Supreme Court No. 90825-7
Court of Appeals No. 30644-5-III

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

GARY DALE ENGELSTAD,

Petitioner.

PETITION FOR REVIEW

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A. IDENTITY OF MOVING PARTY AND DECISION BELOW

Petitioner Gary Dale Engelstad, the appellant below, asks this Court to accept review of the Court of Appeals opinion affirming his convictions, No. 30644-5-III, filed July 24, 2014. An order denying reconsideration was entered August 19, 2014. The opinion is attached as an Appendix. A copy of the appellate docket reflecting the date reconsideration was denied is attached as Appendix B.

B. ISSUES PRESENTED FOR REVIEW

1. Whether the failure to give a "no-adverse-inference" instruction – the only instruction that informs the jury of the accused's privilege against self-incrimination – is a structural error. RAP 13.4(b)(3); RAP 13.4(b)(4).

2. In the alternative, where the State's case was highly circumstantial and, absent a "no-adverse-inference" instruction, the jury was likely to speculate that Engelstad's silence at trial meant he was guilty and the State emphasized this inference in closing, counsel's failure to request a "no-adverse-inference" instruction was deficient performance that prejudiced Engelstad? RAP 13.4(b)(3); RAP 13.4(b)(4).

3. Whether the Court of Appeals decision rejecting Engelstad's contention that counsel's failure to request a "no-adverse-inference" instruction denied him his Sixth Amendment right to the effective

assistance of counsel, without evaluating the claim in light of the facts of the case, is contrary to the decisions of the United States Supreme Court and this Court. RAP 13.4(b)(1); RAP 13.4(b)(3); RAP 13.4(b)(4).

C. STATEMENT OF THE CASE

On March 17, 2011, Kittitas County law enforcement officers investigating a noise complaint in Liberty, off of Highway 97, encountered three men in the process of dismantling an old crane on a mining claim off the highway. RP 14, 40, 43.[1] The officers recognized two of the men as Joe Shouse and appellant Gary Engelstad; the third man was Paul Erickson. RP 23, 163.

The men were not behaving suspiciously or concealing what they were doing, and freely answered questions about their presence on the property. RP 33, 49-50. Shouse, who did most of the talking, explained to the officers that they were scrapping the crane for a friend, TJ Pecka, while Pecka was in prison. RP 23, 43-44. Shouse said that the claim belonged to Pecka, and they had Pecka's permission to be there and clean the camp area. RP 23. The officers checked the registrations on a couple of the motor homes on the claim. They were registered to Debra Armfield, who Shouse said was Pecka's mother. RP 24. The officers

[1] The verbatim report of proceedings, containing hearings on multiple dates, is contained in two consecutively-paginated volumes of transcripts. They are referenced herein as "RP" followed by page number.

found Shouse's explanation plausible and left without taking further action. RP 50.

Pecka did have an interest in the claim, as it originally had belonged to Pecka's grandfather, who left it for the benefit of all family members when he died. RP 100-01, 115, 239. The crane, however, belonged to Bruce Bradshaw, who acquired it from his former business partner, Richard Miller, in 2007. 1RP 124. Bradshaw owned the neighboring claim. RP 74, 108. The boundary lines between the two claims would have been difficult for a person unfamiliar with the property to determine, but the crane was situated just on the Bradshaw side of the claim boundary. RP 34, 59, 92.

When law enforcement officers returned to the property on April 29, 2011, a rusted fuel tank that had been on the claim was gone. Of the crane, only the shell of the cab remained. RP 34, 49. Bradshaw estimated the scrap value of the crane at $3500. RP 64. Based on these events, the Kittitas County prosecutor charged Shouse, Erickson, and Engelstad with theft in the second degree and malicious mischief in the second degree.[2] CP 1-2, 7-9.

[2] Engelstad was also charged with aggravating circumstances based upon unscored criminal history, but those are not at issue in this appeal. CP 8-9.

Shouse pleaded guilty. RP 227. Erickson entered a deal with the State wherein the charges would be dismissed in exchange for his testimony. RP 180. Engelstad proceeded to a jury trial.

At the trial, both Erickson and Shouse testified. Erickson said that Shouse hired him as a driver to pick up scrap from Pecka's claim. RP 163. Shouse gave him the impression that the crane at the claim belonged to Pecka or Pecka's grandfather. RP 174. Shouse told him he had "papers" for the crane's boom. RP 169. Erickson stated that he relied on what Shouse told him and so far as he knew Engelstad did as well. RP 188.

Shouse testified that Pecka had asked him to clean up the claim so that he would not have problems from his family. RP 211. Shouse also testified that Miller gave the crane to him before he died. RP 220.

Shouse stated that Engelstad was on the property only once, on March 17, 2011, when the police saw him there. RP 231. Shouse removed the bucket from the crane a month before that day and the bucket the day after. RP 218-19. Engelstad was present when the bucket and boom were removed. RP 231. Shouse said that Engelstad should not get in trouble because he "did nothing wrong." RP 233.

