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No. 71613-T-1

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

Snohomish County No. 10-1-00761-4

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STATE OF WASHINGTON,

Respondent,

v.

GARY McCALLUM,

Appellant.

FILED  
COURT OF APPEALS DIV 1  
STATE OF WASHINGTON  
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APPELLANT'S REPLY BRIEF

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**I. ARGUMENT IN REPLY**

**A. The Failure to Give a *Carter* Instruction is Reviewable under RAP 2.5(a)(3)**

The State argues that the Court should not reach the merits of the *Carter* instruction issue because it was not preserved for review. Brief of Respondent (hereinafter “Response”) at 5. RAP 2.5(a)(3) provides that a manifest error affecting a constitutional right can be raised for the first time on appeal. Manifest error means that “the appellant must ‘identify a constitutional error and show how the alleged error actually affected the [appellant]’s rights at trial.’” *State v. O’Hara*, 167 Wn.2d 91, 98, 217 P.3d 756, 760 (2009), *as corrected* (Jan. 21, 2010)(quoting *State v. Kirkman*, 159 Wn.2d 918, 926-27, 155 P.3d 125 (2007)).

Washington courts have considered instructional errors as manifest errors affecting constitutional rights in numerous situations:

examples of manifest constitutional errors in jury instructions include: directing a verdict, shifting the burden of proof to the defendant, failing to define the “beyond a reasonable doubt” standard, failing to require a unanimous verdict, and omitting an element of the crime charged.

*O’Hara*, 167 Wn.2d at 103. Consequently, while the State notes that a manifest error requires “actual prejudice,” Response at 8, the reality is that, in the context of jury instructions where the error involves a

constitutional issue, the prejudice is the instructional error itself: “On their face, each of these instructional errors obviously affect a defendant's constitutional rights by violating an explicit constitutional provision or denying the defendant a fair trial through a complete verdict.” *O’Hara*, 167 Wn.2d at 103.

Washington courts have considered *Carter* instruction issues raised for the first time on appeal. *See State v. East*, 3 Wn.App. 128, 131, 474 P.2d 582, 584 (1970). The State argues that *East* predates the Rules of Appellate Procedure, which were adopted in 1976. But in reaching the merits of the issue, *East* applied common law principles quite similar to RAP 2.5(a)(3). *East*, 3 Wn.App. 131 (“[i]f an instruction invades a constitutional right of an accused, appellate review is available even if the instruction was not excepted to at trial”).

Similarly, in *State v. Dauenhauer*, 103 Wn.App. 373, 12 P.3d 661 (2000), Division Three of this Court considered the merits of the appellant’s claim that the unobjected-to *Carter* instruction was error, explaining: “The instruction was a correct statement of the law properly reflecting the admonition ‘that a defendant must pay no court-imposed price for the exercise of his constitutional privilege not to testify.’” *Id.* at 376-77 (citing *State v. Barnes*, 54 Wn.App. 536, 542, 774 P.2d 547 (1989); quoting *Carter v. Kentucky*, 450 U.S. 288, 301, 101 S.Ct. 1112, 67

L.Ed. 2d 241 (1981)). *Dauenhauer* was decided in 2000, long after the Rules of Appellate Procedure were adopted in 1976, and there is no suggestion in the opinion that the issue was not preserved for review.

Under RAP 2.5(a)(3) and Washington case law this Court should reach the merits of the trial court's failure to give a *Carter* instruction.

**B. The Trial Court's Failure to Give a *Carter* Instruction was Structural Error**

The State argues that the failure to give a *Carter* instruction is not structural, and is therefore subject to harmless error analysis. Response at 6-8. This Court should conclude that the failure is a structural error requiring reversal.

**1. *Carter's* Holding**

At the outset, it is worth observing that the narrow question presented to the Court in *Carter* was whether “a defendant, *upon request*, has a right to [a no-adverse-inference] instruction under the Fifth and Fourteenth Amendments of the Constitution.” *Carter*, 450 U.S. at 289-90 (emphasis supplied).<sup>1</sup> The reality is that the facts in *Carter* involved a situation where the defendant had requested the instruction. However, the particular facts of *Carter* do not diminish the importance of the instruction in cases even where defense counsel did not request it. *Carter* is clear that

the instruction is critical to protecting a defendant's Fifth Amendment rights.

