

NO. 73130-1-I

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

FILED  
Dec 30, 2015  
Court of Appeals  
Division I  
State of Washington

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STATE OF WASHINGTON,

Respondent,

v.

EVAN J. WILSON,

Appellant.

---

BRIEF OF RESPONDENT

---

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## **I. ISSUES**

1. The defendant did not testify at trial. He filed with the court a packet of proposed jury instructions including WPIC 6.31, the no-adverse-inference, or Carter instruction. When the court gave the attorneys its proposed instructions and twice addressed them, the defendant never brought to the court's attention the omission of the Carter instruction. Does a party properly request an instruction when he files one in court but fails to bring its omission to the court's attention?

2. When the court took objections and exceptions to its proposed instructions, the defendant did not object to the omission of the Carter instruction.

- a) Is the failure to give a Carter instruction a structural error when it is not a complete denial of a right that affects the framework of the trial?
- b) Was any instructional error harmless when the evidence of guilt was overwhelming?

## **II. STATEMENT OF THE CASE**

In October 2014, 19-year old Blake Rosenthal was living on Whidbey Island with his mother and two younger brothers. 1 RP 98-99. Blake's friend Juan Melena had previously introduced him

to the defendant who was dating Juan's cousin Paola. 1 RP 102-103.

Blake decided to sell a Sig Sauer handgun by posting an ad on his facebook page. 1RP 105, 107-08. He hoped to be paid in a combination of cash and marijuana. The defendant told Blake via facebook that he had a buddy, at that time unnamed, who was interested in the gun. 1 RP 111; 2 RP 21-22. The facebook message was admitted as Exhibit 3.

The defendant and his buddy had known each other for two years. 2 RP 90. The buddy was willing to pay \$600 and two ounces of marijuana. 2 RP 94.

On October 6, Blake and the defendant took the ferry to Mukilteo to meet the defendant's buddy to sell him the gun. Blake had with him his cell phone, his handgun, and ammunition. The defendant's buddy was waiting for them in his white Camry. Blake got into the back seat and the defendant into the front. 2 RP 24-26. The defendant introduced his buddy, Wiley Breon Smith, as "Breon". 2RP 21-22.

Blake did not recognize Breon but acknowledged that it was possible they had met before. 2RP 27-28. Breon did not recognize Blake either. 2 RP 96.

Blake placed the ammunition on the center console and showed Breon the gun. The defendant looked at the ammunition, took the gun, looked at it, and racked the slide. Blake and Breon both thought the gun was loaded and were frightened. 2 RP 29-31, 34, 99-100.

Blake told the defendant to unload the gun; the defendant told him to shut up. 2 RP 32. The defendant said, "How does it feel to get robbed with your own gun?" 2 RP 32, 100.

Breon asked the defendant what he was doing and stopped the car. 2 RP 33. Breon told the defendant not to point the gun at him. 2 RP 100. The defendant pointed the gun at Blake, told him to hand over his phone, and said the phone was his now. 2 RP 33, 38, 102. The defendant told Breon not to give Blake the money for the gun. Blake asked if he could get out of the car. 2 RP 36. The defendant reminded Blake that he knew where Blake's brothers lived. 2 RP 38.

As he made his way back to the ferry terminal, Blake went door-to-door hoping to be permitted to use someone's phone to call his mother Julie to tell her he was on his way home. 2 RP 38-39. One person let him in to use the phone. That man later called Julie

to tell her what had happened and that Blake was on his way home.  
2 RP 141-42.

Blake reached Julie using a borrowed phone while he was on the ferry. Julie met him when the ferry docked at Oak Harbor. Blake was shaken up, talking quickly, lisping, and stuttering. 2 RP 142-44. Blake told Julie how the defendant was supposed to help him sell the handgun but instead loaded it, pointed it at him, stole his gun, stole his money, stole his cell phone, and threatened his brothers. 2 RP 150-51.

Blake did not want to involve the police for two reasons: he was worried about the threat against his brothers and he was worried that selling a gun for marijuana might hurt his chances of joining the Marines. 2 RP 39-40. However, his mother convinced him to call. 2 RP 46-47.

