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No. ~~71613-11~~

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

Snohomish County No. 10-1-00761-4

STATE OF WASHINGTON,

Respondent,

v.

GARY McCALLUM,

Appellant.

APPELLANT'S OPENING BRIEF

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I. ASSIGNMENTS OF ERROR AND ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

A. Assignment of Error

1. The trial court erred in failing to instruct the jury, pursuant to WPIC 6.31, that the defendant was not required to testify and that the jury was not permitted to use the fact that the defendant did not testify to infer guilt or to prejudice him in any way.

B. Issues Pertaining to Assignment of Error

1. Where the Fifth Amendment privilege against self-incrimination is a bedrock constitutional guarantee, is a trial court required to instruct the jury that the defendant is not required to testify and that the jury is not permitted draw an adverse inference from the fact that the defendant did not testify in order to protect the defendant's constitutional rights?

2. Where the defense called no witnesses, presented no evidence of any kind, and relied on a defense of general denial, is it realistic to believe that the jury did not notice or consider the defendant's failure to testify?

4. Absent an instruction informing the jury that it was not permitted to draw an adverse inference from the defendant's failure to

testify, did the defendant receive the protection of the privilege against self-incrimination guaranteed by the state and federal constitutions?

II. STATEMENT OF THE CASE

A. Procedural History

Gary McCallum was initially charged on May 13, 2010 by the Snohomish County Prosecutor's Office with one count of third degree assault. CP 1. Mr. McCallum was accused of assaulting Michael Daniels on October 10, 2009. On May 26, 2010, the Law Offices of Heidi L. Hunt, PLLC entered a Notice of Appearance on behalf of Mr. McCallum. CP 10. On September 2, 2010, the State filed an Amended Information charging one count of first degree assault, and in the alternative, one count of second degree assault. CP 19. On October 22, 2010, the State filed a Second Amended Information charging one count of second degree assault and one count of third degree malicious mischief. CP 23.

The matter proceeded to a jury trial on October 25, 2010 in front of the Honorable Linda Krese. VRP 2. Mr. McCallum was represented by Ms. Cassandra Lopez de Arriaga from Ms. Heidi Hunt's office. VRP 2. On October 26, 2010, the jury returned a guilty verdict on the second degree assault charge and a not guilty verdict on the malicious mischief charge. CP 28; 30-31.

Sentencing was originally set for November 30, 2010. CP 32. Sentencing was reset to January 18, 2011, and then later reset to February 1, 2011. See CP 37. Mr. McCallum failed to appear at sentencing on February 1, 2011, and a warrant was issued. CP 42. On March 6, 2014, Mr. McCallum appeared in court after being picked up on the warrant. CP 44.¹ A new sentencing date was set. CP 44. The court appointed Kathleen Kyle of the Snohomish County Public Defender's Office to represent Mr. McCallum. *Id.*; CP 48. On March 19, 2014, Mr. McCallum was sentenced to 5 months in custody and was granted work release, if eligible. CP 50; 55.

B. Factual Background

1. The State's Case

Michael Daniels testified that in October 2009, he lived in an RV Park in Everett with his wife Loni. VRP 22-23. On the evening he claimed he was assaulted by Gary McCallum, Mr. Daniels had been at a bar near his RV Park. VRP 24. He estimated he had consumed four or

¹ At sentencing, Mr. McCallum and Ms. Kyle explained to the court that his delay in appearing for sentencing was the result of a number of problems with Heidi Hunt's law firm. See VRP 188-89. He never received notice from Ms. Hunt of the sentencing date in 2011. VRP 188. The Court and counsel discussed "the disciplinary action pending against Ms. Hunt," with counsel noting problems that many other clients had with Ms. Hunt. VRP 189. Ms. Kyle explained to the court that Ms. Hunt's law firm was "in crisis." Mr. McCallum, who was the only provider for his family, got scared and lost trust in his attorney and the system. VRP 190-91. Mr. McCallum accepted full responsibility for failing to timely deal with the outstanding warrant. VRP 190. Other than the instant

five beers. VRP 24. Afterward, he came home and was watching television alone. VRP 24.