**2. *Carter* and Other Supreme Court Jurisprudence Suggest that Failure to Give a “No Adverse Inference” Instruction Should be Considered Structural**

Despite the particular issue that was framed given the facts in *Carter*, the treatment the Supreme Court has given to this issue suggests that it should be considered a structural error. Indeed, this Court does not need to look further than *Carter* itself for direction on this question.

In *Carter*, the Court declined to reach the State's claim that the failure to give the instruction was harmless error because that argument had not been presented to the lower courts. *Carter*, 450 U.S. at 304. But the Court took care to note that “it is arguable that a refusal to give an instruction similar to the one that was requested here can never be harmless.” *Id.* (emphasis supplied). *See also James v. Kentucky*, 466 U.S. 341, 352, 104 S.Ct. 1830, 80 L.Ed.2d 346 (1984)(“[w]e have not determined whether *Carter* error can be harmless...”).

Failure to instruct the jury on basic constitutional principles can be structural error. For example, in *Sullivan v. Louisiana*, 508, U.S. 275, 113 S.Ct. 2078, 124 L.Ed 2d 182 (1993), the Supreme Court held that a

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<sup>1</sup> The Supreme Court generally decides only the issues set forth in the petition. *See* Supreme Court Rule 14.1(a)(“only the questions set out in the petition, or fairly included

constitutionally-defective reasonable doubt instruction constituted structural error: “The deprivation of [the right to a jury verdict of guilty beyond a reasonable doubt], with consequences that are necessarily unquantifiable and indeterminate, unquestionably qualifies as ‘structural error.’” *Id.* at 281-82.

As discussed in Appellant’s Opening Brief at 15, in *State v. McHenry*, 88 Wn.2d 211, 214, 558 P.2d 188, 190 (1977), the Washington Supreme Court summarily reversed a conviction where the Court failed to instruct on the presumption of innocence and the proof beyond a reasonable doubt standard without any consideration as to whether the error was “harmless”:

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

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

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

*Id.* at 214 (emphasis supplied).

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therein, will be considered by the Court”).

Indeed, *Carter* essentially equates the “no adverse inference” instruction to other instructions protecting critical constitutional rights. The Court emphasized the importance of instructing the jury in the “basic constitutional principles that govern the administration of criminal justice,” noting

**[s]uch instructions are perhaps nowhere more important than in the context of the Fifth Amendment privilege against compulsory self-incrimination,** since “[t]oo many, even those who should be better advised, view this privilege as a shelter for wrongdoers. They too readily assume that those who invoke it are ... guilty of crime ....

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

A few years before *Carter*, in *Lakeside v. Oregon*, 435 U.S. 333, 98 S.Ct. 1091, 55 L.Ed. 2d 319 (1978), the Court likewise equated the no adverse inference instruction with the reasonable doubt and burden of proof instructions: “The very purpose of a jury charge is to flag the jurors’ attention to concepts that must not be misunderstood, such as reasonable doubt and burden of proof. To instruct them in the meaning of the privilege against compulsory self-incrimination is no different.” *Lakeside*, 435 U.S. at 340.

In arguing that the failure to give a *Carter* instruction is not structural, the State cites federal court decisions that have applied a harmless error analysis. Response at 7 (citing *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)). Both *Brand* and *Soto* apply a harmless error analysis, without mentioning *Carter*'s suggestion – albeit in *dicta* – that refusal to give a *Carter* instruction could arguably “never be harmless.” *Carter*, 450 U.S. at 304 (emphasis supplied).<sup>2</sup>

Other cases cited by the State apply a harmless error analysis, reasoning that the failure to give a *Carter* instruction was less egregious than a prosecutor commenting on a defendant not testifying at trial, which was held to be subject to a harmless error analysis in *Chapman v. California*, 386 U.S. 18, 87 S.Ct. 824, 17 L.Ed.2d 705 (1967). *See* Response at 7 (citing *Hunter v. Clark*, 934 F.2d 856 (7th Cir. 1991); *Richardson v. Lucas*, 741 F.2d 753 (5th Cir. 1984); *Finney v. Rothgerber*, 751 F.2d 858, 864 (6th Cir. 1985), *cert. denied*, 471 U.S. 1020 (1985).

