27, 55-64).

A few hours later in Commerce City, Officer Brandon Zborowski, unaware of the burglary, stopped defendant in a white sedan with a bungee cord holding the trunk shut (TR 10/7/15AM, pp. 116-17). After defendant was taken into custody for unrelated reasons and the sedan impounded, Zborowski saw items in the backseat, which ultimately turned out to be the stolen items from the earlier burglary (TR 10/7/15AM, pp. 11-28, 62-65).

A few days later, Ms. Reyes-Jenardy saw a photograph online and identified defendant as the burglar (TR 10/7/15PM, pp. 49-50). This information led police to the impounded sedan where the items were found (TR 10/7/15AM, pp. 11-28). Defendant was charged with second-degree burglary, and the case proceeded to trial (CF, p. 8).

There were no reports of jurors sleeping through the first day of trial. The proceedings included opening statements and the testimony of two witnesses (TR 10/6/15 PM).

On the second morning of trial, a detective and Mr. Bailey testified (TR 10/7/15 AM). During cross-examination of Mr. Bailey, the following exchange occurred during a sidebar:

> THE COURT: We're really at morning break point. I don't know how long you have to finish this witness.
>
> DEFENSE COUNSEL: I'm about five to ten minutes from being done, probably closer to five.
>
> THE COURT: Then we have redirect.
>
> PROSECUTOR: Mr. [B] is now asleep, Judge, and has been for about the last five minutes.
>
> THE COURT: Let's take a break.

(TR 10/7/15AM, pp. 90-91). The court informed the jury and parties that it was time for the midmorning break, and a 17-minute recess was taken (TR 10/7/15AM, p. 91:6-20).

After the recess, defense counsel lodged no objection to Juror B continuing to serve (TR 10/7/15AM, pp. 92-93). All that occurred was that the trial court instructed the attorneys to speak clearly during bench conferences so that they could be properly recorded (TR 10/7/15AM, pp. 92-93). Mr. Bailey's testimony concluded during the

morning, and Officer Zborowski then testified (TR 10/7/15AM, pp. 92-137). Defense counsel made no assertion concerning Juror B continuing to serve, nor did they assert that defendant's right to a 12-person jury had been infringed.

At the end of the morning session, the parties agreed to dismiss the alternate juror because of a conflict with parent-teacher conferences (TR 10/7/15AM, pp. 148-50). Juror M was not available in the afternoon, and the parties wanted to have a "full trial day" that day (TR 10/7/15AM, p. 149:11). Defense counsel personally consulted with defendant concerning the decision (TR 10/7/15, p. 148:15-16).

In the afternoon, both the prosecutor and defense counsel examined Ms. Reyes-Jenardy (TR 10/7/15PM, pp. 54-73). The prosecutor asked two questions on redirect (TR 10/7/15PM, pp. 73-74). Defense counsel then asked a series of questions on recross that took up approximately four pages of transcript (TR 10/7/15PM, pp. 74-79).

At the conclusion of defense counsel's questioning, the court turned to the jury and asked that any juror questions for the witness be

given to the bailiff (TR 10/7/15PM, p. 77:21-23). The following exchange then occurred during a bench conference:

> DEFENSE COUNSEL C: Juror [B] is asleep, or I think next to your front –
>
> DEFENSE COUNSEL K: We've lost him again.
>
> THE COURT: Yes. He does appear to be dozing off. I have been checking periodically, and he had been fine. I also would note that in the first time this was mentioned, he actually asked a question of that juror -- I noticed he passed one of the notes. So, I think he is with us sometimes. I've been trying to keep an eye on him, and I certainly have tapped the microphone, which usually works. I noticed as soon as we started to speak after that last break, he was attentive. He does seem to be eyes closed and being on sand at the moment.
>
> DEFENSE COUNSEL C: I'm just concerned because I don't know if the Court observed how long he's been asleep.
>
> THE COURT: Well, it's probably been 15 minutes since I looked over at him.
>
> DEFENSE COUNSEL C: Okay.
>
> THE COURT: My law clerk indicates he keeps perking up, but he saw him watching five minutes ago. So, that's as much as we can tell you. We are trying to keep an eye on him.
>
> DEFENSE COUNSEL K: Can we try to rouse him now?
>
> THE COURT: Well, we might as well do it when we're done with this discussion of jury questions.

DEFENSE COUNSEL C: Of course.

(TR 10/7/15PM, p. 78:1-24). The trial court took a recess, after which the trial resumed with juror questions for the witness (TR 10/7/15PM, pp. 78-79).

Once again, defendant did not (1) ask that Juror B be removed, (2) assert that his right to a 12-person jury had been infringed, or (3) ask for a mistrial. He did not question the trial court's representations about how long the juror had been dozing off; he did not ask for an opportunity to question the juror or ask the court to do so; and he raised no objection to the trial continuing.

The 12 members of the jury returned a guilty verdict and all 12 affirmed the verdict upon polling (TR 10/8/15, pp. 40-42). The court sentenced defendant to 12 years in the Department of Corrections (CF, p. 113).

On direct appeal, defendant asserted that he was entitled to a new trial because "a juror slept during trial and was effectively absent," resulting in a verdict rendered "by an incomplete jury." (COA OB, p. 8).

In addition, he asserted that "the trial court's failure to respond to the sleeping juror problem created structural error necessitating automatic reversal," while also acknowledging that the court of appeals had "not yet declared sleeping jurors create structural errors…." (COA OB, pp. 16, 18-19). However, defendant also framed his claim as one concerning juror misconduct, arguing that "[j]urors who fall asleep during trial compromise the defendant's right to be tried by a competent jury." (COA OB, p. 14).

In response, the People asserted that defendant waived any claim of juror misconduct because defendant failed to request any specific remedy and did not object to the court's handling of the situation (COA AB, p. 8).