Mr. Daniels testified that around 2:00 a.m., Gary McCallum, Gary's wife Mary, and Gary's sister showed up at his door. VRP 25. Mary McCallum is Loni Daniels' daughter. VRP 25. Loni had given Mary up for adoption at birth. VRP 25. Loni later testified that her relationship with Mary had not always been good. VRP 111. Loni was not at the RV that night because she was spending the night at her other daughter's house. VRP 115. Mr. Daniels testified that it had been a year and a half since he had last seen Gary McCallum. VRP 27.

Mr. Daniels invited the three into his trailer. VRP 27. Mr. Daniels believed that the three had been drinking. VRP 28. Mary stated that she was there to see her mom. VRP 28. Mr. Daniels explained that her mother was not there. VRP 28.

Mr. Daniels testified that after about five or ten minutes, Mr. McCallum told him that he had something he wanted to talk about. VRP 29. Mary and Gary's sister got up and walked out of the RV. VRP 29. Mr. McCallum started talking about Loni and Mary, and whether they were going to reconcile. VRP 30. Mr. Daniels told Mr. McCallum that there was nothing he (Mr. Daniels) could do about it. VRP 30. Mr.

offense, his only other prior criminal history was a reckless driving charge that was

McCallum started to get agitated. VRP 30. Mr. Daniels then said, "I think it's time for you to go." VRP 30. They were both sitting on the couch at this point. VRP 31. Mr. Daniels admitted that he was also "getting agitated, too. I wanted him to go." VRP 69.

Mr. Daniels then testified that Mr. McCallum pushed him on the shoulder. VRP 31. Mr. Daniels claimed he hit his head on the wood trim on the back of the couch. VRP 31. Mr. Daniels then stood up and pushed Mr. McCallum back into the entertainment center. VRP 31. Everything that was on top of the entertainment center came off the top shelf. VRP 72. Mr. Daniels saw his television go backwards and heard a big crash. VRP 83. He testified that Mr. McCallum then hit him, causing his nose to break, as well as breaking his glasses and causing broken lens to enter his eye. VRP 31. Mr. Daniels conceded that he never actually saw what hit him. VRP 85-86. Afterward, Mr. Daniels started bleeding. VRP 33. After his glasses flew off, he claimed he had a hard time seeing. VRP 33.

Mr. Daniels testified that Mr. McCallum went running out the door. VRP 34. Seconds afterward, Mr. Daniels heard a crash, saw the curtain go flying, and saw the window break. VRP 35. He found pieces of a ceramic owl inside and outside the house. VRP 35. The owl had previously been outside in a planter. VRP 35.

reduced from a DUI. VRP 192.

Mr. Daniels was in pain and had blood in his eye. VRP 37. He does not have a landline and could not find his cell phone. VRP 37. He walked up the hill and called 911 from a phone booth. VRP 37-38. He admitted that he could not tell the 911 operator the name of the person who had hit him, even though he had known Mr. McCallum for eight to ten years. VRP 87. A sheriff's deputy and an ambulance arrived a few minutes later. VRP 39. Mr. Daniels was taken to Providence Hospital, and then Harborview Hospital, where he received medical treatment. VRP 41. Since the incident, Mr. Daniels has had trouble seeing out of his right eye. VRP 43.

Deputy Art Wallin testified that he responded to an assault call involving Michael Daniels on October 10, 2009. VRP 119. Mr. Daniels had made the call from a bar on Highway 99. VRP 119. Deputy Wallin met Mr. Daniels near the bar. VRP 120. Mr. Daniels had watery, bloodshot eyes and was slurring his speech. VRP 121. Deputy Wallin could smell the odor of intoxicants coming from Mr. Daniels. VRP 121. He was bleeding from his nose and mouth. VRP 121. Deputy Wallin visited Mr. Daniels' trailer. VRP 123. He noted a broken window but did not take any pictures. VRP 123.