Mukilteo Officer Jones spoke to Blake on the phone that night. 2 RP 157. Blake identified Evan Wilson as the person who had robbed him. 2 RP 48-49, 160. He could not remember Breon's name but described him to Officer Jones. 2 RP 161. He described Breon to other friends of the defendant to try to figure out his name. Eventually, both he and Officer Jones found Breon on the defendant's facebook page. 2 RP 48-49, 165-66.

Officer Jones also located the man from whose house Blake called Julie. That man confirmed that Blake had come to the door and said he had been robbed. 2 RP 168-69.

On October 17, Snohomish County deputies located defendant and Breon together. 2RP 78-79. Neither had the Sig Sauer. 2RP 135.

Officer Jones arrived at the arrest location and questioned both men about the robbery. Breon made a statement about the October 6 incident. But when Officer Jones asked the defendant about that day, the defendant told him he drinks a lot of alcohol and consumes pills and has difficulty remembering things. Officer Jones tried to refresh the defendant's recollection but the defendant reiterated that he could not remember. 2 RP 179-80.

Questioned by a second Mukilteo officer, the defendant said he was meeting with Breon and Blake but could not remember anything else since he drank a lot and took a lot of pills. Asked about the firearm, the defendant said, "Whoa... You're telling me a convicted felon would have anything to do with a firearm?" He talked again about taking pills, drinking, and not remembering much. 2 RP 189.

The State charged the defendant with four separate crimes: First Degree Robbery with a firearm enhancement, Unlawful Possession of a Firearm Second Degree, Possessing a Stolen Firearm, and Witness Intimidation. CP 180-181.

In his opening statement, defense counsel labelled both Blake and Breon as liars. 1 RP 91, 92, 93, 94, 95. Counsel said that his client did not need to testify. 1 RP 95.

The defendant filed in open court proposed jury instructions that included WPIC 6.31, the no-adverse-inference, or Carter, instruction. CP 153-173. It read:

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 in any way.

CP 172. There was no contemporaneous in-court discussion regarding any of the instructions.

Blake, Breon, Blake's mother, and several officers testified at trial to the above-recited facts. Before trial, Breon reached an agreement with the prosecutor to plead guilty to Possession of Stolen Property Third Degree and to testify against the defendant. 2 RP 105.

Juan Medena and the defendant's girlfriend also testified. Each testified to a time that Blake and Breon had met before the

day of the robbery. 3 RP 20-22, 33-34. Juan testified that Blake told him about the robbery and that he had in turn told the defendant that Blake was talking about him and had gone to the police. 3 RP 16. Paolo, too, said Blake told her about the robbery. 3 RP 43. She told the defendant what Blake had said and the defendant said nothing in response. 3 RP 45-46.

Blake and the defendant had a facebook exchange about what Blake was saying. On October 16, the defendant said, "Why are you talking shit? To kids?... Be a man. I'll meet up." The defendant responded, "you put a gun to my head." The defendant did not respond. 2 RP 55.

On the morning of the third and final day of trial, the court provided the parties with its preliminary packet of instructions. The court mentioned two instructions that would be removed if the defendant did not testify which, "[w]e won't know until you rest." 3 RP 10-11. The defendant did not draw the court's attention to his proposed Carter instruction.

Later that morning, when it was clear the defendant had decided not to testify, the court readdressed instructions. The court removed from its proposed packet the two instructions it had earlier

referred to and gave counsel the lunch hour to review the packet before hearing objections and exceptions. 3 RP 49- 52.

After lunch, the court asked for objections and exceptions. 3RP 53-59. The defendant argued that the jury should not be permitted to consider any firearm enhancements. The court disagreed. There was a discussion about lesser included crimes. The court asked both sides if they wished to argue about any other instructions; they did not. Asked if there were any exceptions or objections, other than those already addressed, defendant said there were none. 3 RP 53-59. The defendant was again silent about the Carter instruction and did not object to its omission.

During closing argument, defense counsel again repeatedly announced that Blake and Breon were liars. 3RP 85, 86, 88, 89. He said nothing about the defendant's right not to testify.

The jury returned a split verdict. It convicted the defendant of First Degree Robbery with a firearm enhancement, Unlawful Possession of a Firearm, and Possessing a Stolen Firearm, but acquitted him of Witness Intimidation. CP 115-119.

