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No. 62067-3-I

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

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**STATE OF WASHINGTON, Respondent,**

**v.**

**CRAIG CARLIS, Appellant.**

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**BRIEF OF RESPONDENT**

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**A. ASSIGNMENTS OF ERROR**

None.

**B. ISSUES PERTAINING TO APPELLANT'S ASSIGNMENTS OF ERROR**

1. Whether Carlis should be precluded from complaining of an erroneous definitional instruction where he failed to object below and the jury was properly instructed on the essential elements of robbery in the first degree.
2. Whether an error in defining 'threat' in the context of a robbery allegation is harmless beyond a reasonable doubt where the uncontroverted evidence demonstrates Carlis used a firearm to commit robbery.

**C. FACTS**

**1. Procedural Facts**

Craig Carlis was convicted by jury of burglary in the first degree and first degree robbery. CP 25-27. The jury also returned special verdicts concluding beyond a reasonable doubt that Carlis was armed with a firearm during the commission of both of these crimes. CP 44. Carlis was given a standard range sentence of 108 months and timely filed a notice of appeal. CP 16, 2.

On appeal Carlis contends for the first time that the trial court erroneously instructed the jury that 'threat' meant to communicate directly or indirectly intent to cause bodily injury immediately and "in the future." CP 40, instruction 9. Carlis also contends his attorney was

constitutionally ineffective for failing to object to this instruction. Br. of App. 1.

## **2. Substantive Facts**

On May 19<sup>th</sup>, 2007 Carlis and his companion Kang arranged to go to 18 year-old Robert Dowdle's apartment in Bellingham to purchase some marijuana. 4RP 7, 15-16. Dowdle worked as a supervisor at Little Caesar Pizza but also sold marijuana on the side to supplement his income. 4RP 8, 28. When Carlis and Kang arrived, Dowdle was at his apartment with his roommate James Pursley and his friends Nicole, Lindsey and Carl. 4RP 16. Dowdle let Carlis whom he knew from previous contacts, and Kang in and the three went upstairs to Dowdle's bedroom. 4RP 27, 49. Dowdle's roommate and friends remained downstairs in the living room and kitchen areas of the apartment. 4RP 31. Dowdle testified his friends were all in a position to observe Carlis and Kang when they entered and left the apartment. 4RP 31.

Upon entering Dowdle's bedroom Carlis and Kang indicated they wanted to get some marijuana and Carlis asked if it was "any good." 4RP 36. Dowdle replied it was and offered to sell all he had; 4-6 grams "take it or leave it." 4RP 36. Dowdle then went into his closet to retrieve the marijuana. 4RP 37. When Dowdle turned around Carlis pulled a semi-automatic handgun out of his waistband, put it in Dowdle's face and told

him he “wasn’t giving him shit.” 4RP 37, 47, 52. Carlis then proceeded to ask for money as well as, all of Dowdle’s drugs. 4RP 37. Dowdle gave Carlis the marijuana and Carlis in turn, handed the drugs back to Kang who then placed the drugs in his pocket. 4RP 38. Carlis appeared nervous to Dowdle and kept saying “you’ve got to have more than this, man, you’ve got to have more than this.” 4RP 41. While Carlis pointed the firearm at Dowdle, Kang searched Dowdle’s person, took over \$500 from Dowdle, checked his identification and took a cell phone from Dowdle’s pants pocket. 4RP 39. Kang also quickly searched Dowdle’s room. 4RP 44.

When Carlis looked at his identification he told Dowdle “I’m looking at your I.D. so now I know who you are.” 4RP 42. Dowdle perceived Carlis statements as trying to intimidate him from reporting the robbery to the police. 4RP 42. Carlis and Kang then left Dowdle in his room and fled down the stairs and out of the apartment. 4RP 55.

Dowdle’s roommate James Pursley remembered two men coming over and going up to Dowdle’s room. 5RP 11. Pursley testified he took a second glance of the Carlis and Kang when they came downstairs to leave because one of them leaned over him and tapped his pocket where his cell phone was. 5RP 11, 12. After Carlis and Kang left, Dowdle immediately told Pursley and friends he’d been robbed. 4RP 55.

Dowdle testified he was very afraid for his and his friends' safety for the five minutes Carlis and Kang were in his bedroom robbing him at gun point. 4RP 52. Specifically, Dowdle feared Carlis and Kang would kill him. 4RP 119. Dowdle also testified that when he spoke to the 911 dispatcher he was afraid Carlis and Kang would return to his apartment if he reported the robbery to the police. 4RP 58.

