No. 30644-5-III

COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION THREE

STATE OF WASHINGTON,

Respondent,

v.

GARY ENGELSTAD,

Appellant.

ON APPEAL FROM THE SUPERIOR COURT OF THE STATE OF WASHINGTON FOR KITTITAS COUNTY

The Honorable Scott R. Sparks

BRIEF OF APPELLANT

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A. ASSIGNMENTS OF ERROR

1. The trial court failed to instruct the jury to draw no adverse inference from the fact that Engelstad did not testify at his trial, contrary to his privilege against self-incrimination.

2. Engelstad's attorney's failure to request an instruction telling the jury to draw no adverse inference from the fact that Engelstad did not testify denied Engelstad the effective assistance of counsel he is guaranteed by the Sixth Amendment and article I, section 22.

B. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. An accused person has an absolute guarantee against compulsory self-incrimination, which is protected by the Fifth Amendment and article I, section 9 of the Washington Constitution. An instruction telling the jury that they may draw no adverse inference from an accused person's exercise of the right not to testify at trial protects this guarantee. Indeed, the United States Supreme Court recognizes that a "no-adverse-inference" instruction may be more important than instructions on other constitutional

rights because jurors are disposed to believe that the accused must prove his innocence and to construe his silence against him. Does the trial court's failure to give a "no-adverse-inference" instruction in this case require reversal of Engelstad's conviction?

2. An accused person has the Sixth Amendment right to the effective assistance of counsel. No direct evidence established that Engelstad knowingly assisted in a theft. Engelstad did not testify at trial. Where the jury was likely to infer guilt from Engelstad's silence, should this Court conclude that his counsel's failure to propose a "no-adverse-inference" instruction was deficient performance that prejudiced Engelstad?

C. STATEMENT OF THE CASE

On March 17, 2011, Kittitas County law enforcement officers investigating a noise complaint in Liberty, off of Highway 97, encountered three men in the process of dismantling an old crane on a mining claim off the highway. RP 14, 40, 43.[1] The officers recognized two of the men as

[1] The verbatim report of proceedings, containing hearings on multiple dates, is contained in two consecutively-paginated volumes of

Joe Shouse and appellant Gary Engelstad; the third man was Paul Erickson. RP 23, 163.

The men were not behaving suspiciously or concealing what they were doing, and freely answered questions about their presence on the property. RP 33, 49-50. Shouse, who did most of the talking, explained to the officers that they were scrapping the crane for a friend, TJ Pecka, while Pecka was in prison. RP 23, 43-44. Shouse said that the claim belonged to Pecka, and they had Pecka's permission to be there and clean the camp area. RP 23. The officers checked the registrations on a couple of the motor homes on the claim. They were registered to Debra Armfield, who Shouse said was Pecka's mother. RP 24. The officers found Shouse's explanation plausible and left without taking further action. RP 50.

Pecka did have an interest in the claim, as it originally had belonged to Pecka's grandfather, who left it for the benefit of all family members when he died. RP 100-01, 115, 239. The crane, however, belonged to Bruce Bradshaw, who

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transcripts. They are referenced herein as "RP" followed by page number.

acquired it from his former business partner, Richard Miller, in 2007. 1RP 124. Bradshaw owned the neighboring claim. RP 74, 108. The boundary lines between the two claims would have been difficult for a person unfamiliar with the property to determine, but the crane was situated just on the Bradshaw side of the claim boundary. RP 34, 59, 92.

When law enforcement officers returned to the property on April 29, 2011, a rusted fuel tank that had been on the claim was gone. Of the crane, only the shell of the cab remained. RP 34, 49. Bradshaw estimated the scrap value of the crane at $3500. RP 64. Based on these events, the Kittitas County prosecutor charged Shouse, Erickson, and Engelstad with theft in the second degree and malicious mischief in the second degree.[2] CP 1-2, 7-9.

Shouse pleaded guilty. RP 227. Erickson entered a deal with the State wherein the charges would be dismissed in exchange for his testimony. RP 180. Engelstad proceeded to a jury trial.