A division of the court of appeals agreed that "defense counsel never requested a remedy and the trial court wasn't presented with any specific objection to rule on." *People v. Forgette*, 2021 COA 21, ¶13. Accordingly, the division first concluded the issue was unpreserved, and also considered whether the issue was waived, first assessing the

nature of the right at issue to determine whether it was waivable by counsel. *Id.* at ¶15.

The division determined that the sleeping juror potentially implicated defendant's right to a jury of 12, which was a right that could be waived by counsel. *Id.* at ¶20 ("Because we conclude that the right at stake was continuing trial with a jury of fewer than twelve – not the right to a trial by jury itself – we reject Forgette's contention that only he could waive the right at stake here."). The division held that counsel's conduct constituted a waiver. The division reasoned that "defense counsel was aware that a juror was asleep during the presentation of evidence but chose to remain mute regarding a remedy." *Id.* at ¶30. In addition, there were "conceivable strategic reasons for defense counsel not to have requested relief," such as the belief "that the sleeping juror was favorable to the defense." *Id.* at ¶31. Thus, the division held that defendant's claim was waived and declined to consider the merits of his claim. *Id.* at ¶33.

This Court granted review.

STANDARD OF REVIEW AND PRESERVATION

The People agree whether a waiver has occurred is reviewed de novo. *Richardson v. People*, 2020 CO 46, ¶21; *Stackhouse v. People*, 2015 CO 48, ¶4.

The proper standard of review for the merits is abuse of discretion. As divisions of the court of appeals have held, an inattentive juror presents an issue of juror misconduct. *People v. King*, 121 P.3d 234, 241 (Colo. App. 2005); *People v. Herrera*, 1 P.3d 234, 240 (Colo. App. 1999); *People v. Thurman*, 948 P.2d 69, 71-72 (Colo. App. 1997); *People v. Evans*, 710 P.2d 1167, 1168 (Colo. App. 1985); *see also United States v. McKeighan*, 685 F.3d 956, 973 (10th Cir. 2012) ("As a general rule, juror misconduct, such as inattentiveness or sleeping, does not warrant a new trial absent a showing of prejudice – i.e., that the defendant did not receive a fair trial.").

Under this Court's precedent, claims involving juror misconduct are reviewed for an abuse of discretion. *People v. Mackey*, 521 P.2d 910, 914 (Colo. 1974); *see also McKeighan*, 685 F.3d at 973 ("[A] court is not invariably required to remove sleeping jurors, and a court has

considerable discretion in deciding how to handle a sleeping juror."). As one state court has observed, "how to respond to a sleeping juror is so peculiarly within the observation, province, and discretion of the trial court that [a reviewing court] should not interfere with the ruling, except upon a clear abuse of discretion." *State v. Marquina*, 2020 UT 66, ¶33*; see also United States v. Batista*, 684 F.3d 333, 340 (2d Cir. 2012) ("Because the District Court is uniquely able to continuously observe the jury in court, we ordinarily review the Court's handling of alleged juror misconduct for abuse of discretion.") (internal quotations and punctuation omitted).

As more fully discussed below, the People disagree that any issue before this Court is preserved. Defendant never asserted before the trial court that a sleeping juror violated his right to a 12-person jury. Nor did he raise any objection to how the trial court handled the situation. Accordingly, the People first assert that any error was waived. Alternatively, the proper standard of reversal is plain error. *See Samad v. United States*, 812 A.2d 226, 230 (D.C. 2002) ("Inasmuch as Samad

acquiesced in the trial court's handling of the matter, we review his sleeping juror claim solely for plain error.").

This Court should decline defendant's invitation to conclude that a sleeping juror constitutes structural error. "The defining feature of a structural error is that it affects the framework within which the trial proceeds, rather than simply being an error in the trial process itself." *Weaver v. Massachusetts*, 137 S.Ct. 1899, 1907 (2017). A sleeping juror is an error in the trial process itself, and any prejudice can be readily ascertained. For example, a juror may sleep for only a brief part of trial. In that situation, a court can be confident the juror can still fulfill the juror's oath. And, as defendant suggests, trial courts can assess the impact of a sleeping juror and respond appropriately. (OB, pp. 20-25). Here, the trial court was actively involved in assessing when and how long the juror slept and in communicating that information to counsel.

In sum, there is no sound reason to depart from the uniform court of appeals' precedent that a trial court must judge, within its discretion, whether prejudice has occurred from a sleeping juror. *People v. Daley*, 2021 COA 85, ¶58; *Evans*, 710 P.2d at 1168.

SUMMARY OF THE ARGUMENT

An inattentive juror is not an absent juror. Twelve jurors were sworn-in on defendant's jury and 12 jurors returned a guilty verdict. Defendant's entire analysis rests on the assumption that a sleeping juror implicates his right to a 12-person jury. It does not.

To the contrary, Colorado courts, and courts from across the country, treat issues of juror inattentiveness under the rubric of juror misconduct. In that situation, a defendant's right to a competent and fair jury may be infringed by an inattentive juror, but inattentiveness does not implicate the right to a 12-person jury. Jurors who are inattentive or sleep through a part of trial are a relatively common occurrence. Defendant has provided no authority that this circumstance results in the denial of the right to a 12-person jury.

The record demonstrates that defense counsel waived any claim concerning Juror B's inattentiveness. Defendant's attorneys were aware that Juror B had slept for a short period on two occasions. After the first instance, they agreed to dismiss the alternate juror. After the second instance, the defense asked for more information concerning how long

he was asleep. When given that information, they responded, "Okay," asked that the juror be woken up, and proceeded with trial. These actions compel the conclusion that counsel was aware of Juror B's inattentiveness but chose not to request a mistrial or any other relief. To reach a contrary conclusion would encourage gamesmanship and provide an appellate parachute for defendants who strategically choose to keep inattentive jurors on the panel.