### III. ARGUMENT

#### A. THE DEFENDANT DID NOT PROPERLY REQUEST A NO-ADVERSE-INFERENCE INSTRUCTION.

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 a defendant's Fifth Amendment right to remain silent. Id. A criminal trial court has a constitutional obligation to give a no-adverse-inference instruction "upon *proper* request to minimize the danger that the jury will give evidentiary weight to a defendant's failure to testify..." Carter v. Kentucky, 450 U.S. 288, 300, 101 S.Ct. 1112, 67 L.Ed.2d 241 (1981) (emphasis added). Counsel has found no federal cases that require a court to give a no-adverse-inference, or Carter, instruction in the absence of a proper request.

Washington law is clearer. A trial court has no duty to give a Carter instruction, unless one is "*properly* requested by the accused." State v. Pavelich, 150 Wn. 411, 420, 273 P. 182 (1929) (emphasis added); State v. Jefferies, 105 Wn.2d 398, 423, 717 P.2d 722 (1986); State v. Zupan, 155 Wn. 80, 97, 283 P. 671 (1929) (court need not give no-adverse-inference instruction unless requested). Whether defense wishes to ask for a Carter instruction

is a purely tactical decision. State v. Dauenhauer, 103 Wn. App. 373, 376, 12 P.3d 661 (2000).

CrR 6.15 outlines the procedure to properly request a jury instruction. A party "shall" serve and file proposed instructions. CrR 6.15(a). Then, if the court refuses to give his instruction, the party "shall" state the reason for the objection. CrR 6.15(b). Any objection to instructions and the grounds for the objections must be put on the record to preserve the issue for review. State v. Sublett, 176 Wn.2d 68, 76, 292 P.3d 715 (2012).

In the present case, the defendant filed a proposed Carter instruction. However, nowhere in the record does defense counsel bring that filing to the court's attention. In fact, the defendant stood silent despite the court's two requests for input on instructions. It appears from the record that defense counsel was satisfied with the absence of the instruction, particularly when the court specifically discussed the defendant's decision not to testify.

The defendant's silence about the Carter instruction can be read as his tactical decision not to. Defense counsel's silence can be read as a tactical decision not to request one. The record supports that interpretation.

In his opening statement, the defendant characterized the State's eyewitnesses as "liars". During trial, he attempted to impeach them and to cast doubt on their version of events. The jury had already heard from police officers that the defendant claimed not to remember what happened that night. Having him testify about his lack of memory would have done nothing to undermine the State's case and would have been an invitation to the jury to rely on the two people whose memory was not clouded by drugs or alcohol.

Breon and Blake's testimony had already been bolstered all of the other witnesses. Officer Jones's testified about what Blake told him, what Breon told him, what the man from whose house Blake called told him. Julie testified about what Blake told her when he made his excited utterances. Juan and Paola, too, testified to what Blake told them had occurred and about how the defendant never denied what he had done to them.

After the defendant told two officers he could not remember what had happened and then not denied it when confronted by Juan and Paola, highlighting his failure to testify could only weaken defense counsel's argument about Blake and Breon's truthfulness.

Defense counsel, quite legitimately, appears to have decided not to draw attention to his client's decision not to take the stand.

Neither the defendant's silence to his friends nor his statement to police contradicted Blake and Breon's testimony. And had the defendant taken the stand and suddenly "remembered" what had occurred, his testimony would have been even more damaging. The defendant would have been impeached by his prior statement and contradicted by all of the other testimony. His testimony would have completely undermined any argument about Blake and Breon's veracity.

Counsel made a tactical decision not to further emphasize the defendant's failure to testify. That is why defense counsel chose not to mention in his closing the defendant's right not to testify.

The purpose of a Carter instruction is to purge from jurors not trained in the law any instinct to draw a negative inference from the defendant's exercise of his right not to testify. Carter, 450 U.S. at 301. The record shows that not highlighting the defendant's silence was the proper decision. The split verdict shows that jurors did not draw a negative inference from the defendant's silence. Rather, they returned a split verdict, convicting on counts I, II, and

III, and acquitting on count IV. The jury appears to have weighed the evidence it had, drawing no inference at all from the defendant's silence. Had it done otherwise, it would have convicted on all four counts.

