

Wake Up! The Proper Error Analysis for the Case of a Sleeping Judge [State v. Johnson, 391 P.3d 711 (Kan. App. 2017), cert. granted Sept. 29, 2017.]

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Summary: The Kansas Court of Appeals held when a judge falls asleep on the bench it constitutes a structural error because it permeates the entire trial. However, the U.S. Supreme Court has only formally recognized a handful of structural errors and judges falling asleep should not be added to this narrow list. Instead, the Kansas Court of Appeals should have applied the harmless-error doctrine and found the judge who fell asleep while presiding over a criminal trial properly mitigated the situation, and upheld the defendant's conviction.

I. INTRODUCTION

Judges are held to the highest professional standard, both within the legal field and their own enumerated code of conduct.¹ A judge presiding over a criminal trial adjudicates matters by issuing rulings and providing explanations for decisions.² When a judge fails to preside over a trial by falling asleep, what happens to the case? The Kansas Court of Appeals in *State v. Johnson*³ held the case should be reversed automatically under the structural error doctrine.⁴ However, the court should not have expanded the structural error doctrine, and instead should have allowed the harmless-error analysis to govern and required the defendant to show some form of prejudice.

1. Brian Holland, *The Code of Judicial Conduct and the Model Rules of Professional Conduct: A Comparison of Ethical Codes for Judges and Lawyers*, 2 GEO. J. LEGAL ETHICS 725, 732 (1989).

2. Judith Resnik, *Managerial Judges*, 96 HARV. L. REV. 374, 378 (1982).

3. 391 P.3d 711 (Kan. Ct. App. 2017), review granted Sept. 29, 2017.

4. *Id.* at 718.

II. BACKGROUND

A. Case Description

Daquantrius Johnson was charged with criminal possession of a firearm by a convicted felon, aggravated assault, and criminal discharge of a firearm.⁵ During the first day of trial, Judge Benjamin L. Burgess and the parties conducted voir dire, opening arguments, and the State's primary witness testified.⁶ The parties made no objections during the afternoon voir dire.⁷ Judge Burgess presided over the parties' peremptory challenges, conversed with counsel regarding preliminary instructions and an evidentiary stipulation, swore in the jury, and provided the jury with preliminary instructions.⁸ During the direct examination of the State's witness, Judge Burgess ruled on the admissibility of several exhibits.⁹ During cross-examination, the State raised one objection for relevance, which Judge Burgess sustained.¹⁰

On the second day of trial, a juror pulled aside the bailiff to ask whether the defendant could have a fair trial, because he had observed Judge Burgess sleeping the previous day.¹¹ Judge Burgess addressed the incident on the record, stating:

[T]he role of the judge and the jury are different. You are the trier of facts. I decide what evidence you will hear and what instructions you will receive. I don't believe during the course of this trial yesterday afternoon there were any objections raised that I had to make rulings on that would have been affected by my nodding off. I acknowledge myself, ladies and gentlemen, that I did nod off some. I doubt that I'm the first judge in America that's ever done that.¹²

Judge Burgess asked defense counsel if he wished to request a mistrial, because the defendant's constitutional right to a fair trial could have been affected.¹³ Defense counsel stated he did not wish to request a mistrial and was prepared to proceed.¹⁴ Judge Burgess said he would "try to do better,"

5. These actions are criminalized at KAN. STAT. ANN. §§ 21-5109(b), 21-6308(a)(1)(B), 21-6308(a)(3)(B), 22-3414(3) (2013); Resnik, *supra* note 2.

6. *Johnson*, 391 P.3d 711, 721 (Buser, J., dissenting).

7. *Id.*

8. *Id.* The preliminary instructions to the jury were lengthy and comprised fourteen pages of the trial transcript. *Id.*

9. *Id.*

10. *Id.*

11. *Id.* at 714.