Should this Court conclude that this choice did not constitute a waiver, defendant's claim is nevertheless unpreserved. While the trial court was certainly aware of Juror B's inattentiveness, defendant lodged no specific objection related to that situation. He did not assert that his right to a 12-person jury was implicated. He did not ask for a mistrial. He did not assert that the trial court's response was inadequate. Yet, on appeal, *after an unfavorable verdict*, he now claims that he is entitled to a new trial for those reasons. Because those arguments were not raised below, the claim is unpreserved.

The record likewise reflects that there was no plain error. Juror B dozed off for less than 10 minutes on two occasions. Nothing in the

record indicates that he slept through such a substantial part of trial that defendant was prejudiced. Similarly, given that defense counsel proceeded with Juror B on the panel, possibly for strategic reasons, a possibility into which the trial court could not inquire, any error could not have been obvious.

ARGUMENT

I. A juror's inattentiveness does not implicate a defendant's right to a 12-member jury.

To begin, the People disagree that this case implicates defendant's right to a 12-person jury. The record shows that 12 individuals were sworn-in as jurors, 12 individuals listened to the evidence at trial, and 12 individuals returned a guilty verdict against defendant, and each of them affirmed that verdict. Thus, defendant's analysis, which is premised on his assertion that a sleeping juror implicates the right to a 12-person jury, misapprehends the nature of the right at issue and misses the mark. Rather, juror inattentiveness for any reason – sleeping, daydreaming, doing a crossword puzzle, or scrolling Twitter on a cell phone – presents an issue of juror misconduct, and to obtain

relief, a defendant must establish that his right to a fair and impartial jury was prejudiced.

For example, in *State v. Williams*, 235 S.E.2d 86, 87 (N.C. App. 1977), one of the jurors fell asleep "during the cross-examination of one of the State's witnesses." After the juror was awakened, the defendant's "counsel then proceeded with cross-examination without so much as suggesting to the court that there was a possibility of prejudice to the defendant." *Id.* On appeal, the defendant asserted the trial court should have declared a mistrial, reasoning the trial was a "nullity because it amount[ed] to a conviction by eleven jurors instead of the required twelve." *Id.* The court held that the defendant's right to a 12-person jury had not been implicated, explaining that the "sleeping juror had been duly impaneled along with the other eleven and the twelve duly returned a verdict of guilty in open court." *Id.*

Similarly, in *State v. Yant*, 376 N.W.2d 487, 489-91 (Minn. App. 1985), the parties were repeatedly advised of sleeping jurors, but neither "party made any requests throughout the trial relative to the jury." Even so, on appeal the defendant asserted that he was "denied

his right to trial by a jury of 12." *Id.* at 491. However, the court stated that at "oral argument, appellant's counsel agreed that this was an innovative argument and that he knew of no case law supporting this claim. Under the circumstances of this case, appellant's argument that there was not a valid waiver of a 'jury trial' is without merit." *Id.*

A similar conclusion should follow here. Absent from defendant's brief (and the division's opinion) is any authority holding that an inattentive or sleeping juror implicates a defendant's right to a jury of 12. Indeed, it appears every case defendant relies on that presents a sleeping-juror issue analyzes it as an instance of juror misconduct. Thus, the applicable authority, including from Colorado, uniformly holds that an inattentive juror presents an issue of juror misconduct.

True, a criminal defendant "has a right to a tribunal both impartial and mentally competent to afford a hearing." *Tanner v. United States*, 483 U.S. 107, 126 (1987) (internal quotations omitted). Juror inattentiveness concerns a juror's qualifications to continue serving. That is, "[i]f sleep by a juror makes it impossible for that juror to perform his or her duties or would otherwise deny the defendant a

fair trial, the sleeping juror should be removed from the jury." *United States v. Freitag*, 230 F.3d 1019, 1023 (7th Cir. 2000). But as a division of the court of appeals held in a sleeping-juror case:

> Jury misconduct which materially affects the substantial rights of a party preventing a fair and impartial trial may serve as grounds for a new trial. However, the defendant must establish that he was prejudiced by the misconduct in order to overturn his conviction, and the prejudicial impact of the misconduct is a question of fact to be determined in light of all the circumstances of the trial.

Evans, 710 P.2d at 1168 (internal citations omitted).

Defendant's position is contrary to the weight of authority and attempts to elevate a juror misconduct issue into a claim of structural error. He asserts that the moment Juror B fell asleep his jury only had 11 members and only he could personally waive his right to be tried by a jury of twelve.[1] And while the division correctly determined that the right to trial by jury was not at issue here, it mistakenly accepted

[1] It is unclear from defendant's brief whether the sleeping juror will continue serving on the panel if a criminal defendant executes a personal waiver, as he contends is necessary. If the juror continued serving after the waiver, then defendant's position is that a defendant must waive his right to a 12-person jury, only to continue the trial with a 12-person jury. To state that position demonstrates its invalidity.

defendant's suggestion that the "right at stake was continuing trial with a jury of fewer than twelve." *Forgette*, ¶20. But that is not what happened here. The trial plainly continued with 12 jurors.

To be sure, a sleeping juror may be problematic and implicate a defendant's right to a competent and fair jury. However, merely because a juror is inattentive at some point during trial does not mean that the juror is no longer part of the jury. Juror B remained a part of the jury. He heard the evidence and voted to convict, affirming his vote during polling. Whether inattentiveness affected the fairness of the trial is potentially an issue defendant may challenge on appeal. However, that challenge is not based on a violation of his right to a 12-person jury.

II. Defense counsel's failure to ask for a specific remedy or to object to the trial court's handling of the situation waived any claim concerning juror inattentiveness.