Detective Wells contacted Gary McCallum by phone on December 28, 2009 and asked him about the altercation. VRP 136. The detective

testified that Mr. McCallum said he was unaware of an altercation. VRP 137. Later that day, Mr. McCallum called back and said that he had been with Mr. Daniels and that Mr. Daniels had apparently felt insulted, and had struck Mr. McCallum in the lip. VRP 137-38. Mr. McCallum told Detective Wells that Mary McCallum, Tonya McCallum, and his coworker had all witnessed Mr. McCallum's injured lip. VRP 139.

The State also presented testimony from doctors who treated Mr. Daniels. *See* VRP 48-67; 88-109.

2. The Defense Rests Without Presenting Evidence

The defense did not call any witnesses. Mr. McCallum did not testify.

3. Jury Instructions

The State submitted a packet of seventeen proposed jury instructions and a verdict form. CP 27. The defense did not propose any jury instructions. VRP 142. Aside from the court inquiring whether the defense submitted any instructions and whether either party had any exceptions, there was no discussion regarding any of the jury instructions. *See* 142-42. The defense did not take exception to the instructions given by the court. VRP 142. The court gave the seventeen jury instructions that were requested by the State. *See* CP 27; 29.

The instructions did not contain WPIC 6.31 or a similar proposed instruction informing the jury that it was not permitted to draw an adverse inference from Mr. McCallum's failure to testify. *See* CP 27.

III. ARGUMENT

A. Grounds for Review

Under RAP 2.5(a)(3), a manifest error affecting a constitutional right can be raised for the first time on appeal. "If an instruction invades a constitutional right of an accused, appellate review is available even if the instruction was not excepted to at trial." *State v. East*, 3 Wn.App. 128, 131, 474 P.2d 582, 584 (1970) (considering the merits of defendant's objection to "no inference of guilt" instruction for the first time on appeal). The trial court's failure to properly instruct the jury on the defendant's constitutional right to remain silent is a constitutional issue that can be raised for the first time on appeal, even though trial counsel did not take exception to the trial court's failure to give such an instruction.

B. Constitutional Provisions and WPIC 6.31

The Fifth Amendment to the United States Constitution provides that no person "shall be compelled in any criminal case to be a witness against himself." Similarly, the Washington Constitution guarantees that "[n]o person shall be compelled in any criminal case to give evidence against himself." Wash. Const. art. I, § 9.

WPIC 6.31 is the Washington pattern jury instruction that articulates this universally accepted, bedrock constitutional right:

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 (3d Ed).

C. **U.S. Supreme Court Precedent Guarantees a Defendant's Right to Instructions Protecting His Fifth Amendment Rights**

In *Griffin v. California*, 380 U.S. 609, 85 S. Ct. 1229, 1233, 14 L. Ed. 2d 106 (1965), the Supreme Court held that “the Fifth Amendment, in its direct application to the Federal Government and in its bearing on the States by reason of the Fourteenth Amendment, forbids either comment by the prosecution on the accused's silence or instructions by the court that such silence is evidence of guilt.” *Id.* at 615. There, the Court reversed a conviction where the trial court had instructed the jury that it could consider the defendant’s failure to testify. *Id.*

In *Lakeside v. Oregon*, 435 U.S. 333, 98 S.Ct. 1091, 55 L.Ed. 2d 319 (1978), the Supreme Court upheld a trial court’s instruction that the jury was not permitted to draw an adverse inference from the defendant’s failure to testify, even where trial counsel had taken exception to the court’s giving of the instruction. The Court rejected the claim that

properly instructing the jury on the defendant's right to remain silent was somehow an impermissible "comment" that prejudiced the defendant:

a judge's instruction that the jury must draw *no* adverse inferences of any kind from the defendant's exercise of his privilege not to testify is "comment" of an entirely different order. Such an instruction cannot provide the pressure on a defendant found impermissible in *Griffin*. On the contrary, its very purpose is to remove from the jury's deliberations any influence of unspoken adverse inferences. **It would be strange indeed to conclude that this cautionary instruction violates the very constitutional provision it is intended to protect.**

Id. at 339 (emphasis supplied).