12. *Johnson*, 391 P.3d at 721 (Buser, J., dissenting). Additionally, in an attempt to mitigate his error, Judge Burgess emphasized the length of his career and the fact he presided over 300 jury trials. *Id.* He stated that in his "43 years of experience most jurors . . . are very conscientious about their role and their responsibility. They take their job seriously." *Id.* Judge Burgess concluded by stating that he was "glad that this matter was brought out in the open so that it [could] be dealt with." *Id.*

13. *Id.*

14. *Id.*

and continued the trial.¹⁵ Subsequently, Johnson was convicted, and Judge Burgess imposed a forty-three-month sentence and lifetime registration as an offender under the Kansas Offender Registration Act.¹⁶ On appeal, Johnson's conviction was reversed when the Court found a judge falling asleep to be a structural error.¹⁷

B. Legal Background

The Supreme Court in *Chapman v. California*¹⁸ first distinguished between different types of constitutional errors that may affect a defendant.¹⁹ The Court divided them into trial errors, which are subject to the harmless-error analysis, and structural errors, which are reversible *per se*.²⁰

Trial errors are those “which occurred during the presentation of the case to the jury, and which may therefore be quantitatively assessed in the context of other evidence presented in order to determine whether its admission was harmless beyond a reasonable doubt.”²¹ Such errors are subject to the harmless-error analysis to avoid the “setting aside [of] convictions for small errors or defects that have little, if any, likelihood of having changed the result of the trial.”²² Even if the error is constitutional, it may still be a trial error subject to the harmless-error analysis.²³ An error is considered harmless when the party benefiting from the error, typically the State, proves beyond a reasonable doubt the error did not affect the verdict.²⁴ If the error is harmless, there are no grounds for mistrial, and the conviction is upheld.²⁵

Structural errors defy the harmless-error analysis because they affect the entire framework and conduct of a trial.²⁶ Structural errors do not require a showing of prejudice and cannot be cured by anything other than a new trial; therefore, if the appellate court finds a structural error, the trial

15. *Id.* at 722.

16. “Offender” is defined at KAN. STAT. ANN. § 22-4902(a) (2015); *Johnson*, 391 P.3d at 713.

17. *Johnson*, 391 P.3d at 715.

18. 386 U.S. 18 (1967).

19. *Chapman v. California*, 386 U.S. 18, 22 (1967)

20. *Id.* at 23.

21. *Arizona v. Fulminante*, 499 U.S. 279, 307–08 (1991).

22. *Chapman*, 386 U.S. at 22.

23. *Appeals*, 91 GEO. L.J. 763, 796 (2003). In Kansas, if a party requests a mistrial at the trial court level, the judge “must (a) decide whether there was some fundamental failure of the proceeding, and if so, (b) determine whether it is possible to continue without an injustice.” KAN. STAT. ANN. § 22-3423 (2011); *State v. Harris*, 306 P.3d 282, 284 (2013). For the second step, the judge must assess whether the effect may be “removed or mitigated through an admonition, jury instruction, or other action.” *Harris*, 306 P.3d at 284.

24. *Chapman*, 386 U.S. at 24.

25. *Id.* at 22.

26. *Fulminante*, 499 U.S. at 309–10.

court's judgment is *per se* reversible.²⁷ The constitutional deprivation causes a defect in the trial's framework, rather than merely the trial's process.²⁸ The *Chapman* Court set out three structural errors that can never be harmless: biased trial judges, admission of a coerced confession, and the denial of the right to counsel.²⁹ The U.S. Supreme Court clarified the dichotomy between structural errors and trial errors in *Arizona v. Fulminante*,³⁰ and expanded the list of structural errors to include: denial of the right to a public trial, the right to *pro se* representation, the right to not have members of one's race excluded from a grand jury, the right to an unbiased judge, and the right to counsel.³¹ Later cases added defective jury instructions on reasonable doubt and the deprivation of counsel of one's choice to the list of structural and trial errors.³²

III. COURT'S DECISION

A. Majority

The Kansas Court of Appeals' majority opinion in *Johnson* held a judge falling asleep on the bench is a structural error.³³ Therefore, the defendant was entitled to a mistrial, and the court reversed his conviction.³⁴ The prosecution argued for application of the invited error doctrine, but because the court held the error was structural, the invited error doctrine was inapplicable.³⁵

27. *Id.* "Per se" refers to a matter of law, "[o]f, in, or by itself; standing alone, without reference to additional facts. This phrase denotes that something is being considered alone, not with other collected things." *Per Se*, BLACK'S LAW DICTIONARY (10th ed. 2014).

28. *Fulminante*, 499 U.S. at 309–10.

29. *Chapman*, 386 U.S. at 22–23. While the *Chapman* Court held the admission of a coerced confession required automatic reversal, the Court in *Fulminante* instead stated that admission of a coerced confession remains subject to the harmless-error analysis. *Compare Chapman*, 386 U.S. at 26, with *Fulminante*, 499 U.S. at 307–08.