Although the division mistakenly followed defendant's lead in identifying the right at issue, it appropriately held waiver applied. This is so because defense counsel was aware of the circumstances surrounding Juror B's alleged slumber. The prosecutor alerted the court

to the first incident in the morning, and defense counsel raised the issue that afternoon. On the second occasion, defense counsel sought out more information, and the parties engaged in a discussion with the court about how long the juror had slept, and the court indicated it had been keeping an eye on Juror B and conveyed its observations, as well as those of the law clerk. When presented with that information, there was no objection. There was no request for further questioning. Defense counsel did not ask that Juror B be removed from the jury. Rather, defense counsel said, "Okay," asked that the juror be woken up, and proceeded with trial.

A. Whether or not to raise objections related to the qualifications of a juror is counsel's decision.

As the division reasoned, the first question in determining whether a claim is waived, is the nature of the right at issue and whether a waiver may be executed by counsel or requires a personal waiver from the defendant. "Whether a particular right is waivable; whether the defendant must participate personally in the waiver; whether certain procedures are required for waiver; and whether the

defendant's choice must be particularly informed or voluntary, all depend on the right at stake." *Stackhouse*, ¶8 (internal quotations omitted).

"[T]he decision of what jurors to accept or strike is a strategic decision reserved for defense counsel." *Richardson*, ¶25. Similarly, whether to ask for a mistrial lies within counsel's purview. *People v. Tee*, 446 P.3d 875, 880 (Colo. App. 2018); *People v. Greenwell*, 830 P.2d 1116, 1119 (Colo. App. 1992). Thus, how to confront juror misconduct and the possible remedies are tactical decisions for defense counsel. *See Lamar v. Graves*, 326 F.3d 983, 986 (8th Cir. 2003) (counsel made reasonable strategic choice when he did not object to a juror sleeping through part of the state's case; counsel withheld his objection because he did not mind if a juror missed part of the state's presentation); *People v. Dunigan*, 831 N.W.2d 243, 249 (Mich. App. 2013) (defense counsel could reasonably make a strategic decision to assume that the juror's missing the testimony from prosecution witnesses would have helped the defense); *State v. Anstrom*, 117 Wash. App. 1005 (2003) (unpublished) ("Numerous strategic reasons exist for trial counsel's

decisions. For example, the attorney may believe a juror is defense oriented, or the alternative juror is more likely to convict. Counsel may believe the State's case has a weakness that would likely be corrected at a new trial."). Accordingly, defense counsel may waive any challenge to juror inattentiveness.[2]

B. Defense counsel waived any challenge to Juror B's inattentiveness.

The record reflects that defense counsel waived any challenge to Juror B's inattentiveness and how the trial court handled the situation.

"Waiver … is the 'intentional relinquishment of a known right or privilege.'" *People v. Rediger*, 2018 CO 32, ¶39 (quoting *Dep't of Health v. Donahue*, 690 P.2d 243, 247 (Colo. 1984)); *see also People v. Smith*, 2018 CO 33, ¶17. "In contrast, forfeiture is 'the failure to make the timely assertion of a right." *Richardson*, ¶24.

---

[2] Once again, defendant's entire analysis that a personal waiver was required is premised on his assumption that the right to a 12-person jury was implicated. As discussed, it was not. Thus, this Court need not even reach the question of whether there is a distinction between the waiver of the right to a jury trial and the waiver of the right to a jury of 12.

"[A] waiver need not be express; it can be implied." *Phillips v. People*, 2019 CO 72, ¶21. The record need only show that a defendant or his counsel made a conscious decision to forego raising an issue or an objection. *Cardman v. People*, 2019 CO 73, ¶18 n.6; *see also Rediger*, ¶45. While forfeited errors are reviewed for plain error, "waiver extinguishes error and … any appellate review." *Richardson*, ¶24.

Six recent decisions from this Court inform the analysis of whether defense counsel's actions amounted to a waiver. Two cases found waiver – *Stackhouse* and *Richardson*, while four cases found no waiver and analyzed the claim for plain error – *Rediger*, *Smith*, *Phillips*, and *Cardman*.

The circumstances of this case demonstrate a waiver because the evidence of waiver that was absent in *Rediger*, *Smith*, *Phillips*, and *Cardman* is apparent on the face of this record.

In *Stackhouse*, this Court held that a defendant's failure to object to an obvious courtroom closure waived any claim of error. *Stackhouse*, ¶16. The court reached this conclusion for several reasons. First, there may be sound strategic reasons to not object to a closure. *Id.* at ¶15.

Second, courts presume that attorneys know the law and can infer from the failure to object that "the attorney made a decision not to exercise the right at issue." *Id.* Third, a contrary rule could lead a defense attorney to intentionally fail to object "as a strategic parachute" to preserve an avenue of attack on appeal. *Id.*

In *Richardson*, defense counsel was aware that a juror was the trial judge's wife, but he did not ask her any questions, challenge her for cause, or attempt to remove her with a peremptory challenge. *Richardson*, ¶26. This Court, noting that there were "sound strategic reasons" for these decisions, held that counsel's failure to challenge the juror waived any right to challenge her qualifications on appeal. *Id.* at ¶26 n.2.

In *Rediger*, defense counsel told the court that he was "satisfied" with the jury instructions even though one of the elemental instructions erroneously tracked the language of a subsection under which the defendant was not charged. *Rediger*, ¶¶8-10. The defendant asserted on appeal that the instruction amounted to a constructive amendment. *Id.* at ¶12. This Court held that counsel's actions did not amount to a

waiver "either express or implied" because there was no evidence that counsel "intended to relinquish his right to be tried in conformity with the charges set forth" in the charging document. *Id.* at ¶42. This Court highlighted the lack of any evidence that counsel "knew of the discrepancy between the … jury instructions and the charging document." *Id.* at ¶43. And without such evidence, nothing in the record suggested counsel "considered objecting to the erroneous instruction but then, for some tactical or other reason, rejected the idea." *Id.* at ¶42 (internal quotations omitted).