Bradshaw acknowledged that while Erickson and Pecka both knew him and knew that the crane belonged to him, Bradshaw was not

acquainted with Engelstad and had "no inkling" whether Engelstad would have known about Bradshaw's ownership of the crane. RP 130-32, 145.

Engelstad did not testify at trial. In his closing argument, the prosecutor referred to what Engelstad should have done, should have asked, or should have believed based upon the circumstances of the crane's removal. See RP 280, 290, 293 (arguing whether it was "reasonable" for Engelstad to believe that Shouse owned the crane); and RP 294 (arguing that Engelstad should have asked Shouse to prove he owned the crane). Even though hearings regarding jury instructions stretched over two days, no party requested WPIC 6.31,[3] which would have told the jury that Engelstad was not required to testify and that they could draw no adverse inference from the fact that he did not testify, and the court did not give the instruction. Engelstad was convicted as charged. CP 51, 66-81.

On appeal, Division Three held that the trial court did not have a duty to give the instruction *sua sponte*. And without conducting any analysis of the facts whatsoever, the Court held that defense counsel's

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[3] WPIC 6.31, titled "Defendant's Failure to Testify", states:

> 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.

failure to request the instruction did not deprive Engelstad of the effective assistance of counsel, and adhered to this position following a motion for reconsideration. As set forth below, this Court should grant review.

D. ARGUMENT

Both the federal and state constitutions guarantee an accused person the right not to incriminate himself. U.S. Const. amend. V; Const. art. I, § 9. The privilege against self-incrimination prohibits the State from using a defendant's silence against him at trial. Griffin v. California, 380 U.S. 609, 615, 85 S.Ct. 1229, 14 L.Ed.2d 106 (1965) ("the Fifth Amendment ... forbids either comment by the prosecution on the accused's silence or instructions by the court that such silence is evidence of guilt"); State v. Easter, 130 Wn.2d 228, 236, 922 P.2d 1285 (1996).

The privilege against self-incrimination

> "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."

Carter v. Kentucky, 450 U.S. 288, 299-300, 101 S.Ct. 1112, 67 L.Ed.2d 241 (1981) (quoting Murphy v. Waterfront Comm'n, 378 U.S. 52, 55, 84 S.Ct. 1594, 12 L.Ed.2d 678 (1964) (alterations in original)).

In Carter, the Supreme Court recognized that an accused person may not wish to testify for reasons unrelated to the crime, such as nervousness, the fear of impeachment by prior convictions, or the reluctance to incriminate others. Carter, 450 U.S. at 300. The Court emphasized that these concerns apply to the innocent and the guilty alike. Id. Thus, not only is it prohibited to encourage the jury to conclude that silence is indicative of guilt, the Fifth Amendment requires the jury be instructed that it may draw no adverse inference from the exercise of the right not to testify where such an instruction is requested. Id.

The "salutary purpose of the instruction, 'to remove from the jury's deliberations any influence of unspoken adverse inferences,'" is of such importance that it outweighs a 'tactical' decision by the accused or his counsel to object to the instruction's issuance. Id. at 301 (quoting Lakeside v. Oregon, 435 U.S. 333, 340, 98 S.Ct. 1091, 55 L.Ed.2d 319 (1978)). In Carter, the Court reaffirmed the rule enunciated in Lakeside, and stressed:

> We have repeatedly recognized that "instructing a jury in the basic constitutional principles that govern the administration of criminal justice," is often necessary. Jurors are not experts in legal

> principles; to function effectively, and justly, they must be accurately instructed in the law. Such 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 ...."

450 U.S. at 302 (internal citations omitted).

The Court therefore held that where such an instruction is requested, the court is obligated to give it. Id. at 302-03. "No judge can prevent jurors from speculating about why a defendant stands mute in the face of a criminal accusation, but a judge can, and must, if requested to do so, use the unique power of the jury instruction to reduce that speculation to a minimum." Id. at 303.

1. **This Court should grant review and hold that a no adverse inference instruction is required to protect the accused's due process right to a fair trial.**

The Supreme Court recognizes that the privilege against self-incrimination is as important a constitutional concept as the State's burden to prove guilt beyond a reasonable doubt and the presumption of innocence. Carter, 450 U.S. at 299-300. Thus, the failure to instruct on the privilege is not simply a technical error which does not affect substantial rights. Id. at 300 (citation omitted). Rather, the right to an instruction on the privilege reflects "the absolute constitutional guarantee against compulsory self-incrimination." Id.

The Court in Carter 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 (citations omitted).