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[2] Engelstad was also charged with aggravating circumstances based upon unscored criminal history, but those are not at issue in this appeal. CP 8-9.

At the trial, both Erickson and Shouse testified. Erickson said that Shouse hired him as a driver to pick up scrap from Pecka's claim. RP 163. Shouse gave him the impression that the crane at the claim belonged to Pecka or Pecka's grandfather. RP 174. Shouse told him he had "papers" for the crane's boom. RP 169. Erickson stated that he relied on what Shouse told him and so far as he knew Engelstad did as well. RP 188.

Shouse testified that Pecka had asked him to clean up the claim so that he would not have problems from his family. RP 211. Shouse also testified that Miller gave the crane to him before he died. RP 220.

Shouse stated that Engelstad was on the property only once, on March 17, 2011, when the police saw him there. RP 231. Shouse removed the bucket from the crane a month before that day and the bucket the day after. RP 218-19. Engelstad was present when the bucket and boom were removed. RP 231. Shouse said that Engelstad should not get in trouble because he "did nothing wrong." RP 233.

Bradshaw acknowledged that while Erickson and Pecka both knew him and knew that the crane belonged to him, Bradshaw was not acquainted with Engelstad and had "no inkling" whether Engelstad would have known about Bradshaw's ownership of the crane. RP 130-32, 145.

Engelstad did not testify at trial. In his closing argument, the prosecutor referred to what Engelstad should have done, should have asked, or should have believed based upon the circumstances of the crane's removal. See RP 280, 290, 293 (arguing whether it was "reasonable" for Engelstad to believe that Shouse owned the crane); and RP 294 (arguing that Engelstad should have asked Shouse to prove he owned the crane). No party requested WPIC 6.31,[3] which would have informed the jury that Engelstad was not required to testify and instructed them that they could draw no adverse inference from the fact that he did not testify, and

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[3] WPIC 6.31, titled "Defendant's Failure to Testify", states:

> The defendant is not required to testify. You may not use the fact that the defendant has not testified to infer guilt or to prejudice *[him][her]* in any way.

WPIC 6.31.

the court did not give the instruction. Engelstad was convicted as charged, and now appeals. CP 51, 66-81.

D. ARGUMENT

1. **The trial court's failure to instruct the jury to draw no adverse inference from Engelstad's failure to testify violated his Fifth Amendment privilege against self-incrimination and his right to a fair trial.**

a. The Fifth Amendment privilege against self-incrimination protects an accused person's right not to testify and to have the jury instructed that they may draw no adverse inference from the absence of his testimony.

Both the federal and state constitutions guarantee an accused person the right not to incriminate himself. U.S. Const. amend. V; Const. art. I, § 9. The privilege against self-incrimination prohibits the State from using a defendant's silence against him at trial. Griffin v. California, 380 U.S. 609, 615, 85 S.Ct. 1229, 14 L.Ed.2d 106 (1965) ("the Fifth Amendment ... forbids either comment by the prosecution on the accused's silence or instructions by the court that such silence is evidence of guilt"); State v. Easter, 130 Wn.2d 228, 236, 922 P.2d 1285 (1996).

The privilege against self-incrimination

> "reflects many of our fundamental values and most noble aspirations: our unwillingness to subject those suspected of crime to the cruel trilemma of self-accusation, perjury or contempt; ... our fear that self-incriminating statements will be elicited by inhumane treatment and abuses; our sense of fair play which dictates 'a fair state-individual balance by requiring the government . . ., in its contest with the individual to shoulder the entire load,' . . .; our distrust of self-deprecatory statements; and our realization that the privilege, while sometimes 'a shelter to the guilty,' is often 'a protection to the innocent."

Carter v. Kentucky, 450 U.S. 288, 299-300, 101 S.Ct. 1112, 67 L.Ed.2d 241 (1981) (quoting Murphy v. Waterfront Comm'n, 378 U.S. 52, 55, 84 S.Ct. 1594, 12 L.Ed.2d 678 (1964) (alterations in original)).