Similarly, in *Smith*, on appeal the defendant asserted that there was a variance between the charge and the instructions. *Smith,* ¶10. But defense counsel had told the trial court that the instruction was "acceptable." *Id.* at ¶6. The parties and the trial court never discussed or acknowledged the pertinent differences between the charging document and the proposed jury instructions. *Id.* at ¶18. So, relying on *Rediger*, this Court held that the defendant did not waive the variance claim because "no evidence suggest[ed] that Smith considered objecting

to the alleged variance but then for some reason, tactical or otherwise, decided against it." *Id.*

In both *Cardman* and *Phillips*, the defendants raised new grounds for suppression of evidence for the first time on appeal. *Cardman*, ¶7; *Phillips*, ¶8. This Court held the issues were not waived because "[m]uch like the record in *Rediger*, the record [was] barren of any indication that defense counsel considered raising the unpreserved contentions before the trial court but then, for a strategic or any other reason, discarded the idea." *Phillips*, ¶22; *see also Cardman*, ¶11.

The distinction between the cases recognizing a waiver (*Richardson* and *Stackhouse*) and those applying forfeiture instead (*Rediger*, *Smith*, *Phillips*, and *Cardman*) is clear. To constitute a waiver, the record must include evidence that counsel:

1. knew (*Richardson*) or must have known (*Stackhouse*) of the legal issue or reason for concern, and
2. decided not to object or otherwise pursue the issue.

This case fits squarely within *Richardson* and *Stackhouse* because the evidence this Court found lacking in *Rediger*, *Smith*, *Phillips*, and *Cardman* is present.

First, defendant does not dispute, nor could he, that defense counsel was aware of the inattentive juror and that it was potentially problematic. Defense counsel was informed of the issue the first time Juror B was dozing off. In the second instance, the issue was discussed with the court on the record, and defense counsel was "concerned" because she didn't know how long Juror B had been asleep. When the court told defense counsel that it had seen Juror B awake 15 minutes earlier, counsel responded, "Okay." The court then told counsel that a law clerk had seen the juror awake five minutes earlier. Counsel's response was, "Can we try and rouse him now?" Thus, because counsel knew of the sleeping juror, this Court need not consider what counsel must have known.

Second, the same exchange demonstrates that counsel decided not to object or pursue the issue beyond suggesting that the juror should be woken up.

One the one hand, counsel did not ask for a mistrial, ask that the juror be removed, ask that the juror be subjected to questioning, or ask that any evidence be presented again. As in *Stackhouse*, because each avenue is a well-known remedy, counsel's awareness of these remedies must be presumed.

On the other hand, as the division observed, similar to *Richardson* and *Stackhouse*, the record compels the conclusion that counsel chose not to object or ask for any further relief because of potential strategic reasons for not doing so. *Richardson*, ¶26 ("Defense counsel could have had sound strategic reasons for this decision. After all, the jury found Richardson guilty of three lesser included offenses and acquitted him of one of the charges.") (internal citations omitted); *Stackhouse*, ¶15 ("This is so because there are sound strategic reasons to waive the right to a public trial, as is particularly apparent in the context of Stackhouse's jury selection for his trial on charges of sexual assault on a minor. For example, defense counsel may prefer closure to avoid tainting of the jury by pretrial publicity, or may believe that potentially biased jurors will be more frank and forthcoming regarding their biases if jury

selection is closed to the public.") (internal citations and punctuation omitted).

Here, counsel accepted the court's statement that the juror had only been asleep for a short period of time. Thus, she may not have thought that any inattentiveness was serious enough to warrant a mistrial. Or she may have believed that the juror was favorable to the defense and did not want to expose the juror to further questioning or risk him being removed from the jury. Or her cross-examination of the victim may have been going poorly, so a juror not observing that part of trial helped the defense. Or counsel may have believed that Juror B's inattentiveness was evidence that the prosecution's presentation of evidence was not compelling, and a mistrial would not have been preferable at that point. *See Batista*, 684 F.3d at 341 ("Defense counsel may simply have concluded that the risk that the juror might have missed important exculpatory testimony was a tolerable one."); *Ciaprazi v. Senkowski*, 151 F. App'x 62, 63 (2d Cir. 2005) ("[T]rial counsel's decision not to object may well have been based on his desire to retain the inattentive juror rather than to seek to replace him with

an alternate."). Counsel's specific reason for her decision to wake the juror and continue with trial is irrelevant. The operative fact is that this Court is not "hard pressed to think of any strategic advantage" the defense could have gained by allowing Juror B to continue to serve on the jury and not ask for any further action from the trial court. *Cardman*, ¶11.

As the division reasoned, this "strategic rationale stands in stark contrast to *Rediger*, *Smith*, *Phillips* and *Cardman*, where such a conceivable rationale was wholly absent." *Forgette*, ¶31. And, as the following cases show, this contrast obviates any need to look for any more specific evidence of counsel's thought process in standing mute after asking that the juror be woken up.

In *United States v. Krohn*, 560 F.2d 293, 297 (7th Cir. 1977), the prosecutor told the court that "one of the jurors had given the appearance of having been asleep during parts of the trial." Defense counsel stood silent and "neither moved for a mistrial nor requested substitution of the alternate juror until after the guilty verdicts were returned." *Id.* The court held that the "*only conclusion possible from this*

record is that defense counsel, fully aware of the existence of the problem that is now pressed upon us, deliberately chose to proceed with the original jury to create a no-lose situation: either a not guilty verdict would be returned or an arguably tainted guilty verdict would provide a basis for appeal." *Id.* (emphasis added). While the court went on to review for plain error, its reasoning fits squarely into this Court's requirements for waiver. *Id.*