In Carter, the Supreme Court noted that "it is arguable that a refusal to give an instruction similar to the one that was requested here can never be harmless." 450 U.S. at 304. The Court, however, expressly declined to reach the issue because it had not been presented to the Kentucky courts.[4]

The Court in Carter declared that a trial court must instruct a jury "in the basic constitutional principles that govern the administration of criminal justice." 450 U.S. at 302. The Court stressed,

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[4] The few federal appeals courts that have considered the issue have applied a constitutional harmless error standard. See United States v. Whitten, 610 F.3d 168, 200 (1st Cir. 2010); United States v. Soto, 519 F.3d 927, 930-31 (9th Cir. 2008); accord United States v. Padilla, 639 F.3d 892, 897-98 (9th Cir. 2011); United States v. Brand, 80 F.3d 560, 568 (1st Cir. 1996). These Courts reach this result by placing unwarranted emphasis on Carter's narrow holding that a "no-adverse-inference" instruction must be given *where it is requested.* See Soto, 519 F.3d at 930. This emphasis slights the constitutional guarantee that an accused person's silence shall not be penalized.

> Jurors are not experts in legal principles; to function effectively, and justly, they must be accurately instructed in the law. **Such instructions are perhaps nowhere more important than in the context of the Fifth Amendment privilege against compulsory self-incrimination**...

Id. (emphasis added).

The Court compared the "no-adverse-inference" instruction to jury instructions on the presumption of innocence, and noted that the "no-adverse-inference" instruction similarly has a "purging" effect and protects "the accused's constitutional right to be judged solely on the basis of proof adduced at trial." Carter, 450 U.S. at 302 n. 19 (quoting Taylor v. Kentucky, 436 U.S. 478, 486, 98 S.Ct. 1930, 56 L.Ed.2d 468 (1978)). And the Court went a step farther, noting that "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., dissenting)). This Court should grant review and hold that the failure to give a "no-adverse-inference" instruction is a structural error that warrants reversal of the conviction.

2. **In the alternative, the Court should review the Court of Appeals holding which applied an incorrect standard to Engelstad's ineffective assistance of counsel challenge to his lawyer's failure to request the instruction.**

Defense counsel inexplicably did not ask the court to instruct the jury that they could not draw an adverse inference from Engelstad's failure to testify, and Division Three, with minimal analysis, held that counsel's omission was not deficient performance. Slip Op. at 6. The Court erred by failing to consider counsel's omission in light of the facts of the case. Specifically, the Court presumed that in the ***abstract***, a reasonably prudent defense attorney might choose not to request a no-adverse-inference instruction without falling below standards of professional competence,[5] but failed to evaluate whether ***here***, such a decision would have been reasonable. It was not, and there is a reasonable probability that, but for counsel's unprofessional omission, the outcome would have been different. This Court should grant review.

There are few if any situations where an attorney's decision can invariably be written off as a matter of reasonable trial strategy, and so per se withstand a claim of ineffective assistance of counsel. Rather, ineffective assistance of counsel claims, even when raised on direct appeal, are considered under the facts of the given case. State v. Thomas,

[5] For purposes of this alternative argument, Engelstad assumes but does not concede that this proposition is true.

109 Wn.2d 222, 226, 743 P.2d 816 (1987) (requiring a showing that "counsel's representation fell below an objective standard of reasonableness **based on consideration of all of the circumstances**") (emphasis added); Strickland v. Washington, 466 U.S. 668, 689, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984) (standard of review requires court "to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time"). Following a proper application of this test, Washington courts have found ineffective assistance even where the record is silent as to the reasons for counsel's omissions. See e.g. Thomas, 109 Wn.2d at 228 (finding defense counsel's performance deficient because counsel did not request voluntary intoxication instruction) State v. Powell, 150 Wn. App. 139, 155, 206 P.3d 703 (2009) (finding defense counsel's performance was deficient where he did not request the jury be instructed on "reasonable belief" defense to rape in the second degree).

Division Three wholly failed to assess counsel's performance in light of the facts of the case. Indeed, the Court's opinion evinces little consideration for the facts. The Court's extremely terse factual recitation states only:

> The charges were filed after Mr. Engelstad and two others were caught dismantling a 1957 Federal Crane at the Big Foot mining claim; they did not own the crane or the

> mining claim. The men intended to recycle the crane as scrap. Mr. Engelstad alone proceeded to jury trial in the Kittitas County Superior Court after the co-defendants resolved their cases.
>
> Mr. Engelstad, who has an extensive felony criminal history, did not testify. His counsel did not seek, and the trial court did not give, an instruction telling the jury it should draw no adverse inference from Mr. Engelstad's decision not to testify.
>
> The jury convicted Mr. Engelstad as charged. After the court imposed a standard range sentence, he timely appealed to this court.

Slip Op. at 1-2.

The Court's discussion does not reference or acknowledge the fact that the State's case against the other two men who were prosecuted was far stronger than the State's case against Mr. Engelstad. See Br. App. at 4-5. In fact, Shouse, the principal in the case, testified that Engelstad "did nothing wrong," and Erickson, the other co-defendant, testified that he was unaware whether Engelstad knew or should have known that the crane belonged to Bradshaw. RP 188. Finally, although Bradshaw was personally acquainted with Erickson and Shouse and believed they knew he owned the crane, Bradshaw was not acquainted with Engelstad and had "no inkling" whether Engelstad would have known about Bradshaw's ownership of the crane. RP 130-32, 145.