After the police were called and started investigating, Dowdle's roommate Pursley and his friends started combing the neighborhood looking for the two robbers. 5RP 18. After finding the home of 'Rob' whom Pursley knew to be a mutual acquaintance of both Carlis and Dowdle, the police came over to investigate. 4RP 119. Pursley was called back to this residence twice by police to identify possible suspects. 5RP 19. Pursley confirmed he did not recognize the first two suspects the police identified. 5RP 19. Later on the same evening Pursley did however, identify two more suspects as the robbers. 5RP 21-22, 4RP 67. Dowdle later also identified the same suspects, Carlis and Kang, as the robbers. Id. At trial, Dowdle testified he was certain the men in the courtroom identified as Carlis and Kang were the same men who robbed him at gun point. 4RP 124.

**D. ARGUMENT**

- 1. Carlis should be precluded from asserting instructional error where he failed to object to below and where the jury was properly instructed on the essential elements of robbery.**

Carlis asserts for the first time on appeal that the trial court erred in instructing the jury with an erroneous definition of the term “threat” as applied to the robbery in the first degree jury instructions. Br. of App. at 7. Specifically, Carlis asserts the “threat” definitional jury instruction erroneously stated the term threat meant a communicated intent to cause bodily injury immediately or in the future.

While this instruction should have confined the definition of “threat” to immediate threats, Carlis failed to object to this definitional instruction. Furthermore, the “to convict” instruction correctly required the jury to find Carlis took property from Dowdle by the use or threatened use of *immediate* force. CP 44, instruction 13. Under these circumstances and where the record reflects the jury returned a special verdict finding Carlis displayed a firearm to commit the robbery, Carlis cannot demonstrate this error is a manifest error affecting a constitutional right. Carlis should therefore be precluded from raising this issue for the first time on appeal.

CrR 6.15 imposes upon both parties the obligation to serve and file proposed jury instructions. CrR 6.15(a). Failure to object to jury instructions below precludes review of alleged jury instruction error on appeal unless the defendant can demonstrate the alleged error constitutes a manifest error affecting a constitutional right. RAP 2.5(a)(3), State v. Kronich, 160 Wn.2d 893, 899, 161 P.3d 982 (2007). The exception for manifest errors of constitutional magnitude is narrow and “is not intended to afford criminal defendants a means for obtaining new trials whenever they can ‘identify a constitutional issue not litigated below.’” Id. at 182-83.

In determining whether an alleged error is a manifest error affecting a constitutional right, the reviewing court follows a four step process. State v. Lynn, 67 Wn. App. 339, 345, 835 P.2d 251 (1992). First, the court must decide in a cursory manner whether the error implicates a constitutional issue. Second, the court must decide whether the error is manifest, *i.e.*, whether the error had “practical and identifiable consequences” in the case. Third, if the error was manifest, the court must address the merits of the constitutional issue. Last, if the error was of constitutional magnitude, the court must then determine whether it was harmless error. Lynn, 67 Wn. App. at 345. It is the defendant’s burden to identify the constitutional error and demonstrate how such error actually

prejudiced his defense. State v. McDonald, 138 Wn.2d 680, 691, 981 P.2d 443 (1999).

In this case Carlis should be precluded from asserting jury instruction error for the first time on appeal because Carlis failed to object to this definitional instruction below. State v. Scott, 110 Wn.2d 682, 691, 757 P.2d 492 (1988); *see also*, State v. Stearns, 119 Wn.2d 247, 248-49, 830 P.2d 355 (1992) (failure to propose instruction defining “manufacture” or to object to definition given precluded review first time on appeal). Definitional instructions are not instructions that implicate a constitutional right. Scott, 110 Wn.2d at 688 n.5, 691. “As long as the instructions properly inform the jury of the elements of the charged crime, any error in further defining terms used in the elements is not of constitutional magnitude.” Stearns, 119 Wn.2d at 250. “[E]ven an error in defining technical terms does not rise to the level of constitutional error.” Stearns, 119 Wn.2d at 250; *see also*, State v. Aumick, 126 Wn.2d 422, 429, 894 P.2d 1325 (1995) (failure to except below was procedural defect precluding from review alleged error regarding failure to define individual or technical terms).