In *Yant*, the parties were informed of sleeping jurors several times during trial. 376 N.W.2d at 489-90. "Neither party made any requests throughout the trial relative to the jury." *Id.* at 490. The court held that, although it would be the "better practice for the court to question the jurors who were observed with closed eyes," the claim was waived because the defendant was "fully apprised of the potential jury misconduct" and did not request a remedy. *Id.* at 490-91. Instead, he "gambled on the result and now cries 'foul.'" *Id.*

In *Hardin v. State*, 956 N.E.2d 160, 162-63 (Ind. App. 2011), defense counsel informed the court and the prosecutor that a juror was asleep. The prosecutor replied, "That's the same [juror who] slept

through everything yesterday." *Id.* After defense counsel said that he had not noticed the juror's slumber on the previous day, the court suggested that they send the juror "a cup of coffee or a glass of water without embarrassing them too much." *Id.* "The trial resumed without any further discussion of the issue, and the juror was not removed and replaced with one of the alternate jurors." *Id.* On appeal, the defendant asserted that he was entitled to a new trial because of the sleeping juror. *Id.* The court held that the issue was waived because counsel "was aware of both the juror's alleged inattentiveness and the trial court's proposed remedy before the trial concluded, yet he did not object to the trial court's proposed remedy." *Id.*

As these authorities demonstrate, the record compels the conclusion that counsel, aware of Juror B's inattentiveness, made the decision not to pursue the issue further. Thus, defense counsel's actions were not the "mere failure to raise an issue." *Phillips*, ¶21. They were aware of the issue, sought out more information concerning Juror B's inattentiveness, pondered trying to rouse him, and decided not to ask

for further corrective action or relief. Thus, defense counsel's actions amount to a waiver.

Defendant asserts that the "record shows no … strategic determination by counsel." (OB, p. 18). But defense attorneys are not in the business of disclosing strategic reasoning on the record during trial, nor should they be. And this Court's precedents do not require defense counsel to put her strategic reasoning on the record to find a waiver. Indeed, defendant seemingly agrees that if his counsel had asked the court not to dismiss the juror or affirmatively declined a remedy, then there would be a waiver. (OB, p. 16). Defendant nevertheless claims that "[r]aising the sleeping-juror issue was inconsistent with a determination" that Juror B's slumber "was beneficial," and that "[p]arties do not waive issues by complaining about them." (OB, p. 18). But contrary to defendant's argument, the record shows more than a mere complaint.

Defense counsel wanted to know how long Juror B had been asleep, categorizing it as a "concern." But when counsel learned that he had only been asleep for five minutes (15 at the most) she dropped the

issue, asked if the juror could be woken up, and proceeded with the trial. Thus, the record reflects that counsel was not merely "complaining" about the sleeping juror. Rather, she was investigating how long he had been asleep and then decided not to pursue the issue further after she found out it was only for a short time. Defendant does not explain what else defense counsel's thought process could have been or how else counsel's actions can be interpreted.

In addition, defendant posits that there is "no real danger of sandbagging" because "if the defense fails to raise the problem, the fact of the sleeping juror will likely escape documentation in the record, and thus appellate review." (OB, p. 20). Defendant's assertion is curious because it was the *prosecutor* who first raised the issue of the sleeping juror. Defendant's argument in this case highlights, rather than refutes, the risk of sandbagging.

Defense counsel was aware that the juror was asleep during short portions of the trial. Yet, counsel did not request any further relief or questioning. Now, following a conviction, defendant argues to this Court that a structural error occurred. In other words, defendant argues for a

rule that counsel has no duty to do anything or request any relief once a juror falls asleep (or is inattentive for any reason), even though the record reflects that counsel did not want the juror removed from the panel. Under defendant's rule, at that point, a defendant has an ace in the hole on appeal, although several alternatives to automatic reversal and retrial are available.[3] He can hope for a favorable outcome at trial, but if that does not occur, he has a sure-fire winner on appeal. But "strategic decisions should not be permitted to provide an appellate parachute to non-objecting defense counsel if the defendant is convicted." *Stackhouse*, ¶14. And even if the sandbagging risk is low under the current law, that risk may skyrocket if this Court ascribes to his rule which is a roadmap for a "heads I win, tails you lose" strategy.

[3] Even if an alternate juror is not available, a defendant should not be heard on appeal if their counsel fails to request a remedy at trial. If the juror can no longer serve, then a defendant may choose between a mistrial or continuing with an 11-member jury, if the prosecution and court agree. *See* § 18-1-406(4), C.R.S. (2021).

In sum, the record demonstrates that defense counsel waived any challenge to Juror B continuing to serve on the jury, as well as any challenge to how the trial court handled the situation.

III. Defendant did not preserve any challenge to Juror B's inattentiveness, and he has failed to carry his high burden of establishing plain error.

If this Court concludes that defense counsel's actions do not amount to a waiver, it should nevertheless conclude that the issue is unpreserved. And in that event, the record reflects that defendant has failed to carry his high burden of establishing plain error.[4]

A. Defendant did not preserve any claim concerning Juror B's inattentiveness or how the court handled the situation.

In its opinion, the division first acknowledged that, while the trial court was informed that a juror was sleeping, defendant "never asked

[4] Defendant asks this Court to remand the case for the court of appeals to apply the plain error standard. (OB, p. 6). But this Court addressed the merits of defendant's claim in *Phillips* even though the certiorari questions only addressed whether or not there was a waiver. *Phillips*, ¶¶9 n.2, 39-50. This Court should take a similar route in this case. If there is no waiver, the merits should be addressed under the plain error standard.

the court to do anything about it." *Forgette*, ¶14. It held that a "statement that a juror was asleep during proceedings, without a request for a remedy or a specific objection, doesn't present the court with anything to rule on and is, therefore, insufficient to preserve the issue." The division was correct.

