

FILED
Feb 26, 2016
Court of Appeals
Division I
State of Washington

No. 73130-1-I

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION ONE

STATE OF WASHINGTON,

Respondent/Cross-Appellant,

v.

EVAN WILSON,

Appellant/Cross-Respondent.

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

APPELLANT'S REPLY BRIEF

MARLA L. ZINK
Attorney for Appellant

WASHINGTON APPELLATE PROJECT
1511 Third Avenue, Suite 701
Seattle, Washington 98101
(206) 587-2711

TABLE OF CONTENTS

A. ARGUMENT IN REPLY 1

1. The Court should decide the constitutional issue on its merits ... 1

**2. The court’s failure to give Evan Wilson’s requested instruction
 informing the jury that it could not infer guilt from his failure to
 testify violated his constitutional right to remain silent 3**

B. CONCLUSION 7

TABLE OF AUTHORITIES

Washington Supreme Court Decisions

City of Seattle v. Hawley, 13 Wn.2d 357, 124 P.2d 961 (1942)..... 3

State v. Gosby, 85 Wn.2d 758, 539 P.2d 680 (1975)..... 2

State v. Myers, 8 Wash. 177, 35 P. 580 (1894) 4

State v. O’Hara, 167 Wn.2d 91, 217 P.3d 756 (2009) 2

State v. Pavelich, 150 Wash. 411, 273 P. 182 (1928) 3, 4

Washington Court of Appeals Decisions

State v. McLoyd, 87 Wn. App. 66, 939 P.2d 1255 (1997)..... 1

United States Supreme Court Decisions

Bruton v. United States, 391 U.S. 123, 88 S. Ct. 1620,
20 L. Ed.2d 426 (1968)..... 6

Carter v. Kentucky, 450 U.S. 288, 101 S. Ct. 1112,
67 L. Ed. 2d 241 (1981)..... 3

Chapman v. California, 386 U.S. 18, 87 S. Ct. 824,
17 L. Ed. 2d 705 (1967)..... 5

Sullivan v. Louisiana, 508 U.S. 275, 113 S. Ct. 2078,
124 L. Ed. 2d 182 (1993)..... 5

Constitutional Provisions

Const. Art. I, § 9 5

U.S. Const. amend. V 2, 4, 5, 6

Rules

CrR 6.15.....	1
RAP 2.5.....	2, 3

A. ARGUMENT IN REPLY

Evan Wilson's state and federal constitutional right to remain silent was violated when the trial court refused his proposed instruction informing the jury not to draw any adverse inferences from his decision not to testify. The State's arguments in response are unavailing.

1. The Court should decide the constitutional issue on its merits.

In arguing review of the substantive issue is barred, the State's response conflates the process for (1) proposing and (2) objecting and excepting to instructions. *See State v. McLoyd*, 87 Wn. App. 66, 70, 939 P.2d 1255 (1997) (discussing distinction as applied to invited error doctrine). Counsel proposed an instruction commanding the jury not to make an adverse inference from Wilson's silence. CP 172; *see* CrR 6.15(a). The court reviewed the parties' proposed instructions and then prepared its own set. 1/28/15 9-11, 57-58. By presenting the court with the written instruction in a packet of proposed instructions, Wilson properly requested the instruction. *See* CrR 6.15(a); *McLoyd*, 87 Wn. App. at 70.

Because Wilson properly requested the no adverse inference instruction, the next question is whether this Court can review the error. The answer is "yes" on two alternative grounds. First, the trial court

was on sufficient notice that the instruction was requested when it was submitted in the defense's proposed instructions. CP 172; *State v. O'Hara*, 167 Wn.2d 91, 98, 217 P.3d 756 (2009) (purpose of preservation of error rule is so that trial court has opportunity to correct the error and avoid an appeal and consequent new trial). The trial court was aware of the requested instruction and had an opportunity to include it in the court's instructions. 1/28/15 9-11 (court has instructions provided by parties); 1/28/15 RP 57-58 (court had reviewed defense proposed instructions before assembling its instructions). The court failed to do so, but that failure does not create an additional preservation burden on Wilson. *See State v. Gosby*, 85 Wn.2d 758, 763, 539 P.2d 680 (1975). The issue is preserved and should be reviewed.