30. 499 U.S. 279 (1991).

31. *Id.* at 307–08 (citing *Vasquez v. Hillery*, 474 U.S. 254, 264 (1986) (grand jury); *Waller v. Georgia*, 467 U.S. 39, 49 (1984) (public trial); *McKaskle v. Wiggins*, 465 U.S. 168, 177–78 (1984) (self-representation); *Gideon v. Wainwright*, 372 U.S. 335, 347 (1963) (Clark, J., concurring) (right to counsel); *Tumey v. Ohio*, 273 U.S. 510, 535 (1927) (unbiased judge)).

32. *United States v. Gonzalez-Lopez*, 548 U.S. 140, 148–51 (2006) (jury instructions); *Neder v. United States*, 527 U.S. 1, 8–9 (1999) (counsel of one's choice).

33. *Johnson*, 391 P.3d 711, 718 (Kan. Ct. App. 2017) (Buser, J., dissenting), *cert. granted* Sept. 29, 2017.

34. *Id.* at 713.

35. *Id.* at 714. The invited error doctrine provides that on appeal, parties may not complain about their own conduct at trial or about rulings they asked a judge to make. *Id.* (citing *State v. Verser*, 326 P.3d 1046, 1053 (Kan. 2014); *State v. Hargrove*, 293 P.3d 787, 795 (Kan. App. 2013)). The doctrine deters parties from littering the record with error to provide grounds for appeal. *Hargrove*, 293 P.3d at 795. Under the invited error doctrine, if a judge gives the defendant the option of declaring a mistrial and the defendant chooses to proceed, the defendant cannot later request a mistrial on the same issue. *Johnson*, 391 P.3d at 714.

The court compared a judge falling asleep on the bench to a judge leaving the courtroom during a trial.³⁶ Other jurisdictions are split on whether a judge leaving the bench is *per se* reversible error, but Kansas has never addressed the issue.³⁷ In this case, the judge falling asleep on the bench defied the harmless-error analysis, because it was unknown how long and during which times the judge was asleep.³⁸ The court also considered it important that a juror mentioned the judge's sleep to the other jurors during jury deliberations.³⁹ Given the difficulty in assessing the prejudice against the defendant, the court held a judge falling asleep is a *per se* reversible error because it affected the framework of the entire trial.⁴⁰

B. Dissent

The dissent argued that no precedent from case law or statutes allowed the Court to find a judge who falls asleep during a criminal trial commits a structural error.⁴¹ Other federal and state courts all require some showing of prejudice prior to overturning a criminal conviction.⁴² In civil and judicial misconduct cases, other Kansas courts require evidence of prejudice before reversing a case in which the judge fell asleep.⁴³ Similarly, when a juror falls asleep during a civil trial, Kansas courts require a showing of prejudice.⁴⁴

The dissent consequently analyzed Judge Burgess nodding off as a trial error rather than a structural error.⁴⁵ Under a prejudice analysis, the dissent said “the lack of prejudice is . . . readily ascertainable and apparent,” considering the trial judge's appropriate response on the record, and that

36. *Johnson*, 391 P.3d at 716.

37. *Id.*

38. *Id.*

39. *Id.*

40. *Id.*

41. *Id.* at 720.

42. *Johnson*, 391 P.3d at 722; *see, e.g.*, *United States v. Martinez*, 97 Fed. Appx. 869, 872 (10th Cir. 2004) (unpublished opinion); *United States v. Barrios*, No. 97-1364, 2000 WL 419940, at *2 (2d Cir. 2000) (unpublished opinion); *United States v. Yanez-Baldenegro*, No. 93-10538, 1994 WL 441757, at *3 (9th Cir. 1994) (unpublished opinion); *United States v. White*, 589 F.2d 1283, 1289 (5th Cir. 1979); *Robinson v. Com.*, No. 2003-CA-002424-MR, 2006 WL 891059, at *4 (Ky. App. 2006) (unpublished opinion) *Lampitok v. State*, 817 N.E.2d 630, 640–41 (Ind. App. 2004).