"To preserve a claim, a party must make an objection specific enough to draw the trial court's attention to the asserted error." *People v. Tallent*, 2021 CO 68, ¶12 (internal quotations omitted). As defendant points out, "the trial court understood the defense did not want jurors sleeping through trial," (OB, p. 12), and the court took appropriate action to address that concern by monitoring Juror B. While the court was certainly aware of the inattentive juror, defendant raised no additional concerns and made no specific objection that would have alerted the trial court to an error it was committing by handling the situation as it did, much less request any sort of ruling.

In *United States v. Fernández-Hernández*, 652 F.3d 56, 75 (1st Cir. 2011), defense counsel alerted the trial court that one of the jurors was falling asleep. Counsel raised no specific objection so the "argument

[was] at best for forfeited on appeal, subject to review only for plain error." *Id.*

In *Batista*, 684 F.3d at 340, a sleeping juror was brought to the trial court's attention several times, and the court interviewed the juror "at least once." *Id.* However, because defense counsel did not object to the trial court's handling of the situation and did not request removal of the juror, the claim was at best unpreserved and subject to plain error review. *Id.*

In *State v. Sanders*, 750 N.E.2d 90, 107 (Ohio 2001), defense counsel alerted the trial court to the fact that a "juror's eyes were shut for about an hour and fifteen minutes, and that the juror was motionless for half an hour." Because the issue had been mentioned before, the trial court stated that it had been watching the juror and later told the jury it was keeping the temperature in the courtroom low because "there's too much sleeping going on." *Id.* On appeal, the defendant asserted the court should have removed the juror or subjected her to further questioning. *Id.* The court held that the defendant "did not request either remedy at trial, nor did he express

dissatisfaction with the trial judge's handling of the matter." *Id.* Thus, the claim was unpreserved. *Id.*

As these authorities demonstrate, defense counsel's actions did nothing to preserve any issue concerning Juror B's inattentiveness. Defendant states that "[c]ontemporaneously pointing out a sleeping-juror problem creates a record and gives the trial court an adequate opportunity to provide an appropriate response." (OB, p. 9). Defendant's statement is true as far as it goes. The trial court was given an opportunity to provide an appropriate response. But defendant ignores the core question at issue: Did defendant assert that response was incorrect or insufficient? Under the circumstances, he did not.

Indeed, defendant now asserts that the juror's inattentiveness requires a new trial because it violated his right to a 12-person jury, and that the trial court erred because it learned of a sleeping juror and "took no further investigative or corrective action." (OB, p. 20).[5] Yet, he

[5] Defendant suggests that where a trial court finds that a juror slept during the presentation of evidence but takes no investigative or corrective action, structural error occurs (OB, p. 26). His analysis

raised neither argument below. He never asserted that the moment Juror B fell asleep a mistrial or a personal waiver was needed. He never asked the trial court to take further investigative or corrective action. To the contrary, counsel walked back to counsel table and continued with trial. The errors that defendant now alleges were never raised below. For that reason, they are unpreserved. *See Hagos v. People*, 288 P.3d 116, 120 (Colo. 2012).

Deleon v. People, 2019 CO 85, does not change the analysis. As defendant observes, there, this Court held that "the issue was preserved where 'undoubtedly, the trial court understood' that the defendant wanted a no-adverse-inference instruction." (OB, p. 12) (quoting *Deleon*,

---

appears to be anchored in the approach taken in *Commonwealth v McGhee*, 25 N.E.3d 251, 257 (Mass. 2015) ("[t]he serious possibility that a juror was asleep for a significant portion of the trial is a structural error that so infringes on a defendant's right to the basic components of a fair trial that it can never be considered harmless."). However, even under this test, his claim fails. Unlike *McGhee*, where the judge failed to conduct any inquiry into the report of a sleeping juror and was unable to watch the identified juror, here the trial court was actively monitoring Juror B and helped the parties assess when and how long the juror slept. And unlike *McGhee*, here the parties did not request further inquiry by the trial court. *Cf. Commonwealth v. Alleyne*, 54 N.E.3d 471, 478 (Mass. 2016) (distinguishing *McGhee*).

¶24). But that quote dooms defendant's argument. In *Deleon*, the record demonstrated what the defendant wanted the court to do – give a no-adverse-inference instruction. Conversely, here, the record (at best for defendant) does not show what defendant wanted the court to do. As discussed, the record actually shows that the court "undoubtedly … understood" that defense counsel was fine with Juror B continuing on the jury. The court certainly had no idea that defendant believed his right to a 12-person jury had been infringed or that the trial court's response to Juror B sleeping was inadequate. Thus, *Deleon* undercuts defendant's assertion.

Defendant's framing of the issue begs the question: he asserts the issue is preserved because the trial court "was alerted to the sleeping-juror issue." (OB, p. 8). But a sleeping juror is not a legal error by itself. Rather, it is a factual circumstance that may lead to a legal error, such as having an incompetent juror serve. But an inattentive juror does not present a circumstance where a particular remedy is automatic.

For example, if a party lodges a hearsay objection, then the remedy is automatic. If the court sustains the objection, the evidence is

precluded, and the jurors should not take it into account in their decision. Conversely, as defendant implicitly acknowledges, the possible permutations of a sleeping juror and the remedies that may be warranted when that circumstance occurs are limitless. The circumstances will always be different in each case surrounding how long the juror was inattentive, why the juror was inattentive, and what evidence (if any) the juror may have missed. In addition, the parties' desires as to what should happen after that information is gleaned are matters of strategy that will also depend on the particular attorney's judgment and the progress of the trial to that point. Thus, the question is not whether a trial court was aware of a sleeping juror. Rather, it is what did the parties (and particularly the defendant) ask the court to do about the sleeping juror and did the defendant object to the trial court's handling of the situation after those requests were made.

Here, defendant made no specific requests other than having Juror B woken up. He did not ask for a mistrial or ask for any other relief. For that reason, the issue is unpreserved. *See People v. Abbott*, 690 P.2d 1263, 1269 (Colo. 1984) (when an accused believes he is

prejudiced by an answer, he must either object, move to strike the answer, or request that the court instruct the jury to disregard it).