In Carter, the Supreme Court recognized that an accused person may not wish to testify for reasons unrelated to guilt or innocence, such as nervousness, the fear of impeachment by prior convictions, or the reluctance to incriminate others. Carter, 450 U.S. at 300. The Court emphasized that these concerns apply equally to the innocent and the guilty alike. Id. Thus, not only is it prohibited to encourage the jury to conclude that silence is indicative of guilt, the Fifth Amendment requires the jury be instructed that it may draw no adverse inference from the

exercise of the right not to testify where such an instruction is requested. Id.

The "salutary purpose of the instruction, 'to remove from the jury's deliberations any influence of unspoken adverse inferences,'" is of such importance that it outweighs a 'tactical' decision by the accused or his counsel to object to the instruction's issuance. Id. at 301 (quoting Lakeside v. Oregon, 435 U.S. 333, 340, 98 S.Ct. 1091, 55 L.Ed.2d 319 (1978)). In Carter, the Court reaffirmed the rule enunciated in Lakeside, and stressed:

> We have repeatedly recognized that "instructing a jury in the basic constitutional principles that govern the administration of criminal justice," is often necessary. Jurors are not experts in legal principles; to function effectively, and justly, they must be accurately instructed in the law. Such instructions are perhaps nowhere more important than in the context of the Fifth Amendment privilege against compulsory self-incrimination, since "[t]oo many, even those who should be better advised, view this privilege as a shelter for wrongdoers. They too readily assume that those who invoke it are ... guilty of crime ...."

450 U.S. at 302 (internal citations omitted).

The Court therefore held that where such an instruction is requested, the court is obligated to give it. Id. at 302-03. "No judge can prevent jurors from speculating

about why a defendant stands mute in the face of a criminal accusation, but a judge can, and must, if requested to do so, use the unique power of the jury instruction to reduce that speculation to a minimum." Id. at 303.

b. The trial court's failure to instruct the jury to draw no adverse inference from Engelstad's failure to testify violated Engelstad's privilege against self-incrimination.

In this case, neither party requested a "no-adverse-inference" instruction, and none was given, although Engelstad exercised his right not to testify. From the extensive discussion of the court and the parties regarding the jury instructions, it is apparent that the failure to give the instruction was not reflective of deliberative strategy, but was an inadvertent omission. RP 255-78 (over the course of two days deciding jury instructions, neither party nor the court references WPIC 6.31, the "no-adverse-inference" instruction).

The failure to give the instruction prejudiced Engelstad and prevented him from receiving a fair trial. The Supreme Court recognizes that the privilege against self-incrimination is as important a constitutional concept as the State's

burden to prove guilt beyond a reasonable doubt and the presumption of innocence. Carter, 450 U.S. at 299-300. Thus, the failure to instruct on the privilege is not simply a technical error which does not affect substantial rights. Id. at 300 (citation omitted). Rather, the right to an instruction on the privilege reflects "the absolute constitutional guarantee against compulsory self-incrimination." Id.

The Court in Carter stated: "[e]ven without adverse comment, the members of a jury, unless instructed otherwise, may well draw adverse inferences from a defendant's silence." Id. at 301. The Court noted,

> It has been almost universally thought that juries notice a defendant's failure to testify. "[T]he jury will, of course, realize this quite evident fact, even though the choice goes unmentioned.... [It is] a fact inescapably impressed on the jury's consciousness." In Lakeside the Court cited an acknowledged authority's statement that "'[t]he layman's natural first suggestion would probably be that the resort to privilege in each instance is a clear confession of crime.'"

Id. at 301 n. 18 (citations omitted).

Jurors "can be expected to notice a defendant's failure to testify, and, without [a] limiting instruction, to speculate about incriminating inferences from a defendant's silence."

Id. at 304. Engelstad's extensive criminal history would have subjected him to impeachment and may have factored into his decision not to testify. See CP 54 (listing Engelstad's prior convictions). The jury, however, would not have been aware of the reasons why an innocent person might choose not to testify, and, absent an instruction informing them that Engelstad had no obligation to do so, likely construed his silence at trial as an admission of guilt.

