

71654-9

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NO. 71654-9

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

STATE OF WASHINGTON

Respondent

v.

GARY T. McCALLUM,

Appellant

BRIEF OF RESPONDENT

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I. ISSUES

The defendant neither proposed an instruction that the jury was to draw no adverse inference from his failure to testify nor did he object when the court did not give that instruction.

1. Has the defendant failed to preserve for review the question of whether the trial court was obligated to give that instruction?

2. Did the trial court err when it did not give that instruction in the absence of a request to do so?

II. STATEMENT OF THE CASE

On October 9-10, 2009 Michael Daniels lived at a trailer park on Highway 99 in Everett with his wife Loni Daniels. Ms. Daniels had two daughters, Mary McCallum and Danielle. Mary McCallum was married to the defendant, Gary McCallum. Ms. Daniels had given Mary up for adoption as an infant, but she had continued to have contact with Mary off and on. Mary and Ms. Daniels did not always get along. As of October 9-10, 2009 Ms. Daniels had not seen Mary for about 12 to 18 months due to a rift that had developed between the two women. RP 22, 25-27, 110-113, 115.

On October 9, 2009 Mr. Daniels spent the evening at a local tavern while Ms. Daniels spent the night at her daughter Danielle's

home. Mr. Daniels came home around 10:00 p.m. Around 2:00 a.m. on October 10 Mr. Daniels was watching television when Mary McCallum, the defendant, and the defendant's sister Tonya McCallum dropped by the Daniels' residence. Mr. Daniels thought that they were all intoxicated. RP 24-25, 27-28, 115.

Mary wanted to see her mother. Mr. Daniels explained that Ms. Daniels was not at home. Shortly thereafter Mary and Tonya left the trailer. The defendant stayed behind and talked to Mr. Daniels about Mary's desire to reconcile with her mother. When Mr. Daniels told the defendant that he could not help Mary with that the defendant became agitated. Mr. Daniels tried to get the defendant to leave, but he refused to do so. RP 28-331.

Mr. Daniels and the defendant had been seated on the sofa. The defendant got up and pushed Mr. Daniels back so that his head struck a wooden rail on the back of the sofa. Mr. Daniels responded by getting up and pushing the defendant back. The defendant fell back into an entertainment center, knocking a television and DVD player back into the kitchen. The defendant then lunged at Mr. Daniels and hit him in the nose. Mr. Daniels suffered a broken nose and an eye injury as result of the assault.

Mr. Daniels vision in his right eye was permanently affected as a result of his injury. RP 30-34, 41-43, 49-55, 60, 95-100.

The defendant fled the trailer after hitting Mr. Daniels. Within seconds after the defendant left the trailer a ceramic owl that had been on the trailer's porch flew through a window, breaking it. The cost to repair the window was estimated at between \$600 and \$1,100. Mr. Daniels' eyes were bloody and he was unable to locate his cell phone in the trailer. Mr. Daniels then went to a phone booth near his home to call the police. RP 35-37.

When Deputy Wallin arrived on scene he observed that Mr. Daniels was upset and that his nose and mouth were bleeding and his lip was swollen. Mr. Daniels identified the defendant as the person who assaulted him. He asked the deputy to go to his home to locate the cell phone. When the deputy arrived he noticed that the window was broken and there was blood on the floor. RP 119-123.

Detective Wells contacted the defendant by phone on December 28, 2009. Initially the defendant denied that he had been in an altercation with Mr. Daniels. Later the defendant called the detective back. The defendant admitted that he had been at the victim's home with Mary and Tonya. The defendant said after

Mary and Tonya left Mr. Daniels and the defendant continued to talk. According to the defendant Mr. Daniels was insulted by something the defendant said so Mr. Daniels struck the defendant. The defendant said he then left without hitting Mr. Daniels. RP 135-138.

The defendant was tried on a second amended information charging him with one count of second degree assault and one count of third degree malicious mischief. 1 CP 48-49. After the State's presentation of the evidence the defense rested without presenting any witnesses. The defense did not propose any jury instructions. Nor did the defense object when the court did not include an instruction consistent with WPIC 6.31 informing jurors that the defendant is not required to testify, and that jurors should not infer that guilt or prejudice the defendant from his failure to testify. 1 CP 22-42; RP 144. The jury returned a verdict of guilty on the assault count and not guilty on the malicious mischief count. 1 CP 20-21.