No error occurs when the court fails to give a Carter instruction absent a proper defense request to give one. Pavelich, 153 Wn.2d at 380; Zupan, 155 Wn. at 97. In the present case, because defense did not draw the court's attention to his proposed instruction, he did not properly propose it. No error occurred when the court did not give a Carter instruction.

**B. EVEN IF PROPERLY REQUESTED, THE DEFENDANT FAILED TO OBJECT TO THE OMISSION OF THE CARTER INSTRUCTION.**

Even if the defendant properly requested the Carter instruction, he did not object when the instruction was not given. His failure to object waived the issue on appeal.

Generally a party waives the right to appeal an error unless he objects at trial. State v. Kalebaugh, 183 Wn.2d 578, 583, 355 P.3d 253 (2015); State v. Kirkman, 159 Wn.2d 918, 926, 155 P.3d 125 (2007); State v. Hamilton, 179 Wn. App. 870, 878, 320 P.3d 142 (2014); RAP 2.5(a). 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. Hamilton, at Id.

As an exception to the rule, an appellate court may review an unpreserved error if it is a “manifest error affecting a constitutional right.” Kalebaugh, Id. at 583; RAP 2.5(a)(3). The rule must be narrowly construed. Id. To obtain review, the defendant must show both that the error is truly of constitutional magnitude and that the error was manifest. Id. The error is still subject to harmless error analysis. McFarland, 127 Wn.2d at Id. However, if the error is structural, no showing of prejudice is necessary and the conviction will be reversed. State v. Paumier, 176 Wn.2d 29, 36-37, 288 P.2d 1126 (2012).

#### **1. Failure To Give A Carter Instruction Is Not Structural Error.**

Automatic reversal is required only when a constitutional error is structural, that is, an error that undermines the framework of the trial. State v. Watt, 160 Wn.2d 626, 632, 160 P.3d 640 (2007). The effect of a structural error cannot be ascertained without speculation. Id. Examples of structural errors are:

United States v. Gonzalez-Lopez, 548 U.S. 140, 126 S.Ct. 2557, 165 L.Ed.2d 409 (2006) (denial of right to counsel of choice); Sullivan v. Louisiana, 508 U.S. 275, 113 S.Ct. 2078, 124 L.Ed.2d 182 (1993) (defective reasonable doubt instruction); McKaskle v.

Wiggins, 465 U.S. 168, 177 n.8, 104 S.Ct. 944, 79 L.Ed.2d 122 (1984) (denial of the right to self-representation); Waller v. Georgia, 467 U.S. 39, 49, n.9, 104 S.Ct. 2210, 81 L.Ed.2d 31 (1984) (denial of right to public trial); Pate v. Robinson, 383 U.S. 376, 387, 86 S.Ct. 836, 15 L.Ed.2d 815 (1966) (discrimination in the selection of a jury); White v. Maryland, 373 U.S. 59, 60, 83 S.Ct. 1050, 10 L.Ed.2d 103 (1963) (failure to determine that a defendant is competent to stand trial); Gideon v. Wainwright, 372 U.S. 335, 83 S.Ct. 792, 9 L.Ed.2d 799 (1963) (denial of right to appointed counsel); Tumery v. Ohio, 273 U.S. 510, 47 S.Ct. 437, 71 L.Ed. 749 (1927) (denial of the right to an unbiased adjudicator).

Id. Most constitutional errors are subject to harmless error analysis. Arizona v. Fulminate, 499 U.S. 279, 306-07, 111 S.Ct. 1247, 113 L.Ed.2d 302 (1991). Failure to give a Carter instruction has never been held to be structural error.