This is especially true given that the State placed such heavy emphasis on what Engelstad should have done to investigate the truth of Shouse's claim and whether it would have been "reasonable" for him to believe that Shouse had the right to dismantle and remove the crane. RP 280, 290, 293-94. The failure to give a "no-adverse-inference" instruction violated Engelstad's privilege against self-incrimination.

c. The error requires reversal of Engelstad's conviction, either as structural error, or under the constitutional harmless error standard.

No published Washington opinion has addressed the question of whether the failure to give a "no-adverse-

inference" instruction is a structural error or whether it should be reviewed under the constitutional harmless error standard. In Carter, the Supreme Court noted that "it is arguable that a refusal to give an instruction similar to the one that was requested here can never be harmless." 450 U.S. at 304. The Court, however, expressly declined to reach the issue because it had not been presented to the Kentucky Supreme Court. Id.

The few federal circuit courts of appeal that have considered the issue have applied a constitutional harmless error standard. See United States v. Whitten, 610 F.3d 168, 200 (1st Cir. 2010); United States v. Soto, 519 F.3d 927, 930-31 (9th Cir. 2008); accord United States v. Padilla, 639 F.3d 892, 897-98 (9th Cir. 2011); United States v. Brand, 80 F.3d 560, 568 (1st Cir. 1996). These Courts reach this result by placing unwarranted emphasis on Carter's narrow holding that a "no-adverse-inference" instruction must be given where it is requested. See Soto, 519 F.3d at 930. This emphasis slights the constitutional guarantee that an accused person's silence shall not be penalized.

The Court in Carter declared that a trial court must instruct a jury "in the basic constitutional principles that govern the administration of criminal justice." 450 U.S. at 302. The Court stressed,

> Jurors are not experts in legal principles; to function effectively, and justly, they must be accurately instructed in the law. **Such instructions are perhaps nowhere more important than in the context of the Fifth Amendment privilege against compulsory self-incrimination**...

Id. (emphasis added).

The Court compared the "no-adverse-inference" instruction to jury instructions on the presumption of innocence, and noted that the "no-adverse-inference" instruction similarly has a "purging" effect and protects "the accused's constitutional right to be judged solely on the basis of proof adduced at trial." Carter, 450 U.S. at 302 n. 19 (quoting Taylor v. Kentucky, 436 U.S. 478, 486, 98 S.Ct. 1930, 56 L.Ed.2d 468 (1978)). And the Court went a step farther, noting that "the claim is even more compelling here than in Taylor, where the dissenting opinion noted that 'the omission [in Taylor's trial] did not violate a specific constitutional guarantee, such as the privilege against

compulsory self-incrimination.'" Carter, 450 U.S. at 302 n. 19 (quoting Taylor, 436 U.S. at 492 (Stevens, J., dissenting)).

Where fully 37% of the public believe that it is the duty of the accused to prove his innocence, Carter, 450 U.S. at 303 n. 21, it is nonsensical to conclude that the failure to give a "no-adverse-inference" instruction is only error if the defense requested the instruction. I.e., the fact that the Court in Carter held that the instruction must be given where it is requested does not mean that the converse is true – that if the instruction was not requested it need not be given.[4] And, given the primacy ascribed by the Court to the constitutional rule that a jury should be correctly instructed on the privilege against self-incrimination, it is equally illogical to conclude that the failure to so instruct is not a structural error. See Washington v. Recuenco, 548 U.S. 212, 219 n. 2, 126 S.Ct. 2546, 165 L.Ed.2d 466 (2006)

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[4] On this point, it is key to remember that the narrow question presented to the Court in Carter was whether "a defendant, upon request, has a right to [a "no-adverse-inference] instruction under the Fifth and Fourteenth Amendments of the Constitution." Carter, 450 U.S. at 289-90 (emphasis added). As a general rule, the Court does not decide issues outside the questions presented by the petition for certiorari. Glover v. United States, 531 U.S. 198, 205, 121 S.Ct. 696, 148 L.Ed.2d 604 (2001); see Supreme Court Rule 14.1(a) ("only the questions set out in the petition, or fairly included therein, will be considered by the Court).

