

DISSENTING OPINION BY DUFFY, J.

I respectfully dissent. The record presented does not show that the circuit court abused its discretion in granting a new trial based on juror misconduct. As the dispute between the majority and dissenting opinion of Justice Acoba itself demonstrates, reasonable people can reasonably differ in their judgment as to whether the sleeping juror could have substantially prejudiced Yamada's right to a fair trial. Under the abuse of discretion standard, therefore, it cannot be said that the circuit court clearly exceeded the bounds of reason in ordering a new trial. See State v. Lumbrera, 845 P.2d 609 (Kan. 1992) ("If reasonable people could differ as to the propriety of the action taken by the trial court, then it cannot be said that the trial court has abused its discretion.").

In my view, where, as here, reasonable people can reasonably differ, reversal of the circuit court's decision constitutes an inappropriate intrusion on the province of the trial court to make determinations regarding the credibility of jurors and the effect of juror misconduct upon Yamada's right to a fair trial. Generally, appellate courts refuse to interfere with the discretion of a trial judge in matters involving the jury because only the trial judge has the opportunity and ability to consider the credibility of the jurors. See, e.g., State v.

Kelly, 502 S.E.2d 99, 104 (S.C. 1998) ("The trial court has broad discretion in assessing allegations of juror misconduct" because "[t]he trial judge is in the best position to determine the credibility of the jurors; therefore, [the court] should grant him broad deference on this issue."); State v. Whitesell, 13 P.3d 887, 909 (Kan. 2000) (In cases of juror misconduct, "[a] high degree of appellate deference is allowed a trial judge's exercise of discretion in assessing the texture and feel of the trial, the credibility of witnesses, and the perceived impact of an allegedly prejudicial event."). Here, however, the majority expressly places itself in the trial court's stead. In examining the "totality of circumstances" that leads it to conclude that the sleeping juror did not substantially prejudice Yamada's right to a fair trial, the majority reasons:

[T]here is nothing in the record of the instant case to suggest that Saka slept through any of the evidence[] adduced at trial or any of the jury instructions that were given. There is also nothing in the record to suggest that he was unable to fully participate in jury deliberations.

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Even if Saka was sleeping and did not hear a portion of defense counsel's closing arguments, he was given the correct instruction and we presume he followed it. . . . We, therefore, believe, based on the totality of circumstances, that the prosecution met its burden in establishing that the alleged deprivation of the right to a fair trial was harmless beyond a reasonable doubt.

Majority Opinion at 11, 13. The majority further reasons that, based upon its own review of the record, the defendant could not have been prejudiced because the points presented in the closing

argument were also presented in the defense's opening statement or in the jury instructions. Majority Opinion at 12-13.

Having in effect conducted a de novo review of the record, the majority then substitutes its judgment for that of the trial court. Its conclusion can thus be restated as the holding that, as a matter of law, a sleeping juror does not substantially prejudice a defendant's right to a fair trial if the missed portion of the trial was (in the appellate court's judgment) repetitious. Although it purports to consider the "totality of the circumstances," the majority leaves no room for circumstances not contained in the transcripts and record, such as the voice, demeanor, conduct, and presentation of the jurors both throughout the trial and during the voir dire for misconduct.

Factors such as demeanor, voice, and conduct must necessarily have affected and influenced the circuit court's decision as to the weight and credibility to assign to Saka's testimony regarding his falling asleep. This court has repeatedly held that it will not review decisions of trial courts which are dependent on credibility or weight. See, e.g., State v. Stocker, 90 Hawai'i 85, 90, 976 P.2d 399, 404 (1999) (an appellate court will not review determinations dependent upon the credibility of witnesses or weight of the evidence because such determinations are the sole province of the trier of fact).

Here, the circuit court was the trier of fact with respect to the motion for a new trial. See State v. Gabalis, 83 Hawai'i 40, 46, 924 P.2d 534, 540 (1996) (at a hearing on a motion for a new trial based on allegations of juror misconduct, the trial judge acts as the trier of fact). Having heard the entire case, it conducted a voir dire of the allegedly sleeping jurors; evaluated their statements, demeanor, and conduct; and ultimately concluded that Yamada's right to a fair trial had been prejudiced. Under these facts, therefore, I am unable to conclude that the circuit court abused its discretion in granting a new trial based on juror misconduct.

Accordingly, I would affirm the circuit court's order granting a new trial based on juror misconduct.

James E. Dulley, Jr.