In *Lakeside*, the petitioner argued that the giving of the instruction drew unnecessary attention to the defendant's failure to testify, and that without the instruction, the defendant could "reasonably hope that the jury will not notice that he himself did not testify." *Id.* at 339-340. The court pointed out the ridiculousness of such a position:

The petitioner's argument would require indulgence in two very doubtful assumptions: First, that the jurors have not noticed that the defendant did not testify and will not, therefore, draw adverse inferences on their own; second, that the jurors will totally disregard the instruction, and affirmatively give weight to what they have been told not to consider at all. Federal constitutional law cannot rest on speculative assumptions so dubious as these.

Id. at 340.

Just three years later, in *Carter v. Kentucky*, 450 U.S. 288, 299-300, 101 S. Ct. 1112, 1118-19, 67 L. Ed. 2d 241 (1981), the United States

Supreme Court reversed a conviction where the trial court had refused a defendant's request to instruct the jury that it could not infer guilt from his failure to testify, explaining that "[t]he principles enunciated in our cases construing this privilege, against both statutory and constitutional backdrops, lead unmistakably to the conclusion that the Fifth Amendment requires that a criminal trial judge must give a 'no-adverse-inference' jury instruction when requested by a defendant to do so." *Id.* at 300.

In reflecting on the reasons behind the Fifth Amendment, the Court noted that

The inclusion of the privilege against compulsory self-incrimination in the Fifth Amendment '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.'

Id. at 299-300 (quoting *Murphy v. Waterfront Comm'n*, 378 U.S. 52, 55, 84 S.Ct. 1594, 12 L.Ed.2d 678 (1964)). The court explained that the "failure to limit the jurors' speculation on the meaning of [the defendant's] silence, when the defendant makes a timely request that a prophylactic

instruction be given, exacts an impermissible toll on the full and free exercise of the privilege.” *Carter*, 450 U.S. at 305.

Undersigned counsel have not located a case in which the United States Supreme Court considered whether the trial Court had an affirmative obligation – in the absence of a request by the defense – to instruct the jury that it must draw no inference from the defendant’s failure to testify.

D. Washington Authority Has Long Recognized the Importance of a “No Adverse Inference” Instruction

Washington courts have recognized the importance of a “no adverse inference” instruction. For example, in *State v. East*, 3 Wn.App. 128, 133, 474 P.2d 582 (1970), the trial court gave the instruction upon the State’s request. On appeal, East claimed that the instruction was a comment on his decision not to testify. *Id.* at 131. Although noting that the instruction should not be given absent a defendant’s request, this Court firmly held that there was not prejudicial error, noting the instruction “accurately express the constitutional protection afforded an accused.” *Id.* at 133.

In *State v. Dauenhauer*, 103 Wn.App. 373, 376-77, 12 P.3d 661 (2000), this Court again refused to find that the trial court’s “no adverse

inference” instruction somehow prejudiced the defendant. There, the appellant claimed

the court committed reversible error by sue sponte giving [WPIC 6.31], which stated he is not compelled to testify, and the fact he has not testified cannot be used to infer guilt or prejudice him in any way. Mr. Dauenhauer now asserts that he made a tactical decision not to request this instruction and the court improperly highlighted or commented on his silence by giving it anyway.

Id. at 375-76. This Court rejected the claim, stating, “[w]e disagree.” *Id.* at 376. “The instruction was a correct statement of the law properly reflecting the admonition ‘that a defendant must pay no court-imposed price for the exercise of his constitutional privilege not to testify.’” *Id.* at 376-77 (citing *State v. Barnes*, 54 Wn.App. 536, 542, 774 P.2d 547 (1989) (quoting *Carter*, *supra*).

