FILED
September 16, 2013
Court of Appeals
Division III
State of Washington

NO. 30644-5-III

COURT OF APPEALS

STATE OF WASHINGTON

DIVISION III

STATE OF WASHINGTON,

Respondent,

vs.

GARY D. ENGELSTAD JR.

Appellants.

RESPONDENT'S BRIEF

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3. Should this court adopt a new standard of conduct for trial courts and defense counsel, as it relates to the giving of a no adverse inference instruction, this Court should still apply the harmless error standard which 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.

B. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR:

1. The trail court was not requested by either the State or defense to give a no adverse inference instruction as found in WPIC 6.31. Case law is clear that a trial court should give such an instruction if requested by the defendant. Case law is clear that if a trial court gives such an instruction sua sponte or over the objection of the defendant, that

an error has occurred, but that such error is harmless, although it could be deemed prejudicial error under the facts of a particular case. There are no reported cases that a trial court has a duty to inquire as to the motives of counsel in seeking or not seeking a no inference instruction.

2. Neither the State nor defense requested an instruction to the jury to draw no adverse inference from the defendant's failure to testify, as set forth in WPIC 6.31. The record is silent as to the motives of the state and defense in not requesting such an instruction. The defendant, without citation to authority, requests this court to find the failure to request such an instruction to form the basis for a finding of ineffective assistance of counsel. This court should decline the request of defendant to create a per se rule as to ineffective assistance of counsel for such a decision.

3. If this Court should determine a new standard for trial court conduct, such that it is error for the trial court not to give such an instruction, regardless of whether it is requested by or objected to by defense counsel, such error should still be measured by the harmless error standard previously articulated. If this Court should determine to create a bright line rule that the failure by defense counsel to request such an instruction in any case where the defendant does not take the stand, such rule should be governed by the harmless error rules in place for ineffective assistance of counsel.

C. STATEMENT OF THE CASE:

The appellant's statement of the case is sufficiently detailed to give this court a sense for what the case was about. And while the State, given different arguments presented, might have elaborated further, it appears to the state that this case is more about what the appellant claims is not in the record, and the assumptions and requests that the appellant has made as a result of items missing from the record.

The State would agree that absent from the record is a request from either party to give WPIC 6.31, the pattern instruction discussing a defendant's failure to testify, and that a jury is to draw no adverse inference from such failure. Also missing from the instructions are an instruction on a lesser included offense of Theft in the Third Degree, or an instruction on a lessor included offense of Malicious Mischief in the Third Degree. Also absent from the record is an inquiry by the trial judge as to why the defendant did not request WPIC 6.31, and why the defendant did not include an instruction on lesser included crimes.

The appellant, in his brief makes an assumption that because there were "...extensive discussion(s) 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." Brief of Appellant, 10. The appellant's argument is premised upon

discussions occurring over the course of two days.

This is not necessarily a misstatement as much as an exaggeration regarding the time spent. It is clear from the record that the discussions began at 3:30 in the afternoon (VRP 255) and ended sometime before the close of business, as the judge commented on trying to make changes to the documents before he went home for the evening. (VRP 275). It is also clear that the proceedings were recessed until 9:30a.m. the next day (VRP 275) and that the jury was brought in after a brief final discussion before 10:00a.m. (VRP 278).

And while stating that the time spent on jury instructions was perhaps not as extensive as appellant claims might be of assistance to a claim of inadvertent omission, it is clear that the parties:

i. Understood the instructions that had been offered,
ii. Understood their theories of the case;
iii. Recollected the evidence as they believed beneficial to their theories of the case;
iv. Debated minute details on proposed instructions; and
v. Declined to have certain instructions given, noting that some were to be provided if requested by defense, but not given if not desired by defense, and defense had the opportunity to decline on those that would have been given by the court if they desired (VRP 255 – 278).

It is also clear what this case is not about, in terms of arguments made by appellant. There is no claim that there was insufficient evidence to convict the defendant. There is no claim that the state commented on

the appellant's right to remain silent. There is no claim that there were instructions given by the court that appellant's silence was evidence of guilt, and no argument by the state that infringed upon the appellant's right to remain silent. Further there is no claimed error that an instruction was given, or not given over the objection of the appellant.

C. ARGUMENT:

1. The trial court did not err in failing to instruct the jury to draw no adverse inference from Mr. Engelstad's failure to testify during trial.