But even if the Court finds Wilson failed to adequately preserve the error, review is proper under RAP 2.5(a)(3), which allows this Court to review for the first time on appeal a "manifest error affecting a constitutional right." The issue here is plainly of constitutional magnitude: whether the trial court's failure to provide a proposed instruction that no adverse inference could be taken from Wilson's failure to testify violated his Article I, section 9 and Fifth Amendment

right to silence. See *City of Seattle v. Hawley*, 13 Wn.2d 357, 358-59, 124 P.2d 961 (1942). The failure to provide a no-adverse-inference instruction had practical and identifiable effects by “exact[ing] an impermissible toll on the full and free exercise of the privilege” against self-incrimination. *Carter v. Kentucky*, 450 U.S. 288, 305, 101 S. Ct. 1112, 67 L. Ed. 2d 241 (1981). The instruction must be given upon request “to minimize the danger that the jury will give evidentiary weight to a defendant’s failure to testify.” *Id.*; *accord* Op. Br. at 18-20 (arguing error was prejudicial). This manifest constitutional error is subject to review under RAP 2.5.

2. The court’s failure to give Evan Wilson’s requested instruction informing the jury that it could not infer guilt from his failure to testify violated his constitutional right to remain silent.

The law is clear that upon Wilson’s request, the trial court was obligated to provide the jury with an instruction delineating that it could not infer guilt from Wilson’s lack of testimony. Op. Br. at 7-13 (citing *Carter*, 450 U.S. 288 and *State v. Pavelich*, 150 Wash. 411, 415, 420, 273 P. 182 (1928) (*Pavelich I*) among other cases). As the State recognizes, “A criminal trial court has a constitutional obligation to give a no-adverse-inference instruction ‘upon proper request.’” Resp. Br. at 9 (quoting *Carter*, 450 U.S. at 300) (emphasis omitted).

The dispute between the parties here is, thus, only whether the error requires reversal. As set forth in Wilson’s opening brief, Washington has long considered this error to be structural. Op. Br. at 7-11. In *Pavelich I*, for example, our Supreme Court reversed where the defendant requested the instruction and the trial court declined to provide it. 150 Wash. at 414-20. “This court has no right to conclude that this omission of the court was not largely instrumental in the conviction of this defendant.” *Id.* at 416 (quoting *State v. Myers*, 8 Wash. 177, 184, 35 P. 580 (1894)). Because it is “a very natural thing for the jury to take into consideration the silence of the defendant when he was charged with this crime, and to use it most tellingly against him,” the failure to instruct the jury as requested is structural error. *Id.* at 416 (quoting *Myers*, 8 Wash. at 184).

The State does not dispute this authority. *See* Resp. Br. at 15-16. The State also does not rely on any cases from this State to argue structural error does not apply. Resp. Br. at 15-16. Accordingly, the State’s brief does not address the state constitutional issue. Our Supreme Court has already held Article I, section 9 requires reversal where a requested instruction is not given. *Pavelich I*, 150 Wash. at 412-13, 415-20. Thus federal cases interpreting the Fifth Amendment

are not authoritative on the scope of our state constitutional right. *Cf.* Op. Br. at 10 (discussing cases from other states where automatic reversal rule applied to error at issue here).

The Court need only reach the issue under the Fifth Amendment if it denies Wilson's claim under Article I, Section 9. With regard to the Fifth Amendment claim, Wilson disagrees with the State's reading of federal law. *See* Op. Br. at 13-16. As argued in the opening brief, the Fifth Amendment also demands automatic reversal when a requested no-adverse-inference instruction is denied. *Id.* Under either state or federal law, structural error inheres where a trial court fails to provide a requested, no-adverse-inference instruction.

