We hold:

The order of the Trial Court precluding testimony introduced for the primary purpose of impeachment when prima facie evidence of a crime has already been established is REVERSED.

The trial court's Order of Dismissal With Prejudice is MODIFIED to reflect the words "Without Prejudice.

Anthony TONASKET, Appellant,
vs.
COLVILLE CONFEDERATED TRIBES, Appellee.
Case Number AP03-002, 4 CTCR 13
7 CCAR 40

[Mike Larsen, Office of the Public Defender for Appellant.
Jonnie Bray, Office of the Prosecuting Attorney for Appellee.
Trial Court Case Number CR-2003-25296]

Oral Arguments July 18, 2003. Decided January 26, 2004.
Before Justice David Bonga, Justice Earl McGeoghegan and Chief Justice Anita Dupris

Dupris, C.J., for the Panel.

SUMMARY

The Appellant was found guilty by a jury of the charge of Battery, CTC §3-1-4, on November 21, 2002. Three days before his sentencing hearing the Appellant' mother told him she saw some of the jurors sleeping during the closing arguments at the trial. The Appellant informed the Court of this information at the Sentencing Hearing on January 17, 2003. Appellant's subsequent Motion to Set Aside the Verdict and for a New Trial was denied by the Court. The Court, without a hearing, reviewed the record and several affidavits from the jurors and Court staff and found the facts did not support a finding that any juror slept during the closing arguments. The Appellant asserts he should have been allowed a hearing to cross-examine the jurors and Court staff regarding the allegations.

The Appellant timely filed the appeal herein. Oral arguments were heard on July 18, 2003. For reasons stated below we affirm the Trial Court and dismiss the appeal.

ISSUE

Did the Trial Court err when it denied the Appellant's Motion to Set Aside Verdict and for a New Trial based on the Appellant's assertion that two jurors slept during the closing arguments, thereby committing juror misconduct in violation of the Appellant's due process rights?

STANDARD OF REVIEW

The issues before us are questions of law; we review the matter *de novo*. *Colville Confederated Tribes vs. Naff*, 2 CTCR 08, 22 ILR 6032 2 CCAR (1995); *Wiley, et al v. Colville Confederated Tribes,* 2 CTCR 09, 22 ILR 6059, 2 CCAR 60 (1995); *Palmer v. Millard, et al,* 3 CCAR 27, 2 CTCR 14, 23 ILR 6094 (1996) (Because the Tribal Court dismissed the case below as a matter of law, we review the matter *de novo*.); Pouley v. CCT, 2 CTCR 39, 25 ILR 6024, 4 CCAR 38 (1997) (The Appellate Court engages in *de novo* review of assignments or errors

which involve issues of law); *In Re The Welfare of R.S.P.V.*, 3 CTCR 07, 26 ILR 6039, 4 CCAR 68, (1998).

DISCUSSION

Appellant asserts his statutory right to make a final (i.e. closing) argument in a jury trial[54] is a fundamental right of due process and is essential to his right to assistance of counsel. He further asserts when a juror sleeps through part of the closing argument, the juror is not "mentally present," and his "absence" during a critical component of the Appellant's case presentation is juror misconduct as a matter of law, which entitles the Appellant to a new trial.[55]

A. Right to Make Closing Argument Not a Fundamental Right

Appellant argues that his right to make closing remarks is raised to a fundamental due process right because the Tribes statutorily recognizes it. This argument is not supported by any authority and is not persuasive. It is standard to instruct the jury that the arguments of counsel are not evidence, and are only to help the jurors evaluate the evidence.[56] A fundamental right is derived implicitly or explicitly from the Constitution, and from the common law upon which it is based. We find guidance in a seminal U.S. Supreme Court case, *Twining v. State of New Jersey*, 211 U.S. 78 (1908), in which the Court stated:

> Is it a fundamental principle of liberty and justice which inheres in the very idea of free government and is the inalienable right of a citizen of such a government? If it is, and if it is of a nature that pertains to process of law, this court has declared it to be essential to due process of law. *Twining, supra,* at p. 106.

