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

APPELLANT'S REPLY BRIEF

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A. ARGUMENT IN REPLY

At Gary Engelstad's trial, defense counsel did not request the jury be instructed to draw no adverse inference from Engelstad's failure to testify, and the court did not issue a no-adverse-inference instruction. There is no indication that defense counsel's omission arose from any strategy or reasoned decision-making. The State nevertheless claims that the trial court's refusal to issue the instruction was not reversible error, that defense counsel's failure to request the instruction was reasonable trial strategy, and, remarkably, that Engelstad should bear the burden of proving the constitutional error was harmless beyond a reasonable doubt. The State's claims are meritless. Engelstad's convictions should be reversed.

1. The failure to give a "no adverse inference" instruction is a constitutional error that is presumed prejudicial and requires reversal unless proven beyond a reasonable doubt to be harmless.

The Fifth Amendment right against self-incrimination prohibits the State from using a defendant's silence as substantive evidence of guilt. State v. Easter, 130 Wn.2d 228, 236, 922 P.2d 1285 (1996); State v. Dauenhauer, 103

Wn.2d 373, 375-76, 12 P.3d 661 (2000), review denied, 143 Wn.2d 1011 (2001). The right includes the requirement that, when requested, the trial court must instruct the jury regarding the defendant's right not to testify and that it may make no adverse inferences from the defendant's decision not to testify. Carter v. Kentucky, 450 U.S. 288, 303, 101 S.Ct. 1112, 67 L.Ed.2d 241 (1981).

> Jurors are not lawyers; they do not know the technical meaning of "evidence." They can be expected to notice a defendant's failure to testify, and, without limiting instruction, to speculate about incriminating inferences from a defendant's silence.

Id. at 303-04.

The failure to give a "no adverse inference" instruction where it is requested is an error of such magnitude that the Court in Carter suggested it might be a structural error. 450 U.S. at 304. Since the issue had not been briefed, the Court applied the constitutional harmless error standard, which imposes on the State the burden of proving beyond a reasonable doubt that the error did not contribute to the jury's verdict. Id.

Carter notwithstanding, in its briefing to this Court, the State advocates the Court place the burden of the error on Engelstad. Br. Resp. at 1 ("the harmless error standard ... requires the defendant to demonstrate that the failure to give such an instruction resulted in an unfair trial such that it cannot be said that a just result was reached"). The State's position is manifestly incorrect. Should this Court agree that the failure to give the no-adverse-inference instruction was error, then the State must prove that the error was harmless beyond a reasonable doubt.

2. Counsel's failure to request the instruction, and the court's failure to issue it, were errors warranting a new trial.

The State concedes that the record "is silent as to the motives" of defense counsel in not seeking a no-adverse-inference instruction. Br. Resp at 2. Nevertheless, without citation to any authority, the State claims that "in all of the cases to discuss the issue, the various courts recognized that there were valid reasons for a defendant not to desire to have such an instruction given." Br. Resp. at 9. Carter suggests the contrary is true. In particular, in Carter the Court noted

that the privilege against self-incrimination and the presumption of innocence are "closely aligned," and that a "no adverse inference" would "contribute[] in a significant way to the jurors' proper understanding of the ... failure to testify." Id. The instruction, coming from the trial court judge, provides "significant additional guidance" in a way that the arguments and statements of counsel cannot.

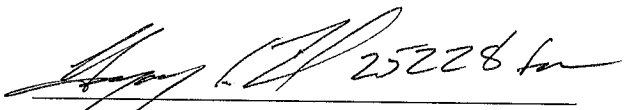
Much of the closing arguments of counsel focused on what Engelstad knew or understood about Shouse's right to dismantle the crane. Without an instruction telling them to draw no adverse inference from Engelstad's failure to testify, the jurors surely speculated that his silence indicated he had something to hide. This Court should conclude that counsel's failure to request the instruction was deficient performance, unjustifiable by any reasonable strategy, and that the trial court's failure to issue the instruction denied Engelstad a fair trial.

B. CONCLUSION

For the foregoing reasons, and based on the arguments articulated in the appellant's opening brief, Gary Engelstad's convictions should be reversed.

DATED this 6th day of November, 2013.

Respectfully submitted:



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Attorneys for Appellant

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
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	)	
Respondent,	)	
	)	NO. 30644-5-III
v.	)	
	)	
GARY ENGELSTAD, JR.,	)	
	)	
Appellant.	)	

DECLARATION OF DOCUMENT FILING AND SERVICE

I, MARIA ARRANZA RILEY, STATE THAT ON THE 6TH DAY OF NOVEMBER, 2013, I CAUSED THE ORIGINAL **REPLY 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 _____

SIGNED IN SEATTLE, WASHINGTON THIS 6TH DAY OF NOVEMBER, 2013.

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