(cataloguing structural errors). This Court should conclude that the omission of the "no-adverse-inference" instruction was a structural error, requiring reversal with no further showing.

Even if the constitutional harmless error standard is applied, however, Engelstad's conviction must be reversed. See Chapman v. California, 386 U.S. 18, 24, 87 S.Ct. 824, 17 L.Ed.2d 705 (1967) (under constitutional harmless error standard, State bears the burden of proving that error was harmless beyond a reasonable doubt).

There was no evidence at trial that Engelstad intended to steal the crane. At most, the State alleged that he was an accomplice to Shouse. The sole question, therefore, was whether Engelstad knew or should have known that Shouse did not have the right to disassemble the crane for scrap. Given that this was the issue before the jury – what Engelstad knew – there is an impermissible risk that because the "no-adverse-inference" instruction was not given, the jury construed his failure to testify as an admission of guilt. Given the complete absence of other

evidence of guilty knowledge and criminal intent, this Court should conclude the failure to give the "no-adverse-inference" instruction prejudiced Engelstad, and requires reversal of his conviction.

2. **Engelstad's lawyer's failure to request a "no-adverse-inference" instruction denied Engelstad the effective assistance of counsel he was guaranteed by the Sixth Amendment and article I, section 22.**

a. An accused person has the right to the effective assistance of counsel.

An accused person has the right under the Sixth Amendment and article I, section 22 of the Washington Constitution to the effective assistance of counsel. U.S. Const. amend. VI; Const. art. I, § 22; Strickland v. Washington, 466 U.S. 668, 686, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984); State v. A.N.J., 168 Wn.2d 91, 96, 225 P.3d 956 (2010); State v. Thomas, 109 Wn.2d 222, 225-26, 743 P.2d 816 (1987). A claim of ineffective assistance of counsel has two components: (1) deficient performance and (2) resulting prejudice, i.e., that but for counsel's deficient performance, there is a reasonable probability the verdict would have been different. Strickland, 466 U.S. at 687. An ineffective

assistance of counsel claim is reviewed de novo. A.N.J., 168 Wn.2d at 109.

b. Engelstad's lawyer's failure to request a "no-adverse-inference" instruction was deficient performance.

The packet of jury instructions submitted by Engelstad's lawyer did not contain a "no-adverse-inference" instruction. CP 14-31. Again, from the record it does not appear that this was a deliberate omission; rather, it seems that all parties and the court simply forgot to give the instruction. RP 255-78. However to the extent that the State may try to claim this was a strategic decision, this Court should conclude that there is no reasonable trial strategy that would excuse the failure to properly instruct the jury on the privilege against self-incrimination. Further, to the extent that early Washington decisions may suggest otherwise, this Court should conclude that they conflict with Carter and must be overruled.

The Supreme Court has repeatedly acknowledged the "proven utility" of the rule against adverse inferences from a defendant's silence. Mitchell v. United States, 526 U.S. 314,

329, 119 S.Ct. 1307, 143 L.Ed.2d 424 (1999) (collecting decisions).

> The rule against adverse inferences is a vital instrument for teaching that the question in a criminal case is not whether the defendant committed the acts of which he is accused. The question is whether the Government has carried its burden to prove its allegations while respecting the defendant's individual rights.

Id. at 330.

A "no-adverse-inference" instruction reflects the "absolute constitutional guarantee against compulsory self-incrimination." Carter, 450 U.S. at 300. The Carter Court cautioned that the right to a fair trial in which this basic guarantee is honored is threatened "when the jury is left to roam at large with only its untutored instincts to guide it, to draw from the defendant's silence broad inferences of guilt." Id. at 301. Indeed, because of the layperson's natural tendency to assume that silence is indicative of guilt, "[e]ven without adverse comment, the members of a jury, unless instructed otherwise, may well draw adverse inferences from a defendant's silence." Id.