In *State v. Goldstein*, 65 Wn.2d 901, 903, 400 P.2d 368, 369 (1965), the Washington Supreme Court upheld the trial court’s giving of an instruction similar to WPIC 6.31 where the trial court had given the instruction over the defense exception, explaining: “It is beyond argument that the instruction states the law as it springs from Art. 1, s 9 of the Washington constitution which provides: ‘No person shall be compelled in any criminal case to give evidence against himself * * *.’” *Goldstein*, 65

Wn.2d at 903 (although noting that the court is not required to give such an instruction).²

E. Washington Authority Has Not Analyzed the Failure to Give a “No Adverse Inference” Instruction as a Fifth Amendment Claim

Undersigned counsel have not located a published Washington appellate decision that has analyzed the failure to give an unrequested “no adverse inference instruction” as a violation of the defendant’s Fifth Amendment constitutional rights. Appellant is aware of cases such as *State v. King*, 24 Wn.App. 495, 601 P.2d 982 (1979), a direct appeal ineffective assistance of counsel claim, where this Court, in summarily rejecting King’s laundry list of ten claimed deficiencies, noted that trial counsel’s failure to propose WPIC 6.31 was not evidence of incompetent counsel. *Id.* at 500. However, the appellant in *King* was not arguing that the failure to give WPIC 6.31 was a violation of his Fifth Amendment privilege against self-incrimination, but rather his Sixth Amendment right to effective assistance of counsel. *See also State v. Jeffries*, 105 Wn.2d

² Notably, Washington used to have a statute that required the trial court to instruct the jury that no adverse inference shall be drawn from the defendant’s failure to testify. *See City of Seattle v. Hawley*, 13 Wn.2d 357, 358-59, 124 P.2d 961 (1942)(“[i]ndeed, under Rem.Rev.Stat. § 2148, it was mandatory that the jury be instructed that no inference of guilt should be drawn from a defendant's failure to take the witness stand”); *State v. Gustafson*, 87 Wash. 613, 616-17, 152 P. 335, 336-37 (1915)(“[t]he remaining assignment is the failure of the court to instruct the jury that no inference of guilt should arise against the accused on account of his failure or refusal to testify in his own behalf. This was error. Section 2148, Rem. & Bal. Code, provides that it shall be the duty of the court to so instruct”).

398, 423, 717 P.2d 722, 736 (1986)(rejecting in one sentence, without even discussing constitutional implications, defendant's claimed error for failure to give instruction regarding defendant's failure to testify, because defendant failed to request the instruction and claimed error was not preserved for appeal).

F. The Court Is Duty-Bound to Instruct on the Fundamental Constitutional Guarantees that are the Bedrock of the Rights Afforded Criminal Defendants

In *State v. McHenry*, 88 Wn.2d 211, 214, 558 P.2d 188, 190 (1977), the Washington Supreme Court reversed a conviction where the Court failed to instruct on the presumption of innocence and the proof beyond a reasonable doubt standard. The Court explained the gravity of the failure to instruct on basic constitutional safeguards:

The failure of the court to state clearly to the jury the definition of reasonable doubt and the concomitant necessity for the state to prove each element of the crime by that standard is far more than a simple procedural error, it is a grievous constitutional failure.

Id. at 214. The court explained that by failing to instruct on a

bedrock 'axiomatic and elementary' principle whose 'enforcement lies at the foundation of the administration of our criminal law.' . . . '**a person accused of a crime . . . would be at a severe disadvantage, a disadvantage amounting to a lack of fundamental fairness...**

Id. at 214 (emphasis supplied).

In *Lakeside, supra*, the U.S. Supreme Court put the privilege against self-incrimination on equal footing with these other bedrock constitutional rights in terms of the necessity of cautionary instructions: “The very purpose of a jury charge is to flag the jurors' attention to concepts that must not be misunderstood, such as reasonable doubt and burden of proof. To instruct them in the meaning of the privilege against compulsory self-incrimination is no different.” *Lakeside*, 435 U.S. at 340.