III. ARGUMENT

The defendant argues that the trial court erred when it did not sua sponte include a limiting instruction regarding the defendant's decision not to testify. He urges the court to find that

such an instruction was required as part of his “bedrock constitutional right” against self-incrimination, in spite of his failure to propose that instruction or object when the court did not include it in its instructions to the jury. The court should reject this argument because the issue has not been preserved for review. Even if this court does review the issue, the trial court committed no error when it did not sua sponte give the limiting instruction.

A. NOT GIVING A CARTER INSTRUCTION IS NOT A STRUCTURAL ERROR. THE DEFENDANT HAS NOT SHOWN THAT A LACK OF THAT INSTRUCTION IS A MANIFEST CONSTITUTIONAL ERROR.

Neither the trial court nor the prosecutor may comment on the defendant’s silence when a defendant elects not to testify at trial. Griffin v. California, 380 U.S. 609, 613, 85 S.Ct. 1229, 14 L.Ed.2d 106 (1965). To do so implicates defendant’s Fifth Amendment right to remain silent. Id. A criminal trial court must give an instruction that the jury must draw no adverse inference from the defendant’s failure to testify “when requested by a defendant to do so.” Carter v. Kentucky, 450 U.S. 288, 300, 101 S.Ct. 1112, 67 L.Ed.2d 241 (1981). Neither the United States Supreme Court nor any court in Washington has held that a trial

court has an obligation to give that instruction in the absence of a request to do so.

Normally a party must lodge an objection in order to preserve an issue for review. State v. Kirkman, 159 Wn.2d 918, 926, 155 P.3d 125 (2007). This issue preservation rule is designed to encourage the efficient use of judicial resources by ensuring that the trial court has the opportunity to correct any errors, and thereby avoid an unnecessary appeal. State v. Hamilton, 179 Wn. App. 870, 878, 320 P.3d 142 (2014). An issue may be reviewed in the absence of a contemporaneous objection if it involves a manifest error affecting a constitutional right. RAP 2.5(a)(3). However, it is not necessary to demonstrate manifest constitutional error when the issue involves a structural error. State v. Paumier, 176 Wn.2d 29, 36, 288 P.3d 1126 (2012).

Undersigned counsel has not found any published Washington or federal cases that have addressed whether the failure to give a Carter instruction in the absence of a request to do so is a structural error. As discussed below early Washington cases have indicated that the Washington constitution does not require a “no adverse inference instruction” in the absence of a request to do so. BOR 12-13. Several federal courts have held that failure to

give a Carter instruction after it had been requested by the defendant is not a structural error that affected the entire conduct of the trial from beginning to end. United States v. Brand, 80 F.3d 560, 568 (1st Cir. 1996), cert. denied, 519 U.S. 1077 (1997), United States v. Soto, 519 F.3d 927, 930 (9th Cir. 2008). In Soto the court reasoned that the error was not like structural errors such as a complete denial of a defendant's right to counsel or public trial Id. Rather the error was more like failing to instruct on all of the elements the crime, an error that was subject to a harmless error analysis. Id.

Other courts, while not directly addressing whether the error was structural, have found it is appropriate to analyze the failure to give a requested Carter instruction for harmless error. Hunter v. Clark, 934 F.2d 856 (7th Cir. 1991), cert denied, 502 U.S. 945 (1991), Richardson v. Lucas, 741 F.2d 753 (5th Cir. 1984), Finney v. Rothgerber, 751 F.2d 858 (6th Cir. 1985), cert denied, 471 U.S. 1020 (1985). Both courts in Hunter and Richardson reasoned that failing to give the instruction was a far less egregious error than a prosecutor commenting on a defendant not testifying at trial. Hunter, 934 F.2d at 859, Richardson, 741 F.2d at 755. Since the latter error had been subject to harmless error analysis in Chapman

v. California, 386 U.S. 18, 87 S.Ct. 824, 17 L.Ed.2d 705 (1967), any error arising from failing to instruct the jury it should draw no adverse inference from the defendant's failure to testify should likewise be analyzed for harmless error. Hunter, 934 F.2d at 934-935, Richardson, 741 F.2d 754-755.

These authorities provide sound reason for this court to likewise find that a failure to give a Carter instruction such as WPIC 6.31 is not a structural error. If failing to give the instruction after it has been requested is not a structural error, then it is certainly not a structural error under the circumstances presented here, where no such instruction was requested and no objection was lodged when the court did not include that instruction in its instruction to the jury.