Two years before Carter was decided, the Washington Court of Appeals held that the use of a "no-adverse-inference" instruction

> presents counsel with a tactical choice. It must be given by the court if requested by the defense, but some defendants do not want it given because they feel that such an instruction highlights defendant's silence and enables the prosecutor to point out that he did not testify by using the court's own words, thereby undermining the protection afforded by [Griffin].

State v. King, 24 Wn. App. 495, 500, 601 P.2d 982 (1979) (internal citation omitted).

This Court cited the rule in King in a dictum in State v. Dauenhauer, 103 Wn. App. 373, 376, 12 P.3d 661 (2000), but in Dauenhauer the trial court gave the "no-adverse-inference" instruction sua sponte, the defendant did not object, and the instruction became the law of the case. Dauenhauer, 103 Wn. App. at 376.[5] Dauenhauer thus is not on point. Other than Dauenhauer, no Washington decision has meaningfully examined King or reevaluated that decision in light of Carter.

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[5] Although Lakeside involved a similar procedural history, 435 U.S. at 339-340, Lakeside was not cited in Dauenhauer.

It is axiomatic that the privilege against self-incrimination is an "absolute constitutional guarantee." Carter, 450 U.S. at 300. The rule that no inference of guilt may be drawn from a defendant's rightful silence "has become an essential feature of our legal tradition." Mitchell, 526 U.S. at 330. Thus, it is wrong to assume that a "no-adverse-inference" instruction calls unwanted attention to an accused person's exercise of his right not to testify. Carter, 450 U.S. at 302-03. Instead, without a "no-adverse-inference" instruction, jurors may expect that the defendant has an obligation to prove his innocence and, worse, may infer that his silence means that he is guilty. Id. at 302.

It is for this reason that an instruction telling the jury that the defendant has no obligation to testify and directing them to draw no adverse inference from his failure to do so is of equal importance to other instructions on fundamental constitutional rights, such as instructions on the State's burden of proof and the presumption of innocence. Id. The failure to correctly instruct on the State's burden to prove guilt beyond a reasonable doubt is reversible error. State v.

Castillo, 150 Wn. App. 466, 469, 208 P.3d 1201 (2009). The same is true about the failure to instruct the jury on the presumption of innocence. Taylor, 436 U.S. at 485. Yet, according to the rationale in King, a defense attorney may waive his client's privilege against self-incrimination, which surely is as important as the State's burden of proof and the presumption of innocence, as a matter of trial "strategy." King, 24 Wn. App. at 500.

This is an untenable rule. Waiver of a constitutional right must be knowing, intelligent and voluntary. Brewer v. Williams, 430 U.S. 387, 404, 97 S.Ct. 1232, 51 L.Ed.2d 424 (1977); State v. Stone, 165 Wn. App. 796, 815, 268 P.3d 226 (2012). "[C]ourts indulge every reasonable presumption against waiver of fundamental constitutional rights and ... do not presume acquiescence in the loss of fundamental rights." Johnson v. Zerbst, 304 U.S. 458, 464, 58 S.Ct. 1019, 82 L.Ed. 1461 (1938) (internal quotations and citations omitted). Although the right to a "no-adverse-inference" instruction reflects the constitutional guarantee that a defendant's decision not to testify may not prejudice

him, according to the holding in King, silent waiver of this right would relegate it to the territory of "trial strategy," even where the record does not demonstrate that the defendant understood or was aware of the import of his lawyer's "decision."

Here, the record does not support the conclusion that Engelstad's lawyer chose not to submit a "no-adverse-inference" instruction as a matter of trial "tactics" (as opposed to that he simply forgot or was ignorant of the instruction). But even if this Court could somehow conclude that omission of the "no-adverse-inference" instruction was a strategic decision, the record does not support a finding that Engelstad validly waived his right to the instruction.