The State would concur with appellant that the state and federal constitutions guarantee an accused the right not to incriminate himself. The State would concur with appellant that the privilege against self-incrimination prohibits the state from using Mr. Engelstad's silence against him at trial. And, the State would concur that the trial court may not give an instruction stating that a defendant's silence is evidence of guilt.

But none of the above cited errors are alleged in this appeal. What is alleged by appellant is that the trial court committed reversible error, violating the appellant's Fifth Amendment privilege against self-incrimination, by not giving an instruction that was not requested by either party – specifically WPIC 6.31.

The State would concur that the case law is clear that a trial

court should/must give an instruction such as WPIC 6.31 when such an instruction is requested by a defendant. Carter v. Kentucky, 450 U.S. 288, 101 S.Ct. 1112, 67 L.Ed.2d 241 (1981). The State would also concur that giving such an instruction as found in WPIC 6.31 sua sponte by the trial court without objection by a defendant does not constitute reversible error, and in fact, that an to instruction not objected to becomes the law of the case not subject to appeal absent a manifest error affecting a constitutional right. State v. Dauenhauer, 103 Wn. App. 373,376 12 P.3d 661 (2000).

And, the United States Supreme Court has indicated that the giving of such an instruction over the objection of counsel does not violate the privilege against compulsory self-incrimination guaranteed by the Fifth and Fourteenth Amendments to the United States Constitution. Lakeside v. Oregon, 435 U.S. 333, 341, 98 S.Ct. 1091, 55 L.Ed.2d 319 (1978).

The State would also concur with appellant that there are many reasons why both a guilty defendant and a not guilty defendant might choose not to testify in a criminal trial. Many of those reasons were articulated in Carter, 450 U.S. 288, 101 S.Ct. 1112, 67 L.Ed.2d 241 (1981). However, this might be where the State ends their concurrence with appellant. Despite the fact that appellant cites to no

case for the proposition that a trial court must inquire as to the motives of counsel in seeking or not seeking such an instruction, counsel for appellant then boldly proclaims that it was manifest error for the trial court not to sua sponte give such an instruction, which failure prejudiced the appellant's right to a fair trial.

Appellant's argument twists the language of both Carter, 450 U.S. 288, 101 S.Ct. 1112, 67 L.Ed.2d 241 (1981) and Lakeside, 435 U.S. 333, 98 S.Ct. 1091, 55 L.Ed.2d 319 (1978). Neither case was so bold in their proclamations, rather, the singular holding was that when a request is made for such an instruction, that the trial court potentially commits reversible error in not giving the instruction, but that the giving of such an instruction without request or over objection of the defendant, is not error under the protections of the federal constitution.

However, the Supreme Court in Lakeside, 435 U.S. 333, 98 S.Ct. 1091, 55 L.Ed.2d 319 (1978) took pains to clarify that their analysis was exclusively under federal law. The Court took the time to caution, however, that:

> It may be wise for a trial judge not to give such a cautionary instruction over a defendant's objection. And each State is, of course, free to forbid its trial judges from doing so as a matter of state law....

Id, at 340-341. That Court also quoted from Judge Learned Hand:

> It is no doubt better if a defendant request no charge upon the subject, for the trial judge to say nothing about it; but to say that when he does, it is error, carries the doctrine of self-incrimination to an absurdity.

Id, at 341.

We know under Washington State law, that if WPIC 6.31 is requested, it must be provided. State v. Dauenhauer, 103 Wn. App. 373,376 12 P.3d 661 (2000). It is clear that Dauenhauer, cautions against given such instruction over a defendant's objection, as do the commentaries to WPIC 6.31. But there is no Washington or federal court case that has found error on the part of a trial court in NOT sua sponte giving such an instruction. Appellant's request for this Court to articulate such a rule is misplaced.

2. Defendant Engelstad has a constitutional right to present a defense, which includes the right **NOT** to request a no adverse inference instruction. Mr. Engelstad's decision not to request a no adverse inference instruction was a tactical decision which does not give rise to a claim of ineffective assistance of counsel.

Appellant, continues to weave an interesting but unsupported tapestry out of whole cloth as it relates to the performance of defense Counsel. The Appellant has requested that this Court craft a new rule stating that it is an error of constitutional magnitude requiring reversal of a conviction when a trial court fails to give an instruction on no adverse inference sua sponte, and regardless of the desires of the defendant or

defense counsel. The Appellant then turns to request a new rule concerning the performance of counsel, stating that this Court should craft a bright line rule, that the failure of counsel to request the giving of WPIC 6.31 constitutes ineffective assistance of counsel.