However, even if not a structural error, the failure to provide the requested instruction requires reversal here because the error was not harmless beyond a reasonable doubt. *Chapman v. California*, 386 U.S. 18, 24, 87 S. Ct. 824, 17 L. Ed. 2d 705 (1967); Op. Br. at 17-20. It cannot be said that the verdict in Wilson's trial "was surely unattributable to the" trial court's failure to instruct the jury it could not use Wilson's silence to infer his guilt. *Sullivan v. Louisiana*, 508 U.S. 275, 279, 113 S. Ct. 2078, 124 L. Ed. 2d 182 (1993) (emphasis added).

The State argues the error is harmless because “the evidence of guilt was overwhelming.” Resp. Br. at 17. But the State ignores the disputed nature of its evidence.

The central issue in the case was the credibility of the State’s two witnesses. One of these witnesses, Rosenthal—the jury learned, received immunity in exchange for his testimony and had a strong motive to lie in order to receive delayed entry into the military. Ex. 14; 1/27/15 RP 40, 56-57. The other witness, Smith, was inherently suspect as Wilson’s co-defendant and also received a deal in exchange for his testimony. *Bruton v. United States*, 391 U.S. 123, 136, 88 S. Ct. 1620, 20 L. Ed.2d 426 (1968); 1/27/15 RP 105-06. Smith also admitted lying to the police and asserted his Fifth Amendment right not to testify against himself at one point during cross-examination. 1/27/15 RP 128-30. Both key witnesses’ testimony was called into doubt further because they claimed not to know each other but two defense witnesses testified they had been together with Smith and Rosenthal for hours. *Compare* 1/27/15 RP 27-28, 96, 110 *with* 1/28/15 RP 20-22, 34.

In light of the uncertainties in the State’s case, this Court cannot be convinced beyond a reasonable doubt that the jury verdict would

have been the same if the jury had been instructed that it could not use Wilson's decision not to testify against him in any way.

B. CONCLUSION

Because the trial court denied Wilson's instruction informing the jury not to draw any adverse inferences from his decision not to testify at trial, the convictions must be reversed and remanded for a constitutional trial under the state and federal constitutions.

Respectfully submitted this 26th day of February 2016.

s/Marla L. Zink
Marla L. Zink – WSBA # 39042
Washington Appellate Project
Attorneys for Appellant

**IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION I**

STATE OF WASHINGTON,)	
)	
Respondent,)	
)	NO. 73130-1-I
)	
EVAN WILSON,)	
)	
Appellant.)	

DECLARATION OF DOCUMENT FILING AND SERVICE

I, MARIA ARRANZA RILEY, STATE THAT ON THE 26TH DAY OF FEBRUARY, 2016, I CAUSED THE ORIGINAL **REPLY BRIEF OF APPELLANT** TO BE FILED IN THE **COURT OF APPEALS – DIVISION ONE** AND A TRUE COPY OF THE SAME TO BE SERVED ON THE FOLLOWING IN THE MANNER INDICATED BELOW:

- | | | |
|--|----------------------------|--|
| <p>[X] JANICE ALBERT, DPA
[jalbert@co.snohomish.wa.us]
SNOHOMISH COUNTY PROSECUTOR'S OFFICE
3000 ROCKEFELLER
EVERETT, WA 98201</p> | <p>()
()
(X)</p> | <p>U.S. MAIL
HAND DELIVERY
AGREED E-SERVICE
VIA COA PORTAL</p> |
| <p>[X] EVAN WILSON
380693
WASHINGTON STATE PENITENTIARY
1313 N 13TH AVE
WALLA WALLA, WA 99362</p> | <p>(X)
()
()</p> | <p>U.S. MAIL
HAND DELIVERY
_____</p> |

SIGNED IN SEATTLE, WASHINGTON, THIS 26TH DAY OF FEBRUARY, 2016.



X _____

Washington Appellate Project
701 Melbourne Tower
1511 Third Avenue
Seattle, Washington 98101
☎(206) 587-2711