Engelstad did not testify in his defense, and, as noted, the State emphasized what Engelstad should have known, should have said, and should have done to assure that Shouse had a right to dismantle the crane. Given this focus and the circumstantial nature of the evidence, a jury would surely believe that Engelstad's failure to testify in his defense meant that he knew Shouse's conduct was illegal, absent an instruction telling them such an inference is forbidden.

> 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 ... The layman's natural first suggestion would probably be that the resort to privilege in each instance is a clear confession of crime.

Carter, 450 U.S. at 301 n. 18.

Under the circumstances of the case, any reasonably prudent defense attorney would have been aware that the State's theory depended on convincing the jury that Engelstad should have known the crane belonged to Bradshaw. In such factual scenarios, it is critical that the jury be instructed not to draw an adverse inference from the defendant's exercise of his right to silence, particularly since juries are apt to remark upon and assume guilt from a defendant's silence.[6]

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[6] Engelstad believes the notion that juries will somehow draw an adverse inference from a no-adverse-inference instruction is nonsensical, and that the Court's decision on this point is contrary to Carter. "Juries are presumed to have followed the

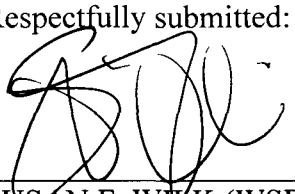
In sum, review is warranted of the appellate court's misapplication of the ineffective-assistance-of-counsel standard. This Court should grant review and conclude that no reasonable trial strategy could excuse counsel's failure to request a no-adverse-inference instruction.

E. CONCLUSION

Review is warranted of the important constitutional issue whether a no-adverse-inference instruction is required, and whether counsel's failure to request such an instruction under the facts of this case violated Mr. Engelstad's right to the effective assistance of counsel.

DATED this 19th day of September, 2014.

Respectfully submitted:



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trial court's instructions, absent evidence proving the contrary." State v. Kirkman, 159 Wn.2d 918, 928, 155 P.3d 925 (2007). A no-adverse-inference instruction not only tells the jury that they must not draw an adverse inference from the defendant's failure to testify, it also informs the jury that a defendant is not compelled to testify in his defense—something which a lay juror may not otherwise know. For this reason, Engelstad believes that to the extent a "per se" rule should be created, it should operate to create a presumption that the ***failure*** to request a no-adverse-inference instruction establishes deficient performance, not the contrary proposition. As argued *supra*, Engelstad believes such a rule is consistent with the doctrine enunciated in Carter and its progeny.

State v. Engelstad, Court of Appeals No. 30644-5-III

Appendix A

FILED

JULY 24, 2014

In the Office of the Clerk of Court
WA State Court of Appeals, Division III

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION THREE

STATE OF WASHINGTON,	)	No. 30644-5-III
	)	
Respondent,	)	
	)	
v.	)	
	)	
GARY ENGELSTAD, Jr.,	)	UNPUBLISHED OPINION
	)	
Appellant.	)	

KORSMO, J. — Gary Englestad, Jr., challenges his convictions for second degree theft and second degree malicious mischief, arguing that the court should have given a *Carter*[1] instruction although none was requested. We conclude that neither the trial judge nor defense counsel erred, and affirm the convictions.

FACTS

The charges were filed after Mr. Engelstad and two others were caught dismantling a 1957 Federal Crane at the Big Foot mining claim; they did not own the crane or the

[1] *Carter v. Kentucky*, 450 U.S. 288, 303, 101 S. Ct. 1112, 67 L. Ed. 2d 241 (1981).

mining claim.[2] The men intended to recycle the crane as scrap. Mr. Engelstad alone proceeded to jury trial in the Kittitas County Superior Court after the co-defendants resolved their cases.

Mr. Engelstad, who has an extensive felony criminal history, did not testify. His counsel did not seek, and the trial court did not give, an instruction telling the jury it should draw no adverse inference from Mr. Engelstad's decision not to testify.

The jury convicted Mr. Engelstad as charged. After the court imposed a standard range sentence, he timely appealed to this court.

ANALYSIS

This appeal presents two related questions concerning the lack of a *Carter* instruction – whether (1) the trial court was required to give the instruction *sua sponte*, and (2) defense counsel provided ineffective assistance of counsel by not seeking the instruction. We answer both questions "no."

Necessity for Instruction

In *Carter v. Kentucky*, 450 U.S. at 303, the United States Supreme Court held that, upon request, a jury must be instructed that it can draw no adverse inference from a defendant's failure to testify. Mr. Engelstad argues that *Carter* thus imposes a duty on

[2] The claim owner, Mr. Bradshaw, testified that he named the claim for the legendary Big Foot who was "still running around." Report of Proceedings at 116.

the trial court to give an instruction whenever a defendant does not testify. As noted previously, we disagree.