Appellant does not cite to any state or federal court case that has reached a similar conclusion. Having boldly stated that the failure of the trial court to give such an instruction violated the defendant's privilege against self-incrimination, appellant then claims that the failure to request such an instruction is per se ineffective assistance of counsel.

Appellant further requests this court to determine "that there is no reasonable trial strategy that would excuse the failure to properly instruct the jury on the privilege against self-incrimination. (Appellant Brief at 18) However, there is no legal support for such an argument. In fact, 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.

Appellant points to the absence of a colloquy as proof that there was no conscious decision on the part of Counsel/defendant to not include the instruction in the packet of requested instructions. However, there is no case law suggesting that there is such a standard, rather the case law indicates that should a defendant not request such an instruction, that the

trial court should be very cautious in giving such an instruction.

A review of the proceedings herein would suggest that there were other pattern instructions suggested by the state that also dealt cursorily with the right against self-incrimination, which were deleted at the request of the defendant:

> State's proposed instruction 6 dealing with the potential limitation of a witnesses' answer only as to their credibility - WPIC 4.64 (VRP 259 – 260);
>
> State's proposed instruction 8, dealing with evidence of prior convictions - WPIC 5.05 – not used because the defendant did not testify and was not subject to impeachment by same (VRP 260);
>
> State's proposed instruction 9 that dealt with the testimony of an accomplice given on behalf of the state, and cautioning the jury as to the use of such testimony-WPIC 6.05 (VRP 260 – 261 – which has similar instructions as WPIC 6.31, that such instruction should be given when requested by the defense);
>
> State's proposed instruction 10 dealing with weight and credibility of out-of-court statements of the defendant-WPIC 6.41 (VRP 261 - 262; and
>
> State's proposed instruction 19 dealing with a special verdict form concerning criminal history as an aggravating factor – WPIC 160.00 - rejected as a stipulation was agreed upon and used (VRP 273)

If the standard that appellant requests were to be adopted, would it apply to any and all jury instructions? For example, one could argue on appeal, if any of the above instructions were not given, or for that matter requested, that an error had occurred. If we adopt the test proposed by Counsel, how would a trial court defer to the sound trial tactics of defense

counsel and a defendant? How would the trial court balance their responsibility in assuring a fair trial with the requirement that trial courts are not to interfere in the decision making process of counsel in presenting their cases? In this case, would the failure to request an instruction on a lesser included offense of Theft in the 3rd Degree or Malicious Mischief in the Third Degree also form the basis for an ineffective assistance of counsel claim?

If the rule as requested by the appellant were to be adopted, the question then before trial courts, prosecutors, and defense counsel would be – How far does the rule extent? If it is ineffective to request WPIC 6.31 in every case where a defendant does not testify, is it also ineffective assistance not to request a lesser included instruction – even if counsel and the defendant, as in this case, were not arguing over the value, but rather the lack that Mr. Engelstad had any reason to doubt that he was lawfully entitled to be on the property scrapping the property with Mr. Shouse? Such a rule would be, to use the words of Justice Learned Hand – absurd.

There is no federal or state case that has stated that the failure to request WPIC 6.31 or an equivalent instruction amounts to ineffective assistance of counsel, and this court should refrain from entertaining creating such a rule. There is no federal or state case that requires a trial court to inquire, or counsel to explain to the tribunal, their decision on

which jury instructions to request, or not to request. That does not mean that parties are not allowed to request instructions, nor does it mean that a trial court is not entitled to make sure that the instructions given to a jury are sound statements of the law, and reasonably allow both sides to argue their theory of the case if supported by the evidence presented in court.

3. Should this court adopt a new standard of conduct for trial courts and defense counsel, as it relates to the giving of a no adverse inference instruction, this Court should still apply the harmless error standard which 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.

While appearing to request the court to create new standards for the performance of trial courts and defense counsel relating to WPIC 6.31, appellant maintains that the appropriate standard of review for ineffective assistance of counsel should remain the 2-part test set forth in Strickland v. Washington, 466 U.S. 668, 686 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984) - (1) There must be deficient performance demonstrated by the defendant/appellant; and (2) whether counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result.

As to the first prong, it requires a showing that counsel made errors so serious that counsel was not functioning as the "counsel"

guaranteed the defendant by the Sixth Amendment. As to the second prong, the defendant must show that the deficient performance prejudiced the defense. This requires a showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable. Strickland at 687

The Court in Strickland, went on to say that:

> No particular set of detailed rules for counsel's conduct san satisfactorily take account of the variety of circumstances faced by defense counsel or the range of legitimate decisions regarding how best to represent a criminal defendant. Any such set of rules would interfere with the constitutionally protected independence of counsel and restrict the wide latitude counsel must have in making tactical decisions.