Instead RAP 2.5 should determine whether the issue has been preserved for review. Pursuant to that rule the defendant's failure to object when the court did not give the instruction waives the issue unless the defendant demonstrates that the issue involves an error that (1) is manifest, and (2) is truly of constitutional dimension. State v. O'Hara, 167 Wn.2d 91, 98, 217 P.3d 756 (2009). Manifest means the defendant must show actual prejudice. Id. at 99. Actual prejudice is demonstrated when the defendant makes a plausible showing that the asserted error had a

practical and identifiable consequence in the trial of the case. Kirkman, 159 Wn.2d at 935. The focus on whether actual prejudice exists is whether the alleged error is so obvious on the record that the error warrants appellate review. O'Hara, 167 Wn.2d at 99-100. "If the facts necessary to adjudicate the claimed error are not in the record on appeal, no actual prejudice is shown and the error is not manifest." State v. McFarland, 127 Wn.2d 322, 333, 899 P.2d 1251 (1995). Only if the court determines that a manifest constitutional error occurred will it then undertake a harmless error analysis. State v. Lynn, 67 Wn. App. 339, 345, 835 P.2d 251 (1992).

The defendant does not attempt to demonstrate the asserted error was manifest. Instead he relies on State v. East, 3 Wn. App. 128, 474 P.2d 582, review denied, 78 Wn.2d 995 (1970). In East this Court considered whether it was error to give a "no adverse inference" instruction even in the absence of a contemporaneous objection at the trial level reasoning that the issue involved the invasion of the constitutional right of an accused. Id. at 131. Courts have not consistently reviewed an assignment of error related to jury instructions. East relied on State v. Peterson, 73 Wn.2d 303, 306, 438 P.2d 183 (1968). Peterson, in turn relied in part on State v. Louie, 68 Wn.2d 304, 413 P.2d 7 (1966). Louie refused to

consider an alleged error in the “to convict” instruction. Id. at 310. The Court stated that it has “with almost monotonous continuity” refused to consider an assignment error in giving or not giving a jury instruction absent an objection at trial or a showing of “obvious and manifest injustice.” Id. at 312.

Further the rule in East has been superseded by court rule. After East was decided the Supreme Court adopted of the Rules of Appellate Procedure¹. Thus, pursuant to RAP 2.5 the defendant may not assign error to the court’s failure to give a Carter instruction unless he demonstrates that a manifest constitutional error has occurred. No manifest error occurred in this case.

The purpose of the instruction is to purge from jurors who are not trained in the law any instinct to draw a negative inference from the defendant’s exercise of his right to not testify. Carter, 450 U.S. at 301. The most significant evidence that jurors did not draw a negative inference from the defendant’s decision not to testify comes from the verdicts the jury returned. While the jury convicted on count I it acquitted the defendant on count II. If the jury had drawn a negative inference from the defendant’s exercise of his

¹ The Rules of Appellate Procedure were adopted in 1976.

right to remain silent it is more likely that it would have drawn that inference as to both counts and convicted on both counts.

The courts instructions to the jury also support the conclusion that no manifest error occurred. The court instructed the jury that "The evidence that you are to consider during your deliberations consists of the testimony that you have heard from witnesses and the exhibits that I have admitted during the trial. If evidence was not admitted or was stricken from the record, then you are not to consider it reaching your verdict." 1 CP 23. When the defense rested without presenting any evidence the jury was aware that the defendant had not testified. The defendant not testifying was not evidence that had been admitted. The jury was therefore instructed to not consider the fact that the defendant had not testified in its deliberations. Jurors are presumed to follow the court's instructions. State v. Emery, 174 Wn.2d 741, 766, 278 P.3d 653 (2012).

The court also instructed the jury that "the state is the plaintiff and has the burden of proving each element of each crime beyond a reasonable doubt. The defendant has no burden of proving that a reasonable doubt exists." 1 CP 27. Defense counsel relied on this instruction to argue repeatedly that the defense bore

no burden of proof, and it was the State's burden to prove each element beyond a reasonable doubt. RP 157, 158, 160, 162. If the defendant has no burden of proof he has no burden to take the stand and testify on his own behalf. This instruction, taken to its logical conclusion, instructed jurors not to consider the fact the defendant did not testify on his own behalf.

To the extent that the defendant does address the impact the absence of a Carter instruction had on the jury he relies on speculation. He argues that in the absence of an instruction a jury "may well draw adverse inferences from a defendant's silence." BOA at 17, quoting Carter, 450 U.S. at 301. The defendant argues that it is unrealistic to believe that a jury would not notice a defendant's failure to testify. This kind of speculation does not demonstrate a manifest error occurred.