43. *Johnson*, 391 P.3d at 722–23; *see, e.g.*, *State v. Hayden*, 130 P.3d 24, 29 (Kan. 2006) (judicial misconduct); *State v. Miller*, 49 P.3d 458, 462 (Kan. 2002) (judicial misconduct); *Ettus v. Orkin Exterminating Co.*, 665 P.2d 730, 739 (Kan. 1983) (civil); *Fiechter v. Fiechter*, 155 P. 42, 43 (Kan. 1916) (civil). There are specific differences in the legal standards for civil and criminal cases. *See generally* Kenneth W. Graham, Jr., *Policy Background; Burdens of Proof*, 21B FED. PRAC. & PROC. EVID. § 5122 (2d ed. 2017). The standards of review for a civil trial are merely persuasive in criminal trial. *Id.* In a civil case, the jury must find the defendant liable by a preponderance of the evidence. *Id.* On the contrary, for criminal cases the prosecution faces a much heavier burden because of the potential jail time for the defendant; consequently, each element of the claim must be proved beyond a reasonable doubt. KAN. STAT. ANN. § 21-5108(a) (2011).

44. *Johnson*, 391 P.3d at 723; *see, e.g.*, *State v. Kirby*, 39 P.3d 1, 20 (Kan. 2002).

45. *Johnson*, 391 P.3d at 723–26.

“there were no objections, complaints, or mention by either counsel about inattentiveness, improper rulings, or irregular proceedings.”⁴⁶ Regardless of whether there was prejudice to the defendant, when defense counsel declined the trial judge’s offer for a mistrial, his actions were invited error.⁴⁷

IV. COMMENTARY

Both the majority and dissent compared judges falling asleep to analogous cases, such as a juror falling asleep or the judge leaving the room.⁴⁸ These comparisons either explain the need for an automatic reversal or the need to require prejudice.⁴⁹ However, both of these analogous arguments are flawed. The comparison should instead be made to those cases in which the Supreme Court has, on so few occasions, determined an error to be structural, and the conviction is therefore *per se* reversible.⁵⁰ As the Court rarely determines an error to be structural, judges falling asleep should not be added to that short list.⁵¹

From the recognized list of structural errors, the right to an unbiased judge is most similar to a judge falling asleep.⁵² Structural errors permeate the entire trial and cannot be cured by anything other than a new trial; for example, a biased judge is biased from start to finish.⁵³ If the judge has an interest in the outcome of the case, his or her bias is reflected in every aspect of managing the trial and ruling on objections.⁵⁴ When a judge sleeps through an entire trial, his or her “absence” similarly is reflected in every aspect of trial management.⁵⁵

Because of the majority’s holding in *Johnson*, defendants will be able to appeal on the grounds that the judge closed his or her eyes at one point during the trial.⁵⁶ Under *Johnson*’s reasoning, if a judge closes his or her

46. *Id.* at 723–24.

47. *Id.* at 726.

48. *See supra* Section III.

49. *Id.*

50. *Arizona v. Fulminante*, 499 U.S. 279, 307–08 (1991); *see Chapman v. California*, 386 U.S. 18, 22–23 (1967).

51. *See supra* notes 30–31 and accompanying text.

52. *See Tumey v. Ohio*, 273 U.S. 510, 534 (1927). The right to an unbiased judge is the only structural error related to the role of a judge during a trial, as opposed to the denial of the right to a public trial, the right to *pro se* representation, the right to not have members of one’s race excluded from a grand jury, and the right to counsel. *Fulminante*, 499 U.S. at 309–10.

53. *Fulminante*, 499 U.S. at 309–10.

54. *Tumey*, 273 U.S. at 534.

55. *Cf. United States v. Mortimer*, 161 F.3d 240, 241–42 (3d Cir. 1998) (finding structural error when a judge was absent during a critical stage of the trial); *Gomez v. United States*, 490 U.S. 858, 873 (1989) (holding defendant’s right to a judge is violated when a judge is absent during a critical stage of the trial).

56. *See State v. Johnson*, 391 P.3d 711, 716–17 (Kan. App. 2017) (Buser, J., dissenting), *cert. granted* Sept. 29, 2017. From the majority’s question, “[h]ow long is it permissible for a judge to sleep before it becomes prejudicial? Fifteen minutes?” follows, what standard of evidence must be provided to show the judge did indeed fall asleep? *Id.*; *see also Ettus v. Orkin Exterminating Co.*, 665 P.2d 730,

eyes for any length of time, he or she could be accused of falling asleep and trigger an automatic mistrial.⁵⁷ However, there are many differences in a person's awareness level between zoning out, nodding off, or falling unconscious from sleep.⁵⁸ In these situations, courts are obligated to determine whether a judge actually fell asleep; it poses no greater burden on the court system to determine to what extent the judge falling asleep prejudiced the defendant, if at all.