G. Claimed Tactical Justifications for Failing to Offer or Give a “No Adverse Inference” Instruction Cannot Be Squared with the Reality of the Jury System

The United States Supreme Court has articulated the dangers in permitting the jury to speculate on the defendant’s silence without appropriate instruction. In *Carter*, 450 U.S. at 302, the Court emphasized the importance of instructing the jury in the “basic constitutional principles that govern the administration of criminal justice,” noting

[s]uch 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

Carter, 450 U.S. at 302 (emphasis supplied).

The *Carter* Court 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 (internal citations omitted).

In *East*, this Court quoted Judge Henry Friendly of the Second Circuit in explaining:

It is far from clear that such an instruction is prejudicial to a defendant; the chances are rather that it is helpful. The jurors have observed the defendant's failure to take the stand; in the absence of instruction, nothing could be more natural than for them to draw an adverse inference from the lack of testimony by the very person who should know the facts best. And ‘despite the vast accumulation of psychological data, we have not yet attained that certitude about the human mind which would justify * * * a dogmatic assumption that jurors, if properly admonished, neither could nor would heed the instructions of the trial court that the failure of an accused to be a witness in his own cause ‘shall not create any presumption against him.

East, 3 Wn.App. at 133 (quoting *United States v. Garguilo*, 310 F.2d 249, 252 (2d Cir. 1962)).

Indeed, the U.S. Supreme Court has explicitly held that the importance of instructing the jury on the Fifth Amendment can override claimed defense “tactics” in failing to request such an instruction. *See, e.g., Carter*, 450 U.S. at 301 (“[t]he salutary purpose of the instruction, to remove from the jury's deliberations any influence of unspoken adverse inferences, was deemed so important [in *Lakeside*] it there outweighed the defendant's own preferred tactics”).

It is impossible to turn a blind eye to the defendant’s failure to testify. From the moment a jury panel identifies the defendant, his or her every move – appearance, mannerisms, facial expressions, and interactions with defense counsel, to name a few – are observed. If a defendant does not testify in his or her defense, every single juror will notice it, and it will be discussed in the jury room during deliberations. To believe that twelve common persons will somehow forget or ignore this failure is, quite frankly, naïve. *See Lakeside*, 435 U.S. at 339-40 (discarding as “doubtful,” “dubious,” and “speculative” petitioner’s claim that because the defendant called “several witnesses, the defendant [could] reasonably hope that the jury will not notice that he himself did not testify”). Such a view has been rejected by the United States Supreme Court and cannot be squared with the realities of the jury system and criminal trial practice.

Claiming that the jury should not be instructed on the Fifth Amendment privilege because it highlights the defendant's failure to testify is no different than saying the Court should not instruct the jury that "the State bears the burden of proof," because to do so would highlight the fact that the defendant offered no evidence to rebut the State's charge. Nor is it different from saying that the Court should not instruct the jury that the standard of proof is "proof beyond a reasonable doubt," because to do so would highlight the fact that any doubts justifying acquittal must be "*reasonable*."

"Jurors are not experts in legal principles; to function effectively, and justly, they must be accurately instructed in the law." *Carter*, 450 U.S. at 302. The Washington Supreme Court has "recognized that '[t]he jury is presumed to follow the instructions of the court.'" *State v. Yates*, 161 Wn.2d 714, 763, 168 P.3d 359 (2007)(citing *State v. Grisby*, 97 Wn.2d 493, 499, 647 P.2d 6 (1982)). *See also State v. Moe*, 56 Wn.2d 111, 115, 351 P.2d 120 (1960)("[t]here is a presumption that [the juror] will be faithful to his oath and follow the court's instructions"); *State v. Trickel*, 16 Wn.App. 18, 28, 553 P.2d 139 (1976)("[t]here is a general presumption that jurors carry out their duties honestly and in accordance with the instructions given them by the trial judge").