The instructional error Carlis alleges does not implicate a constitutional right because contrary to Carlis’ assertion, the jury was instructed on all of the essential elements of robbery in the first degree and

the jury was asked to determine beyond a reasonable doubt if Carlis displayed a operational firearm during the commission of the robbery.

The jury was instructed, in accord with RCW 9A.56.200(1), that in order to find Carlis guilty of robbery in the first degree, they must find the following beyond a reasonable doubt:

- (1) That during or about the 19<sup>th</sup> day of May 2008, the defendant unlawfully took personal property from the person of Robert Dowdle;
- (2) That the defendant intended to commit theft of the property;
- (3) That the taking was against the person's will by the defendant's use or threatened use of immediate force, violence, or fear of injury to that person;
- (4) That the force of fear was used by the defendant to obtain or retain possession of the property or to prevent or overcome resistance to the taking;
- (5) That in the commission of these acts or in the immediate flight therefrom, the defendant displayed what appeared to be a firearm or other deadly weapon; and
- (6) That any of these acts occurred in the state of Washington.

CP 44, instruction 13. The constitution requires only that the jury be instructed on all of the elements of the charge. Scott, 110 Wn.2d at 689.

Carlis asserts nonetheless that the trial's court's use of the following jury instruction defining 'threat' was given in error and permitted the jury to conclude Carlis was guilty of robbery predicated on Dowdle's fear that Carlis would return in the future in the if he reported the crime.

Threat means to communicated, directly or indirectly, the intent to cause bodily injury immediately or in the future to the person threatened or to any other person.

CP 44, instruction 9.

It is error to instruct the jury in a robbery case that the term ‘threat’ encompasses threats in the future as well as immediate threats. State v. Gallaher, 24 Wn.App. 819, 604 P.2d 185 (1979). In Gallaher, the Court erroneously defined threat in the context of a robbery in the second degree charge as follows:

Threat means to communicate, directly or indirectly the intent; to cause bodily injury in the future to the person threatened or to any other person; or, to do any other act which is intended to harm substantially the person threatened or another with respect to his health, safety, business, financial condition, or personal relationship.

Id. The Gallaher Court determined that in the context of a robbery, where the statute defines robbery as requiring an immediate threat of force or fear of injury while the robbery is taking place, it is error to define ‘threat’ as to include threats of harm to cause bodily injury in the future. Id. Nonetheless, the Gallaher Court concluded the inclusion of this erroneous definition instruction was not reversible error because the remaining instructions to the jury required the jury to find the threat of injury was immediate and the evidence at trial supported this conclusion. State v. Gallaher, 24 Wn.App. at 823-4.

As in Gallaher, the essential elements of robbery in the first degree were properly set forth in Carlis' 'to convict' instructions. In order to convict, the jury was required to find beyond a reasonable doubt that Carlis took personal property from Dowdle by the use or threatened use of immediate force. Id. Additionally, the uncontroverted facts reveal Carlis put a gun in Dowdle's face to accomplish this robbery and the jury specifically found Carlis used a firearm during the commission of the robbery. The jury finding confirms the threat of harm in this case was immediate. Under these circumstances the use of the erroneous threat definition instruction does not implicate Carlis' constitutional rights and Carlis should be precluded from raising this issue for the first time on appeal.

**2. The erroneous threat definition could not have had any practical consequence where the uncontroverted evidence demonstrates Carlis used a firearm as an immediate threat of force to commit Robbery.**

Even if the erroneous definitional instruction implicates Carlis' constitutional right to instruct the jury on the essential elements of robbery in the first degree, Carlis cannot demonstrate any error in giving this instruction could have resulted in any practical or identifiable consequences or was harmless where the jury found beyond a reasonable doubt Carlis committed the robbery by thrusting a gun in Dowdle's face

and demanding money and drugs. The use of the weapon evidences Carlis committed the robbery by use of immediate force or violence, regardless of whether Dowdle also feared retribution in the future.