To maintain the integrity of the judicial process, judges cannot fall asleep on the bench without consequence; however, defendants should be required to show evidence of prejudice before receiving a mistrial.⁵⁹ Consistent with the majority opinion, when a judge falls asleep, "jurors may perceive evidence received in the judge's absence as less significant."⁶⁰ This is the very type of analysis the court should undertake to determine a defendant was unfairly prejudiced when his or her judge fell asleep. Many other factors would also be considered in a prejudice analysis, such as at what point during the trial the judge allegedly fell asleep, whether it was a jury or bench trial, whether the judge was required to make a ruling on something that occurred during his slumber, or who noticed the judge sleeping.⁶¹ Each of these factors would be analyzed when applying the harmless-error analysis to show prejudice.⁶² When a judge has to be awakened to properly rule on an objection, the judge is unable to properly preside over the trial, and the resulting prejudice requires a mistrial.⁶³ Even if a judge falls asleep during a bench trial, the defendant would still need to demonstrate he was harmed; this argument is the necessary slight showing of prejudice.⁶⁴

The majority stated it was unable to apply the harmless-error analysis.⁶⁵ However, the ease with which the analysis can actually be applied clearly illustrates the court incorrectly ruled a judge falling asleep

739 (1983) (finding a juror's affidavit stating he saw the judge sleeping was not enough evidence to show the necessary prejudice to grant a new trial).

57. See *Johnson*, 391 P.3d at 717–18.

58. *Burdine v. Johnson*, 262 F.3d 336, 361–62 (5th Cir. 2001) (Baskdale, J., dissenting) (there was "no finding that [defense counsel's] dozing or sleeping reached [a] level of unconsciousness" so there should not have been *per se* prejudice); *Tippins v. Walker*, 77 F.3d 682, 689 (2d Cir.1996) ("consciousness and sleep form a continuum, and that there are states of drowsiness that come over everyone from time to time during a working day, or during a trial"); *State v. Kirby*, 39 P.3d 1, 20 (Or. 2002) (even though a juror appeared to nod off, there was no statement by the juror that he did not hear the testimony).

59. *Johnson*, 391 P.3d at 723–26; see also *Ettus*, 665 P.2d at 739 (when a judge falls asleep during a civil trial, "only a slight showing of prejudice would be necessary to authorize a reversal").

60. *Johnson*, 391 P.3d at 717 (citing *People v. Vargas*, 673 N.E.2d 1037, 1045 (1996) (holding a judge's absence was *per se* reversible error)).

61. *Id.* at 724.

62. See *id.*

63. See *id.*

64. See *id.*

65. *Id.* at 716.

during a trial constitutes a structural error.⁶⁶ Had the defense counsel moved for a mistrial, the analysis would have been as follows: there was a fundamental failure when Judge Burgess fell asleep, but the trial could have continued without injustice because of the Judge's mitigation of the error by going on the record.⁶⁷ On review under the harmless-error analysis, there is no reasonable probability the jury would have found the defendant not guilty, had the judge not fallen asleep.⁶⁸

V. CONCLUSION

The Kansas Court of Appeals' reversal of Mr. Johnson's conviction was incorrect, because a judge falling asleep on the bench is not a structural error—it is a trial error. If the court had properly applied the harmless-error analysis, it would have affirmed the trial court's decision as the dissent suggested. While a judge has an obligation to remain attentive during a trial, there may be situations where the judge falling asleep is indeed harmless. Thus, a judge falling asleep during trial should be a mere trial error, and the defendant should be required to show prejudice before receiving a mistrial.

66. *Johnson*, 391 P.3d at 723–24.

67. See KAN. STAT. ANN. § 22-3423 (2011); *Johnson*, 391 P.3d at 716–17 (Buser, J., dissenting); *State v. Harris*, 306 P.3d 282, 284 (2013).

68. At trial, the State has the burden of proving guilt beyond a reasonable doubt; but on appeal, the burden would shift to the appealing party to prove the jury's verdict would have been different had the error not occurred. *State v. Miller*, 49 P.3d 458, 468 (2002).