Many constitutional rights stand in tension with other constitutional rights. The right to counsel in criminal cases is in conflict with the right to self-representation. The Fifth Amendment privilege against self-incrimination is in contrast to the defendant's Sixth Amendment right to testify and to present witnesses. *E.g.*, *State v. Thomas*, 128 Wn.2d 553, 556-57, 910 P.2d 475 (1996). Many of these rights can be exercised only to the exclusion of another right. Because of this fact, trial courts tread carefully in inquiring about defense decisions at trial. A case on point is *State v. Russ*, 93 Wn. App. 241, 969 P.2d 106 (1998).

There the defendant did not testify, but argued on appeal that he had wanted to do so and that the trial court erred by not conducting a colloquy to assess his apparent waiver of the right to testify. *Id.* at 244. This court, analogizing to the treatment of several other constitutional rights, concluded that it was not appropriate for the trial court to engage in a colloquy with the defendant. *Id.* at 247. The *Thomas* court likewise recognized that it would be "ill-advised" to intrude upon the defense's trial strategy by inquiring about which rights were to be exercised. 128 Wn.2d at 560.

If it is "ill-advised" to *inquire* about the defendant's decision, we believe it also would be very ill-advised to *sua sponte* give an instruction calling the jury's attention to the defendant's decision not to testify. *Carter* only mandated use of the instruction when

requested by the defendant. It did not require the instruction in all cases.[3] It is better practice to always inquire of defense counsel, outside the presence of the jury, if the defense desires a *Carter* instruction. However, the trial court is not required to inquire and can rely upon the failure to submit such an instruction as an expression that the defense does not want the instruction to highlight the defendant's decision not to testify.

We conclude that the trial court had no duty to give a *Carter* instruction where one was not requested by the defense.

Effective Assistance of Counsel

Mr. Engelstad alternatively argues that his counsel failed to provide effective assistance when he did not request a *Carter* instruction. Like the decision whether or not to testify, this was a tactical choice rather than a failure of counsel.

Well settled standards govern the ineffective assistance of counsel claim. An attorney's failure to perform consistent with the standards of the profession will require a new trial when the client has been prejudiced by counsel's failure. *State v. McFarland*, 127 Wn.2d 322, 334-35, 899 P.2d 1251 (1995). In evaluating ineffectiveness claims, courts must be highly deferential to counsel's decisions. A strategic or tactical decision is not a basis for finding error. *Strickland v. Washington*, 466 U.S. 668, 689-91, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984). Under *Strickland*, courts evaluate counsel's performance

[3] This fact is one reason why we disagree with Mr. Engelstad's argument that the absence of a *Carter* instruction is structural error. We also note that the Ninth Circuit has rejected the argument. *United States v. Soto*, 519 F.3d 927 (9th Cir. 2008).

using a two-prong test that requires determination whether or not (1) counsel's performance failed to meet a standard of reasonableness and (2) actual prejudice resulted from counsel's failures. *Id.* at 690-92. When a claim can be disposed of on one ground, a reviewing court need not consider both *Strickland* prongs. *State v. Foster*, 140 Wn. App. 266, 273, 166 P.3d 726 (2007).

Both before and after *Carter*, divisions of this court have opined that the decision to seek a "no inference" instruction is a tactical one for defense counsel to make. *State v. Dauenhauer*, 103 Wn. App. 373, 376, 12 P.3d 661 (2000); *State v. King*, 24 Wn. App. 495, 500, 601 P.2d 982 (1979).[4] Mr. Engelstad contends that these decisions are merely dicta on the issue presented here. Whether that is true or not, the observations in *Dauenhauer* and *King* are consistent with the experiences of this court – although many defense counsel seek a *Carter* instruction when appropriate, not all do so, and many who decline such instructions do so for the tactical reason of not highlighting the defendant's decision to not testify. That approach may be appropriate in some cases such as when the defense is able to launch a strong attack on the prosecutor's case. There are many reasons why the defense might prefer to have the jury focus on the State and its burden of proof rather than being reminded that the defendant did not testify.

[4] At issue in *Dauenhauer* was the trial court's decision to *sua sponte* give a *Carter* instruction. This court rejected the defendant's argument that it was error to give the instruction without a defense request. 103 Wn. App. at 376-77. In *King* the court concluded counsel was not ineffective for failing to offer a pre-*Carter* "no inference" instruction. 24 Wn. App. at 500.

Accordingly, we conclude that the decision not to use a *Carter* instruction often is a tactical choice of counsel. In the absence of strong evidence to the contrary, the mere failure to request such an instruction is not a basis for finding counsel failed the first prong of the *Strickland* test. On the facts of this case, we conclude that there was no evidence that defense counsel failed to perform to the standards of the profession. The ineffective assistance argument thus necessarily fails without need to discuss the prejudice prong of *Strickland.*

Affirmed.

A majority of the panel has determined this opinion will not be printed in the Washington Appellate Reports, but it will be filed for public record pursuant to RCW 2.06.040.