The Washington constitution does not require a Carter instruction in the absence of a request to give one. State v. Pavelich, 150 Wn. 411, 420, 273 P. 182 (1929). Some federal courts have held that failure to give a requested Carter instruction is not a structural error. United States v. Brand, 80 F.3d 560, 568 (1<sup>st</sup> Cir. 1996), cert. denied, 519 U.S. 1077 (1997), United States v. Soto, 519 F.3d 927, 930 (9<sup>th</sup> Cir. 2008). The Soto court reasoned that the error was not like a complete denial of a defendant's right to counsel or public trial. Id. It 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 analyzed the failure to give a requested Carter instruction for harmless error. Hunter v. Clark, 934 F.2d 856 (7<sup>th</sup> Cir. 1991), cert denied, 502 U.S. 945 (1991), Richardson v. Lucas, 741 F.2d 753 (5<sup>th</sup> Cir. 1984), Finney v. Rothgerber, 751 F.2d 858 (6<sup>th</sup> Cir. 1985), cert denied, 471 U.S. 1020 (1985). In both Hunter and Richardson, the courts 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 provide a Carter instruction should be analyzed not as a structural error but rather for harmless error if the error was manifest. Hunter, 934 F.2d at 934-935; Richardson, 741 F.2d 754-755.

That reasoning applies in the present case. The failure to give a Carter instruction was not structural.

**2. Any Error That Occurred Was Harmless Beyond A Reasonable Doubt Because The Evidence Of Guilt Was Overwhelming.**

Manifest constitutional error is subject to harmless error analysis. State v. Guloy, 104 Wn.2d 412, 425-26, 705 P.2d 1182 (1985); Chapman v. California, 386 U.S. 18, 24, 87 S.Ct. 824, 17 L.Ed.2d 705 (1967). An error may be harmless if there is overwhelming untainted evidence guilt. Guloy, at 425-26.

In the present case, the evidence of guilt was overwhelming. Of the three people present at the robbery, two, Blake and Breon said that the defendant was present at the scene as a middleman, took Blake's gun, took Blake's money, and ordered Blake out of the car. The third, the defendant, told police officers that he did not recall what happened that day due to his extensive drug and alcohol use. The State's case was not based on "shaky" testimony.

Blake's description of the robbery was corroborated by all of the other witnesses. On the way to the ferry he stopped at a house and called his mother, telling the homeowner he had been robbed. Police found the homeowner and Blake's mother confirmed that the homeowner had called her to tell her what had happened. Julie testified that Blake was still upset when he arrived home and blurted how and by whom he had been robbed. He talked to police

that night and told them a consistent version of events when he later gave a statement. Blake also told Juan Medena and Paolo what the defendant had done and the defendant never denied it to them either.

Breon talked to police officers within two weeks of the incident. Breon, like Blake, said the defendant had robbed Blake, further corroborating Blake's testimony.

All of the State's overwhelming evidence was consistent with the verdicts that found the defendant, a convicted felon, robbed Blake Rosenthal of his gun, ammunition, and cell phone. The evidence of the defendant's guilt was overwhelming and the conviction should be affirmed.

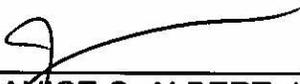
#### **IV. CONCLUSION**

For the foregoing reasons, the convictions should be affirmed.

Respectfully submitted on December 16, 2015.

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IN THE COURT OF APPEALS  
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DIVISION I

THE STATE OF WASHINGTON,

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v.

EVAN J. WILSON,

Appellant.

No. 73130-1-1

DECLARATION OF DOCUMENT  
FILING AND E-SERVICE

AFFIDAVIT BY CERTIFICATION:

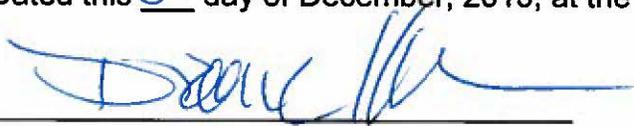
The undersigned certifies that on the 30<sup>th</sup> day of December, 2015, affiant sent via e-mail as an attachment the following document(s) in the above-referenced cause:

BRIEF OF RESPONDENT

I certify that I sent via e-mail a copy of the foregoing document to: The Court of Appeals via Electronic Filing and Marla Zink, Washington Appellate Project, [marla@washapp.org](mailto:marla@washapp.org) and [wapofficemail@washapp.org](mailto:wapofficemail@washapp.org).

I certify (or declare) under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

Dated this 30<sup>th</sup> day of December, 2015, at the Snohomish County Office.

  
\_\_\_\_\_  
Diane K. Kremenich  
Legal Assistant/Appeals Unit  
Snohomish County Prosecutor's Office