Noticing the defendant did not testify and drawing an adverse inference from that fact are two different things. One can notice that a defendant did not testify and not draw an adverse inference from it, as jurors are expected to do when given a Carter instruction. It does not automatically follow that jurors having noticed the defendant did not testify would infer that the defendant must be guilty from that fact in the absence of such instruction. As

discussed above the jury's split verdicts provide strong evidence that the jury did not employ that impermissible inference. The defendant's speculation that such inference was drawn fails to account for this evidence. His speculation does not meet his burden to show actual prejudice from the record. McFarland, 127 Wn.2d at 334.

B. THE COURT WAS NOT REQUIRED TO SUA SPONTE GIVE A NO ADVERSE INFERENCE INSTRUCTION WHEN THE DEFENDANT DID NOT ASK FOR IT.

Although the court will generally not review an issue that has not been preserved for review the rule is discretionary. In limited circumstances the court has accepted for review an issue even though it has been waived, and the issue does not involve a manifest constitutional error. State v. Russell, 171 Wn.2d 118, 122, 249 P.3d 604 (2011). Should this court choose to exercise its discretion and review the issue it should find that the trial court did not err when it did not give a "no adverse inference" instruction despite the defendant's failure to propose such an instruction or object when that instruction was not given.

In an early case the Washington State Supreme Court held that a court was required to give a no adverse inference instruction when a defendant requested it. State v. Pavelich, 150 Wash. 411,

420, 273 P. 182 (1928). The holding rested on the State constitutional protection against self-incrimination. Id. The next year the Supreme Court relied on Pavelich to hold that such an instruction was not required unless it had been requested. State v. Zupan, 155 Wash. 80, 283 P. 671 (1929). By relying on Pavelich the court signaled that there was no constitutional requirement to give that instruction in the absence of a request to do so.

When the court gave the no adverse inference instruction over the defendant's objection the court found no error in State v. Goldstein, 65 Wn.2d 901, 903, 400 P.2d 368, cert denied, 382 U.S. 895 (1965). The court reaffirmed that there was no affirmative duty to give that instruction in the absence of a request. Id.

Like the defendant here the defendant in Jeffries assigned error to the trial court's failure to instruct the jury that the jury must not consider the fact that the defendant did not testify in the penalty phase of his trial. State v. Jeffries, 105 Wn.2d 398, 423, 717 P.2d 722, cert denied, 479 U.S. 922 (1986). The defendant had not

requested that instruction at the trial level. The court held “absent a request, there was no error in not giving such instruction.” Id.²

In addition courts have treated the decision whether to request that instruction as tactical. State v. King, 24 Wn. App. 495, 500, 601 P.2d 982 (1979), State v. Dauenhauer, 103 Wn. App. 373, 376, 12 P.3d 661 (2000), review denied, 143 Wn.2d 1011 (2001). “Some defendants forego the instruction on the theory it highlights the defendants’ silence and enables the prosecutor to point out he did not testify by using the court’s own words.” Id. This Court agreed with decisions which expressed the opinion that the instruction should not be given unless requested, although it was not error to give the instruction sua sponte. East, 3 Wn. App. at 133.

Here the trial court did just what this Court suggested; it did not give the instruction in the absence of a request to do so. While the instruction may have been helpful to the defense under other circumstances, counsel was justified in concluding that under the facts of this case the instruction may not have been helpful, and in

² The defendant incorrectly states that the court rejected Jeffries’ argument on the basis of issue preservation. BOA at 15. The court stated that it would consider the issue despite the defendant’s failure to object or propose instructions during that phase of the trial. Jeffries, 105 Wn.2d at 418. Thus the court’s holding was on the merits of the issue, not on issue preservation.

fact may have had a negative impact on her chosen trial strategy. It was unnecessary for the defendant to testify because his version of events was already before the jury in the State's case. Counsel emphasized throughout closing that the State bore the burden of proof, not the defendant. An instruction that referenced the defendant's failure to testify may have detracted from defense counsel's theme, by shifting focus from the State's case to the defense. Since the court has recognized that whether to request the instruction presents a valid tactical decision, it follows that the trial court did not err by allowing counsel to proceed with that tactic when she did not request the instruction.

IV. CONCLUSION

For the foregoing reasons the State asks the Court to affirm the defendant's conviction.

Respectfully submitted on January 27, 2015.

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