Korsmo, J.

WE CONCUR:

Brown, A.C.J.

Lawrence-Berrey, J.

State v. Engelstad, Court of Appeals No. 30644-5-III

Appendix B

CASE EVENTS # 306445			
Date	**Item**	**Action**	**Participant**
09/18/2014	Petition for Review ***Comment:*** *or mandate*	Due	
08/19/2014	Order on Motions ***Comment:*** *Order Denying Motion for Reconsideration*	Filed	SIDDOWAY, LAUREL H.
08/19/2014	Letter	Sent by Court	
08/05/2014	Motion for Reconsideration **Service Date:** 2014-08-05 **Hearing Location:** None **Motion Status:** Decision filed ***Comment:*** *Motion to Reconsider circulated to Panel 10 on 8/11/14*	Filed	WILK, SUSAN F
07/24/2014	Decision Filed	Status Changed	
07/24/2014	Opinion **Pages:** 6 **Publishing Status:** Unpublished **Publishing Decision:** Affirmed **Opinion Type:** Majority **Opinion Number:** 2014-04383 **JUDGE:** Lawrence-Berrey Robert E. **ROLE: Concurring** **JUDGE:** Korsmo Kevin M. **ROLE: Authoring** **JUDGE:** Brown Stephen M. **ROLE: Concurring**	Filed	KORSMO, KEVIN M.
07/24/2014	Trial Court Action	Not Required	KORSMO, KEVIN M.
07/24/2014	Letter	Sent by Court	
06/25/2014	Appellant Additional Authorities **Service Date:** 2014-06-25 ***Comment:*** *circ'd to panel 6/26/14*	Filed	WILK, SUSAN F
03/19/2014	Heard and awaiting decision	Status Changed	
03/19/2014	Non-Oral Argument Hearing ***Comment:*** *11:00 AM* *Korsmo, Kevin M.* *Brown, Stephen M.* *Lawrence-Berrey, Robert E.*	Scheduled	

01/24/2014	Set on a calendar	Status Changed	
01/24/2014	Non-Oral Argument Setting Letter	Sent by Court	
01/02/2014	Screened	Status Changed	
11/14/2013	Letter	Sent by Court	
11/13/2013	Ruling on Motions ***Comment:*** *No action necessary given the ruling entered on the motion filed November 4, 2013.*	Filed	TOWNSLEY, RENEE S.
11/13/2013	Ruling on Motions ***Comment:*** *The Motion is granted to the date of receipt, November 6, 2013.*	Filed	TOWNSLEY, RENEE S.
11/06/2013	Appellants Reply brief **Service Date:** 2013-11-06	Filed	WILK, SUSAN F
11/04/2013	Motion to Extend Time to File **Service Date:** 2013-11-04 **Hearing Location:** None **Motion Status:** Decision filed ***Comment:*** *to 11/6*	Filed	WILK, SUSAN F
11/01/2013	Motion to Extend Time to File **Service Date:** 2013-11-01 **Hearing Location:** None **Motion Status:** Decision filed ***Comment:*** *to 11/4*	Filed	WILK, SUSAN F
10/30/2013	Payment for Sanction ***Comment:*** *Per clerk's ruling 7/11/13 Waive sanctions? See letter rec'd 7/29; see internal; ltr sent 10/17, now due 10/28 or add to mandate* *invoice No. 12095*	Filed	Smith, Jewel L.
10/17/2013	Letter of Sanctions ***Comment:*** *if not paid will be added to mandate*	Sent by Court	
10/15/2013	Ruling on Motions ***Comment:*** *The Motion is granted. The Appellant's Reply Brief is now due November 1, 2013.*	Filed	TOWNSLEY, RENEE S.
10/14/2013	Motion to Extend Time to File **Hearing Location:** None	Filed	WILK, SUSAN F

	Motion Status: Decision filed ***Comment:*** *asking to 11/1/13*		
09/25/2013	Supplemental Designation of Clerk's Papers **Service Date:** 2013-09-25 ***Comment:*** *filed w/county 9/16*	Filed	ZEMPEL, GREGORY LEE
09/17/2013	Supplemental Clerk's Papers **Pages:** 21	Filed	KITTITAS COUNTY SUPERIOR COURT
09/16/2013	Ready	Status Changed	
09/16/2013	Respondents brief **Service Date:** 2013-09-16 **Pages:** 21 ***Comment:*** *was due 1/18/13:per ext 1/11/13 now due 2/19/13:per ext 3/1/13 now due 21 days after supp vrp served--See ltr from Jewel Smith rec'd 7/29, rp not available; mot for ext 8/16, now due 9/16*	Filed	ZEMPEL, GREGORY LEE
08/16/2013	Ruling on Motions ***Comment:*** *Motion granted. The Respondent's Brief is now due September 16, 2013.*	Filed	TOWNSLEY, RENEE S.
08/16/2013	Letter	Sent by Court	
08/12/2013	Motion to Extend Time to File **Service Date:** 2013-08-12 **Hearing Location:** None **Motion Status:** Decision filed ***Comment:*** *>*	Filed	ZEMPEL, GREGORY LEE
07/29/2013	Letter ***Comment:*** *Copy of letter to Zempel--disks unavailable, unable to transcribe requested rp*	Received by Court	Smith, Jewel L.
07/26/2013	Supplemental Report of Proceedings ***Comment:*** *2/6/12* *was due 3/29/13:10 day sent 4/9/13 now due 4/19/13:per ext 6/5/13 now due 6/21/13; > Clerk's ruling, sanctions imposed, now due 7/26* *See ltr rec'd 7/29*	Information - not filed	Smith, Jewel L.
07/16/2013	Letter	Sent by Court	
07/11/2013	Other Ruling	Filed	TOWNSLEY, RENEE S.