The statutory provision, CCT §1-2-43 (Final Argument), providing for closing arguments assists the parties in presenting evidence on one's own behalf; it is not an inalienable nor a fundamental right. Its roots cannot be traced to a tribal custom or tradition, nor to a common law of any jurisdiction on the Colville Reservation, nor to the Colville Tribal Constitution, nor to the Indian Civil Rights Act of 1968, 25 U.S.C. §§1302 *et seq.,* all of which guide us on questions of fundamental rights. We so hold.

B. No Juror Misconduct

Appellant asserts that two jurors slept during closing arguments, thereby "mentally absenting" themselves from the trial at a critical juncture for the Appellant and in effect denying him the right to make a closing argument. In effect neither party was denied a closing argument. The real question is, if one or more juror slept during the closing arguments, did the sleeping jurors thereby commit juror misconduct? Appellant also asserts that the Judge denied him the right to ask questions of the jurors regarding the sleeping

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[54] CTC § 1-2-43 Final Argument. Upon the conclusion of the evidence, the plaintiff shall be given an opportunity to argue his case. The defendant shall then be given an opportunity to argue his case, and the plaintiff shall be given an opportunity to make a closing argument. Further argument may be allowed at the Court's discretion.

[55] CTC §1-1-282 Grounds for Appeal. Grounds for requesting **a new trial** or limited appeal on issues of law and/or fact shall be limited to one or more of any of the following: ... (b) Misconduct of the prosecution, judge **or jury**...(emphasis added).

[56] "Counsel's remarks, statements and arguments are intended to help you understand the evidence and apply the law. They are not evidence, however, and you should disregard any remarks, statements or arguments which are not supported by the evidence or by the law as given to you by the court." JURY INSTRUCTION NO. 1.

allegations, and conducted his own fact-finding on the question, thereby irreparably impairing the Appellant's ability to have a fair and objective inquiry. Based on the findings of the Trial Court and the law, we hold the Trial Court was not required to conduct a hearing for the Appellant to question the jurors, and there was no juror misconduct.

1. Standard of Juror Misconduct

There are numerous cases on juror misconduct in federal and state courts. Generally the party alleging the misconduct has the burden to prove the misconduct and prejudice; the trial court has substantial discretion in dealing with a sleeping juror. *See Kelly v. State*, 805 So.2d 88 (Fla. 2d DCA, 2002) (remand for hearing on issue of sleeping juror who slept through significant portions of trial); *State v. Burns*, 800 So.2d 106 (La. App. 2 Cir. 2001) (new trial where judge *sua sponte* replaced sleeping juror without asking attorney's and trial counsel objected); *Spunaugle v. State*, 946 P.2d 246 (Okla, 1997) (Court's denial of defendant's timely motion to replace sleeping juror is reversible error); *People v. Evans* 710 P.2d 1167 (CO Ct of App., 1985) (trial court reversed, case remanded when juror slept through the defendant's argument; Court noted "...closing argument is one of the most consequential parts of the trial.").

Specifically what is this Court to consider in finding "juror misconduct?" The federal courts have Federal Rule of Evidence (FRE) 606(b)[57] to guide them. This is a case of first impression for our Court. After reviewing other jurisdictions' decisions, we find the Supreme Court's decision in *Tanner v. U.S.*, 483 US 107 (1987) instructive.[58]

In *Tanner* the Supreme Court affirmed a denial of a new trial when the facts showed that the jurors were abusing alcohol and drugs throughout the trial as well as sleeping during the trial. The Court found that if it granted a new trial it would in effect impeach the jury's findings, which is frowned upon by public policy. *Id*. at pp 120-121. *Tanner* discusses in length the common-law origins of FRE 606(b). For example, "the near-universal and firmly established common-law rule in the United States prohibited the admission of juror testimony to impeach a jury verdict." (cites omitted) *Id*. at 117. "[T]he result would be to make what was intended to be a private deliberation, the constant subject of public investigation - to the destruction of all frankness and freedom of discussion and conference." *Id.* at 120 (cite omitted). "Moreover, full and frank discussion in the jury room, jurors' willingness to return an unpopular verdict, and the community's trust in a system that relies on the decisions of laypeople would all be undermined by a barrage of postverdict scrutiny of juror conduct." *Id.* at pp 121-122 (cites omitted). And finally: "Public policy requires a finality to litigation." *Id*. at p. 124.