B. The record reflects that there was no plain error.

Because the record demonstrates that the juror did not miss a substantial part of trial and any error wat not obvious, there was no plain error.

"To qualify as plain error, an error must generally be so obvious that a trial judge should be able to avoid it without the benefit of an objection." *Scott v. People*, 390 P.3d 832, 835 (Colo. 2017); *see also Zoll v. People*, 2018 CO 70, ¶18.

"For an error to be this obvious, the action challenged on appeal ordinarily must contravene (1) a clear statutory command; (2) a well-settled legal principle; or (3) Colorado case law." *Scott*, 390 P.3d at 835 (internal quotations omitted). "Conversely, an error is generally not obvious when nothing in Colorado statutory or prior case law would have alerted the trial court to the error." *Id.* A court need not determine

whether there was error at all if the alleged error was not obvious. *See Hoggard v. People*, 2020 CO 54, ¶¶16-19.

"When a trial court receives a report of a sleeping juror, it has considerable discretion in deciding how to respond." *Samad*, 812 A.2d at 230. A reviewing court defers to the trial court's actions "because of the court's familiarity with the proceedings, its observations of the witnesses and lawyers and jurors, and its superior opportunity to get a feel for the case." *Id.*

Here, the record reflects that the court was made aware that Juror B was possibly sleeping during trial for approximately five minutes on each occasion. While defendant now asserts that the court should have investigated further or taken additional corrective action, the court was monitoring the situation to ensure that the juror remained alert and was paying attention. When the subject was brought up the second time, the court noted that the juror became attentive when someone began talking and that the juror had passed a question on during the first incident. Neither the prosecutor nor defense counsel expressed concern that the juror would be unable to serve or

slept through a significant or highly material portion of the trial. Under these circumstances no plain error occurred.

Further, any error was not obvious. The trial court, with firsthand observation, did not believe that the juror had slept through a significant portion of the trial as to require further action – nor did either party. The record reflects the juror was asleep for, at most, approximately five minutes on each occasion during the end of cross-examination of two witnesses. Thus, "there is no evidence that the juror missed large or critical portions of the trial." *Sanders*, 750 N.E.2d at 107; *see also Freitag*, 230 F.3d at 1023 ("Here, there is no evidence that the sleeping juror missed large portions of the trial or that the portions missed were particularly critical. As noted earlier, the parties dispute the extent of the juror's slumber, and defense counsel failed to raise the matter when he first noticed the sleeping juror."); *Welch v. United States*, 807 A.2d 596, 604 (D.C. 2002) ("[T]he chances are slim that a juror who dozed off for no more than five minutes would have missed testimony so vitally important that failing to hear it not only would have swayed the juror's decision but enabled that juror also to sway the

decisions of the other eleven jurors who found appellant guilty. Such an outcome can charitably be described as fanciful at best."). Nor is there any clear Colorado case law or statute that demonstrates the trial court's response was inadequate. Defendant asserts the trial court should have done more, but it was his duty to ask for such relief. *See Abbott*, 690 P.2d at 1269. Nor is there any authority that a sleeping juror violates a defendant's right to a 12-person jury.

In addition, at minimum, it is a "fair inference … that the defense was not displeased by the juror's slumber." *Samad*, 812 A.2d at 231; *see also United States v. Krohn*, 560 F.2d 293, 297 (7th Cir. 1977). When strategic considerations are at play, there cannot be obvious error.

In *Romero v. People*, 2017 CO 37, despite the fact that he did not object, the defendant asserted on appeal that the trial court had erroneously given the jury unfettered access to recorded statements during deliberations. *Id.* at ¶5. This Court held there was no plain error because it was "not so clear-cut that the trial court should have limited access to the recordings." *Id.* at ¶8. The court noted that "[t]here are many reasons a defendant may want a jury to have unfettered access to

recordings, including reviewing inconsistencies between the recording and live testimony given during court proceedings." *Id.* Thus, there was no plain error because "without an objection … a trial court is not required to make sua sponte restrictions on that access." *Id.*

A similar conclusion should follow here. The possible strategic reasons for counsel's actions demonstrate the lack of obvious error. Defendant asks for a "rote application of the plain error standard" that is nothing more than an attempt to make "counsel's sound strategy … become plain error at appellate counsel's urging." *United States v. Smith*, 459 F.3d 1276, 1299-1300 (Tjoflat, J., concurring); *see also United States v. Simmons,* 961 F.2d 183, 186 (11th Cir. 1992) ("Given the final colloquy and the strong possibility of a strategic decision by defense counsel, any error by the lower court is clearly not 'obvious.'").

In sum, defendant has failed to carry his high burden to establish plain error.

CONCLUSION

Under the circumstances of this case, the trial court responded appropriately to the reports of a sleeping juror, and, while defendant now speculates that further action was required, he made no such requests during trial and instead chose to proceed with Juror B. The record supports a determination that defendant waived this claim and also establishes that he failed to properly preserve the arguments he now raises on appeal. And given that he is unable to show that any possible error was obvious or to demonstrate prejudice from a juror who was briefly inattentive during trial, his claims fail.

Considering the foregoing, the judgment of the court of appeals, which affirmed defendant's convictions, should likewise be affirmed.

PHILIP. J. WEISER
Attorney General

/s/ William G. Kozeliski
WILLIAM G. KOZELISKI, 37824*
Senior Assistant Attorney General
Criminal Appeals Section
Attorneys for Respondent
*Counsel of Record

CERTIFICATE OF SERVICE

This is to certify that I have duly served the within **PEOPLE'S ANSWER BRIEF** upon **JACOB MCMAHON** via Colorado Courts E-filing System (CCES) on August 25, 2022.

/s/Michael Rapp