	Comment: *Given the verbatim report of proceedings has not been filed, sanctions in the amount of $150.00 are hereby imposed.*		
06/06/2013	Letter	Sent by Court	
06/05/2013	Ruling on Motions ***Comment:*** *No action necessary given the Court's Ruling on March 1, 2013. The Respondent's brief will be due 21 days following service of the supplemental report of proceedings.*	Filed	TOWNSLEY, RENEE S.
06/05/2013	Ruling on Motions ***Comment:*** *Given the original due date was March 29, 2013 and only one date is requested, the Motion is granted in part. The Supplemental Verbatim Report of Proceedings is now due June 21, 2013. No further extensions will be granted.*	Filed	TOWNSLEY, RENEE S.
05/30/2013	Motion to Extend Time to File **Service Date:** 2013-05-30 **Motion Status:** Decision filed	Filed	ZEMPEL, GREGORY LEE
05/30/2013	Motion to Extend Time to File **Service Date:** 2013-05-30 **Motion Status:** Decision filed	Filed	ZEMPEL, GREGORY LEE
05/29/2013	Telephone Call ***Comment:*** *to prosecutor re extension.*	Sent by Court	
04/25/2013	Letter ***Comment:*** *Unable to file VRP on time. Request to counsel to file extension request.*	Filed	Smith, Jewel L.
04/09/2013	Letter	Sent by Court	
03/01/2013	Ruling on Motions ***Comment:*** *The motion for Order Extending Time for Filing Response Brief is granted in part. The Respondent's brief is now due 21 days following service of the supplemental report of proceedings.*	Filed	TOWNSLEY, RENEE S.
03/01/2013	Letter	Sent by Court	
02/27/2013	Supplemental Statement of Arrangements **Service Date:** 2013-02-27 ***Comment:*** *Smith (2/6/12)*	Filed	ZEMPEL, GREGORY LEE

02/20/2013	Affidavit of Service ***Comment:*** *to correct service date*	Filed	ZEMPEL, GREGORY LEE
02/20/2013	Telephone Call ***Comment:*** *requesting corrected service.*	Sent by Court	
02/19/2013	Motion to Extend Time to File **Service Date:** 2013-02-14 **Motion Status:** Decision filed	Filed	ZEMPEL, GREGORY LEE
01/11/2013	Ruling on Motions ***Comment:*** *The Motion is granted. The Appellant's Brief is now due February 19, 2013, the next judicial day following February 18, 2013.*	Filed	TOWNSLEY, RENEE S.
01/11/2013	Letter	Sent by Court	
01/09/2013	Motion to Extend Time to File **Service Date:** 2013-01-09 **Motion Status:** Decision filed	Filed	ZEMPEL, GREGORY LEE
12/31/2012	Statement of Additional Grounds for Review	Not filed	Engelstad, Gary Dale Jr.
11/30/2012	Clerk's Notice to Crim App Re Statement	Sent by Court	
11/27/2012	Affidavit of Service ***Comment:*** *to provide complete address on appellant: When rec'd send SAG ltr*	Filed	WILK, SUSAN F
11/27/2012	E-mail ***Comment:*** *requesting corrected service*	Sent by Court	
11/19/2012	Appellants brief **Service Date:** 2012-11-19 **Pages:** 26 ***Comment:*** *ELF*	Filed	COLLINS, NANCY P
10/23/2012	E-mail ***Comment:*** *Sanctions taken off invoice.*	Received by Court	
10/16/2012	Report of Proceedings **Pages:** 334 **Volumes:** 2 ***Comment:*** *2/3/12, 2/7/12, 2/8/12, 2/9/12 and 2/14/12*	Received by Court	KITTITAS COUNTY SUPERIOR COURT