This Court should conclude that King's holding that a lawyer may justifiably make a tactical choice to refuse a "no-adverse-inference" instruction conflicts with Carter. Given that the court would have been obligated to give the instruction had it been requested, this Court should further conclude that counsel's failure to request the instruction was deficient performance.

c. Counsel's omission prejudiced Engelstad.

The second prong of Strickland requires Engelstad to establish that he was prejudiced by his lawyer's deficient, unreasonable strategy. Strickland, 466 U.S. at 687. To prove prejudice, an accused person must simply show "that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Id. at 694. "A reasonable probability is a probability sufficient to undermine confidence in the outcome." Id.

The State did not allege that Engelstad orchestrated the dismantling and theft of the crane. He was present when the police investigated the noise complaint at the mining claim, but it was uncontested that it was Shouse's idea to disassemble the crane. Thus, whether the jury convicted Engelstad depended entirely on whether he knew that Shouse did not have the right to dismantle the crane.

Given this factual scenario, the jury undoubtedly was waiting to hear from Engelstad himself that he did not know that Shouse had no right to the crane. When he did not

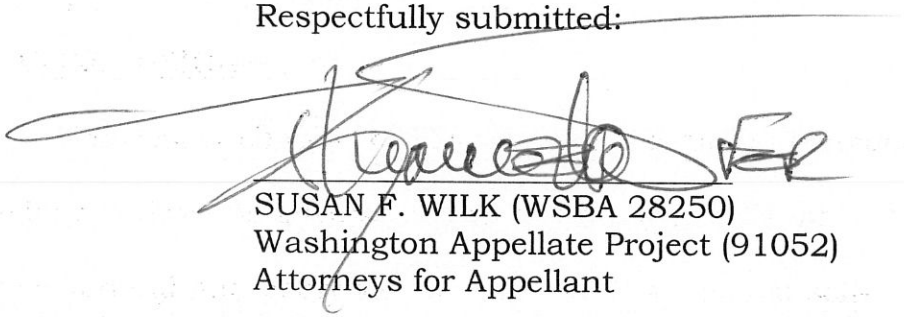
testify, in the absence of an instruction forbidding them from drawing an adverse inference from his silence, the jury was likely to conclude that his silence was tantamount to an admission of guilt. This Court should conclude that Engelstad was prejudiced by his lawyer's omission.

E. CONCLUSION

This Court should conclude that the failure to instruct the jury to draw no adverse inference from the fact that Engelstad did not testify violated his privilege against self-incrimination. This Court should further hold that trial counsel's failure to propose such an instruction denied Engelstad his Sixth Amendment right to the effective assistance of counsel.

DATED this 19th day of November, 2012.

Respectfully submitted:



SUSAN F. WILK (WSBA 28250)
Washington Appellate Project (91052)
Attorneys for Appellant

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION ONE

STATE OF WASHINGTON,	)	
	)	
RESPONDENT,	)	
	)	
v.	)	NO. 30644-5-III
	)	
GARY ENGELSTAD,	)	
	)	
APPELLANT.	)	

DECLARATION OF DOCUMENT FILING AND SERVICE

I, ANN JOYCE, STATE THAT ON THE 19TH DAY OF NOVEMBER, 2012, I CAUSED THE ORIGINAL **BRIEF OF APPELLANT** TO BE FILED IN THE **COURT OF APPEALS – DIVISION THREE** AND A TRUE COPY OF THE SAME TO BE SERVED ON THE FOLLOWING IN THE MANNER INDICATED BELOW:

[X] GREGORY ZEMPEL, DPA KITTITAS COUNTY PROSECUTOR'S OFFICE 205 W 5TH AVE STE 213 ELLENSBURG, WA 98926	(X) ( ) ( )	U.S. MAIL HAND DELIVERY _____
[X] GARY ENGELSTAD WASHINGTON STATE PENITENTIARY	(X) ( ) ( )	U.S. MAIL HAND DELIVERY _____

SIGNED IN SEATTLE, WASHINGTON THIS 19TH DAY OF NOVEMBER, 2012.

X Ann Joyce

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