Carlis argues nonetheless, that a misstatement of the ‘threat’ definition should be construed a misstatement of the law that is a presumptive error constitutional magnitude. Br. of App. at 11, *citing State v. Marquez*, 131 Wn.App. 566, 579, 127 P.3d 786 (2006); *State v. Walden* 131 Wn.2d 469, 478, 932 P.2d 1237 (1997). Generally, jury instructions are sufficient if they are supported by substantial evidence, allow the parties to argue their theories of the case and inform the jury of the applicable law when read as a whole. *Walden*, 131 Wn.2d at 478. In self defense cases such as *Walden* and *Marquez* however, the jury instructions of defense of another “must more than adequately convey the law.” *Walden*, 131 Wn.2d at 473. Thus, a jury instruction that misstates the law of self defense constitutes an error of constitutional magnitude that is presumed prejudicial. *Id.* The erroneous instruction alleged in this case does not pertain to the law of self defense and is not therefore, contrary to Carlis argument, presumed prejudicial.

Even if this instructional error were to be construed as a manifest error of constitutional magnitude, the error in this case is harmless beyond a reasonable doubt because the jury would have reached the same result

absent the error. State v. Linehan, 147 Wn.2d 638, 654, 56 P.3d 542 (2002).

Carlis asserts that because the trial court did not define “immediate” as the court did in Gallaher to explain that the threat had to occur while the robbery was taking place, the instructional error in this case should not be construed as harmless. Also, Carlis contends the erroneous threat instruction was compounded by the prosecutor allegedly emphasizing Dowdle’s fear that Carlis and Kang would come back if he reported the robbery to the police. Br. of App. at 10. Carlis’ argument lacks merit.

First, the jury instructions complied with due process considerations. The jury was properly instructed on the essential elements of robbery in the first degree which required the jury to find beyond a reasonable doubt that the robbery occurred by the ‘use or threatened use of immediate force.’ CP 44, instruction 13. Dowdle testified he feared for his life and the safety of his roommates during the robbery and, the jury found beyond a reasonable doubt that Carlis used an operational firearm to commit the robbery. Thus, any rational jury would have found Carlis used immediate force to commit this robbery regardless of how or whether ‘threat’ was further defined.

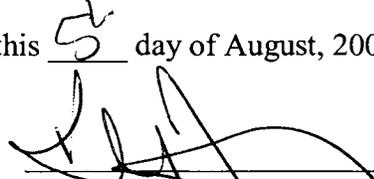
Second, the prosecutor's comments at closing taken in context reveal the prosecutor did not rely on threats of harm in the future to secure Carlis' guilt but used this testimony to argue Dowdle's testimony was credible and reliable. 6RP 354. The prosecutor's closing statements demonstrate the prosecutor was relying on the use of the firearm during the robbery to prove Carlis stole property from Dowdle by the use or threatened use of immediate force. 6RP 353.

The use of an erroneous definition instruction does not implicate a constitutional right within the context of this case where the facts demonstrate the threat of harm to accomplish the robbery was immediate. Thus, Carlis should be precluded from raising this issue for the first time on appeal and error if any, should be construed as harmless. Furthermore, even if Carlis' issue were to be reviewed in the context of an ineffective assistance of counsel claim, Carlis has not shown he was prejudiced by his counsel's failure to object below based on the facts of this case. Strickler v. Greene, 527 U.S. 263, 119 S.Ct 1936, 144 L.Ed 2d 286 (1999). As explained previously Carlis cannot show there is a reasonable probability, but for his counsel's error, the result of the proceeding would have been different had the error not occurred. Strickland, 466 U.S. at 694. Carlis' argument should be rejected.

**E. CONCLUSION**

The State respectfully requests this Court affirm Carlis' convictions for robbery and burglary in the first degree with firearm enhancements.

Respectfully submitted this 5<sup>th</sup> day of August, 2009.

  
\_\_\_\_\_  
Kimberly Thulin, WSBA#21210  
Appellate Deputy Prosecuting Attorney  
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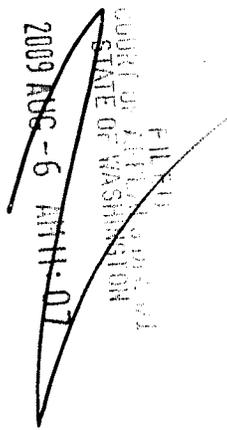
**CERTIFICATE**

I certify that on this date I placed in the U.S. mail with proper postage thereon, or otherwise caused to be delivered, a copy of the document to which this Certificate is attached to this Court and Appellant's attorney, Kari Dady and David Koch, addressed as follows:

Nielsen, Broman & Koch  
1908 East Madison  
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\_\_\_\_\_  
LEGAL ASSISTANT

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