466 U.S. 668, 688-689 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984)

And finally, the Strickland Court indicated that reviewing courts are required to entertain a strong presumption that adequate assistance was rendered, and that significant decisions were made based upon the exercise of reasonable professional judgment. 466 U.S. 668, 690 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984)

It this Court should craft a new rule as to the performance of defense counsel that holds that a failure to request WPIC 6.31 is per se ineffective then the first prong, of the test shall be met. If that result is reached, this Court must still then review the entirety of the record to determine whether such ineffective assistance prejudiced the

defendant.

Counsel argues that the failure to give WPIC 6.31 did prejudice the defendant, given the arguments of the state. However, a review of the record clearly indicates the skill by which defense counsel was able to articulate facts and information as to the testimony of each and every state witness during cross examination. And, the record would also indicate that although Joseph Shouse and Paul Erickson were called to testify by the state, that both individuals were in essence, at every possible turn, making statements and providing evidence that supported the theory pieced together by counsel for Mr. Engelstad, including coming up with testimony and information not previously imparted to law enforcement.

The defense made a tactical decision not to have Mr. Engelstad take the stand in his own defense, a decision that can hardly be questioned given his extensive criminal history, and his long time association with Mr. Shouse whose own extensive criminal history was partly put into the record. The defense strategy was not to focus on what Mr. Engelstad said, or did not say, but rather on what he was told by Mr. Shouse and Mr. Erickson. It was the strength of what these witnesses were willing to say about Mr. Engelstad's lack of knowledge, and the state's inability to point to concrete statements by

Mr. Engelstad as to his culpability that formed the strategy of the defense. In this context, emphasizing that Mr. Engelstad did not testify with an instruction was not as beneficial as simply using the testimony that was provided to argue that he had no information that would provide him with a culpable mental state, and in fact, that based upon the testimony provided, was not present when the items were removed from the property.

CONCLUSION:

All that is required of the State is to provide a defendant with a fair trial. Mr. Engelstad had a fair trial. Mr. Engelstad's counsel presented a solid case, asking proper questions, eliciting necessary information, requesting proper instructions, conceding points that needed to be conceded, and otherwise providing competent assistance of counsel

The trial court, did not violate any known standard in conducting this trial. Had WPIC 6.31 been requested, the Court would have reviewed the instructions/recommendations and held an inquiry similar to the inquiry held as to WPIC 6.05, and would have deferred to the desires of the defendant as it properly did so as to that WPIC.

Absent a new rule being articulated by this Court as requested by appellant, there is no error on the part of the trial court or defense counsel. Under existing state and federal law, there is no trial court error and no

ineffective assistance of counsel. Given that there was no error under existing case law, the judgment and sentence entered in this case should be upheld. If, however, this Court should find that error was present on the part of the trial court or counsel, this Court should apply the proper test and find, based upon the totality of the circumstances that no prejudice resulted.

DATED this 16th day of September, 2013.

Respectfully submitted,

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COURT OF APPEALS FOR THE STATE OF WASHINGTON

DIVISION III

STATE OF WASHINGTON vs. GARY D. ENGELSTAD JR.,	)	No. 30644-5 PROOF OF SERVICE

STATE OF WASHINGTON)
) ss.
County of Kittitas)

The undersigned being first duly sworn on oath, deposes and states:

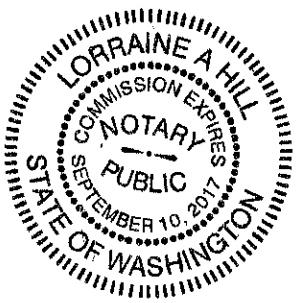
That on the 16th day of September, 2013, affiant filed a Response to Appellant Brief electronically per agreement to serve by e-mail to:

Renee S. Townsley, Clerk	Susan F. Wilk
Court of Appeals	Attorney at Law
Division III	1511 Third Avenue, Suite 701
500 N. Cedar St.	Seattle, WA 98101
Spokane, WA 99210	**E-Mail**
Electronic Filing	

containing copies of the following documents:

(1) Response to Appellant Brief
(2) Proof of Service

SIGNED AND SWORN to (or affirmed) before me on this 16th day of September, 2013 by INGRID BUTLER.



NOTARY PUBLIC in and for the
State of Washington.
My Appointment Expires: 09-10-17