In *Carter*, the Court compared the “no-adverse inference” instruction to instructions on the presumption of innocence that the Supreme Court held were required in *Taylor v. Kentucky*, 436 U.S. 478, 98 S.Ct. 1930, 56 L.Ed.2d 468 (1978). The Court explained that the presumption of innocence instruction “has a ‘salutary effect upon lay jurors,’ and that ‘the ordinary citizen well may draw significant additional guidance’ from such an instruction.” *Carter*, 450 U.S. at 301 n. 19 (quoting *Taylor*, 436 U.S. at 484). The Court noted the “‘purging’ effect of the instruction and the need to protect ‘the accused’s right to be judged solely on the basis of proof adduced at trial.’” *Carter*, 450 U.S. at 301 n. 19 (quoting *Taylor*, 436 U.S. at 486). The *Carter* Court noted:

The same can be said, of course, with respect to the privilege of remaining silent. Indeed, 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)).

This Court should hold that the defendant’s Fifth Amendment privilege against self-incrimination is a bedrock constitutional right on which the trial court must instruct the jury.

H. The Trial Court Failed to Protect Mr. McCallum's Fifth Amendment Rights by Giving an Instruction Similar to WPIC 6.31

In this case, the defense theory advanced by trial counsel was denial, as articulated to the court during pretrial motions:

THE COURT: Ms. Lopez de Arriaga, what is the defense here? General denial?

MS. LOPEZ DE ARRIAGE: General denial. Your honor, our issue is actually all the allegations have to be proven here today.

VRP 7.

In closing argument, defense counsel rested her defense on the basic rights guaranteed a criminal defendant by the state and federal constitutions: the burden of proof and the proof beyond a reasonable doubt standard. *See* VRP 155-162. Counsel did not shy away from embracing the constitutional principles articulated in the jury instructions: “Why are we here? And the reason why we’re here is because of principle, the same principle that I told you about the Constitution, the founding rules and law of our government...” VRP 155. Defense counsel emphasized that the State bore the burden of proof, explaining, “[t]hat is required by the law, by the Constitution and the oath you all took.” VRP 162. She encouraged the jury to carefully review the jury instructions: “I mean debate, read the jury instructions, fight it out...” VRP 158.

The elephant in the room, of course, was Mr. McCallum's failure to testify, which was patently obvious to the jurors. Without WPIC 6.31 or a similar instruction advising the jury that it was not permitted to draw any adverse inference from his failure to testify, the jury was free to consider, discuss, and draw whatever negative inferences it so desired. In direct violation of the state and federal constitutions, the jury was entitled to accept Mr. McCallum's "privilege [not to testify] as a shelter for wrongdoers" and to "readily assume that those who invoke it are ... guilty" of the crime charged. *Carter*, 450 U.S. at 302. By failing to appropriately instruct the jury on one of Mr. McCallum's most fundamental rights, the trial court committed a "grievous constitutional failure" requiring reversal. *See McHenry*, 88 Wn.2d at 214.

V. CONCLUSION

The state and federal constitutions guarantee a criminal defendant certain fundamental, bedrock rights. One of the most fundamental rights is the privilege against self-incrimination. Mr. McCallum did not testify. Without an instruction informing the jury that it was not permitted to draw an adverse inference from his failure to testify, the jury was bound to do exactly that which the constitution prohibits.

Accordingly, this Court should hold that the trial court committed plain error when it failed to instruct the jury with an instruction similar to

WPIC 6.31. This Court should vacate Mr. McCallum's conviction and remand to the trial court for a new trial.

RESPECTFULLY SUBMITTED this 13th day of November, 2014.



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PROOF OF SERVICE

Sarah Conger swears the following is true under penalty of perjury under the laws of the State of Washington:

On the 13th day of November, 2014, I sent by United States Mail, postage prepaid one true copy of Appellant's Opening Brief directed to attorney for Respondent:

Snohomish County Prosecutor's Office
Appellate Division
Snohomish County Courthouse
3000 Rockefeller Avenue
Everett, WA 98201-4060

And mailed to Appellant:

Gary McCallum
[Address Intentionally Withheld]

DATED at Seattle, Washington this 13th day of November, 2014.


SARAH CONGER
Legal Assistant