10/16/2012	ASCII Disk	Received by Court	KITTITAS COUNTY SUPERIOR COURT
10/05/2012	Payment for Sanction ***Comment:*** *Imposed 7/20/12:was due 8/23/12: 10 day sent w/extension letter dated 9/25/12 now due 10/5/12:per email 10/23 will be taken from the case/invoice*	Information - not filed	Smith, Jewel L.
10/04/2012	Filing of VRP by Crt Reporter **Service Date:** 2012-10-03	Filed	Smith, Jewel L.
10/03/2012	Record Ready	Status Changed	
10/03/2012	Report of Proceedings ***Comment:*** *2/3/12, 2/7/12, 2/8/12, 2/9/12 and 2/14/12 was due 5/22/12: 10 day sent 6/1/12 now due 6/11/12:Ruling imposing $150.00 filed 7/20/12: now due 8/3/12:Per ext 8/6/12 now due 8/17/12:per ext 9/24/12 now due 9/28/12. No further extensions will be granted.*	Filed	Smith, Jewel L.
09/25/2012	Letter	Sent by Court	
09/24/2012	Ruling on Motions ***Comment:*** *Motion granted. The Verbatim Report of Proceedings is now due September 28, 2012. No further extensions will be granted given the original due date for the report of proceedings was May 22, 2012.*	Filed	TOWNSLEY, RENEE S.
09/21/2012	Motion to Extend Time to File **Service Date:** 2012-09-21 **Motion Status:** Decision filed	Filed	COLLINS, NANCY P
08/30/2012	Letter ***Comment:*** *Requesting a Second Extension*	Filed	Smith, Jewel L.
08/06/2012	Ruling on Motions ***Comment:*** *Motion granted. The Verbatim Report of Proceedings is now due August 17, 2012.*	Filed	TOWNSLEY, RENEE S.
08/06/2012	Letter	Sent by Court	
08/02/2012	Letter ***Comment:*** *Copy of letter to counsel requesting an extension.*	Filed	Smith, Jewel L.

08/02/2012	Motion to Extend Time to File **Service Date:** 2012-08-02 **Motion Status:** Decision filed	Filed	COLLINS, NANCY P
07/24/2012	Letter	Sent by Court	
07/20/2012	Other Ruling ***Comment:*** *Given the verbatim report of proceedings has not been filed, sanctions in the amount of $150.00 are hereby imposed as indicated in the Courts June 1, 2012 overdue letter.*	Filed	TOWNSLEY, RENEE S.
06/01/2012	Letter ***Comment:*** *10*	Sent by Court	
05/07/2012	Supplemental Clerk's Papers **Pages:** 2 ***Comment:*** *ELF*	Filed	KITTITAS COUNTY SUPERIOR COURT
05/07/2012	Clerk's Papers **Pages:** 81 ***Comment:*** *ELF*	Filed	KITTITAS COUNTY SUPERIOR COURT
03/23/2012	Notice of Appearance **Service Date:** 2012-03-23	Filed	COLLINS, NANCY P
03/23/2012	Supplemental Designation of Clerk's Papers **Service Date:** 2012-04-23	Filed	COLLINS, NANCY P
03/23/2012	Statement of Arrangements **Service Date:** 2012-04-23 ***Comment:*** *Smith (2/3/12, 2/7/12, 2/8/12, 2/9/12 and 2/14/12)*	Filed	DONNAN, DAVID L.
03/23/2012	Designation of Clerks Papers **Service Date:** 2012-03-23	Filed	COLLINS, NANCY P
02/23/2012	Perfection Letter	Sent by Court	TOWNSLEY, RENEE S.
02/23/2012	Indigent Defense Counsel Assigned ***Comment:*** *Appoints David Donnan*	Filed	
02/15/2012	Case Received and Pending	Status Changed	
02/15/2012	Judgment & Sentence ***Comment:*** *2nd Degree Theft; 2nd Degree Malicious Mischief*	Filed	

02/15/2012	Order of Indigency in Superior Court ***Comment:*** *Allows for counsel and costs* *No restriction on RP*	Filed	
02/14/2012	Notice of Appeal **Service Date:** 2012-02-14	Filed	

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION III

STATE OF WASHINGTON,	)	
	)	
RESPONDENT,	)	
	)	
v.	)	NO. 30644-5-III
	)	
GARY ENGELSTAD, JR.,	)	
	)	
APPELLANT.	)	

DECLARATION OF DOCUMENT FILING AND SERVICE

I, NINA ARRANZA RILEY, STATE THAT ON THE 19TH DAY OF SEPTEMBER, 2014, I CAUSED THE ORIGINAL **PETITION FOR REVIEW** 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, PA KITTITAS COUNTY PROSECUTOR'S OFFICE 205 W 5TH AVE STE 213 ELLENSBURG, WA 98926	(X) ( ) ( )	U.S. MAIL HAND DELIVERY _____
[X]	GARY ENGELSTAD, JR. 788871 WASHINGTON STATE PENITENTIARY 1313 N 13TH AVE WALLA WALLA, WA 99362	(X) ( ) ( )	U.S. MAIL HAND DELIVERY _____

SIGNED IN SEATTLE, WASHINGTON THIS 19TH DAY OF SEPTEMBER, 2014.

X _____

Washington Appellate Project
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