One recognized exception to the prohibitions of FRE 606(b) is "...to retain the common-law exception allowing post-verdict inquiry of juror incompetence in cases of **substantial if not wholly conclusive evidence of incompetency**." (emphasis added) *Id*. at p.125. We adopt this standard when inquiring into juror incompetence, finding the public policy considerations of FRE 606(b) persuasive.

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[57] "Upon an inquiry into the validity of a verdict or indictment, a juror may not testify as to any matter or statement occurring during the course of the jury's deliberations or to the effect of anything upon his or any other juror's mind or emotions as influencing him to assent to or dissent from the verdict or indictment or concerning his mental processes in connection therewith, **except that a juror may testify on the question whether extraneous prejudicial information was improperly brought to the jury's attention or whether any outside influence was improperly brought to bear upon any juror**. Nor may his affidavit or evidence of any statement by him concerning a matter about which he would be precluded from testifying be received for these purposes." (emphasis added)

[58]. Jury trials are not tribally culturally-based; we have adopted them from the non-Indian judicial systems. As such we need to look to their origins in the non-Indian culture for guidance.

If we examine the alleged facts of the Appellant in the most favorable light and accept that one or more of the jurors slept during closing arguments, we find this would not rise to the level of substantial nor wholly conclusive evidence of incompetency. There are no allegations that all of the jurors did not hear all of the evidence or all of the instructions of law of the judge. Closing arguments are not evidence. They are intended to assist the jurors in doing their job: fact-finding. In this instance, however, the Judge conducted a fact-finding inquiry. He evaluated affidavits of jurors and court staff; he relied on his observations. He entered findings of fact, finding there was insufficient evidence of sleeping jurors. It is well within a judge's discretion to conduct an inquiry into the facts in cases such as the instant one. We hold there is insufficient evidence to show juror misconduct in this case.

2. There is No Right to A Hearing on the Issue of Juror Misconduct

Appellant asserts his due process rights were irreparably impaired when the Court disallowed a hearing on the issue of juror misconduct and conducted its own inquiry. One of the questions in *Tanner* was "whether the District Court was required to hold an evidentiary hearing, including juror testimony, on juror alcohol and drug use during the trial." For the public policies set out in *Tanner,* the general rule of FRE 606(b) is that the juror's shall not be subjected to a post-verdict hearing. The limited exceptions to this rule are: "except that a juror may testify on the question whether extraneous prejudicial information was improperly brought to the jury's attention or whether any outside influence was improperly brought to bear upon any juror." No one alleges that either extraneous prejudicial information or outside influence affects the jurors in this case.

Our jury system is rooted in western common law; we are directed in other criminal matters to use federal law as a guidance; the public policy of providing finality to litigation is valid for our Courts; the public policies of FRE 606(b) regarding protecting the privacy of the jury deliberations are valid in our Courts. The Trial Court conducted an inquiry into the allegations and found the facts did not support a finding that a juror slept during the closing arguments. We cannot ignore these findings of fact. As such, we cannot find that the Appellant was prejudiced by not being able to make an independent inquiry about the issue. Even assuming we accept as fact that a couple of the jurors nodded off during the closing arguments, the Appellant has not shown any causal connection between the napping jurors and the guilty verdict.

Conclusion

Statutorily-allowed closing arguments are procedural rights and not fundamental rights. The Appellant was not denied a closing argument. At best he was not paid attention to; a new trial would not guarantee this either. There was no jury misconduct in this case, nor a right to an independent inquiry into the juror's conduct by the Appellant. We so hold.

The Trial Court is AFFIRMED and this matter is REMANDED to the Trial Court for further action consistent with this Opinion.