But none of the cited decisions address *Carter*'s suggestion that it is arguable that failure to give a no adverse inference instruction “can never be harmless.” *Carter*, 450 U.S. at 304. Nor do they fairly recognize *Carter* and *Lakeside*'s warnings of the danger of leaving the jury free to consider the defendant's silence, or adequately discuss the importance

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<sup>2</sup> It is worth noting that in *Brand*, although the trial court refused to give the defendant's requested *Carter* instruction, the trial court did instruct the jury that “[e]ach defendant is presumed to be innocent and does not have to testify...” *Brand*, 80 F.3d at 566 (emphasis supplied). Therefore, the jury had actually received instruction from the court on a portion of the important principles enunciated in the Fifth Amendment.

both decisions ascribe to the instruction. Indeed, the cases cited by the State seem to treat the *Carter* violation as a garden variety trial mistake. See, e.g., *Hunter*, 934 F.2d at 860 (“most constitutional violations” are harmless and the court has a duty to ignore them (*quoting United States v. Hasting*, 461 U.S. 499, 508-09, 103 S.Ct. 1974, 76 L.Ed. 2d 96 (1983))); *Finney*, 751 F.2d at 864 (“...there may be some constitutional errors which in the setting of a particular case are so unimportant and insignificant...” (*quoting Chapman*, 386 U.S. at 22)).

Equating the failure to instruct on the defendant’s Fifth Amendment privilege with “most constitutional violations,” or characterizing it as an error that is “so unimportant and insignificant,” cannot be squared with prior treatment of this issue by the Supreme Court. Respectfully, these few cited federal decisions stray significantly from the firm foundation laid by the Supreme Court in *Lakeside* and *Carter* – that instructing the jury on the defendant’s failure to testify is critical to protecting a defendant’s constitutional rights under the Fifth Amendment and to ensuring a fair and just trial.

C. **The Failure to Give a *Carter* Instruction was not Cured by Other Instructions**

The State argues that because the trial court provided a boilerplate instruction to the jury about how it was to consider testimony and admitted

evidence – and that it was not to consider evidence that had not been admitted – “[t]he jury was therefore instructed to not consider the fact that the defendant had not testified in its deliberations.” Response at 11. This argument was roundly rejected in *Carter* itself. As explained by the Supreme Court:

Kentucky also argues that in the circumstances of this case the jurors knew they could not make adverse inferences from the petitioner's election to remain silent because they were instructed to determine guilt “from the evidence alone,” and because failure to testify is not evidence. The Commonwealth's argument is unpersuasive. Jurors are not lawyers; they do not know the technical meaning of “evidence.” They can be expected to notice a defendant's failure to testify, and, without limiting instruction, to speculate about incriminating inferences from a defendant's silence.

*Carter*, 450 U.S. at 303-04 (emphasis supplied).

The State also argues that the trial court’s instruction on the burden of proof and standard of proof somehow rectify the failure to give the *Carter* instruction because they impute to the jury the legal understanding that no adverse inference should be drawn from the defendant’s failure to testify. Response at 11. *Carter* also dismissed a similar claim by the State of Kentucky that the presumption of innocence instruction somehow conveyed the legal principles in the “no-adverse inference” instruction:

The other trial instructions and arguments of counsel that the petitioner's jurors heard at the trial of this case were no substitute for the explicit instruction that the petitioner's

lawyer requested. Although the jury was instructed that “[t]he law presumes a defendant to be innocent,” it may be doubted that this instruction contributed in a significant way to the jurors' proper understanding of the petitioner's failure to testify. Without question, the Fifth Amendment privilege and the presumption of innocence are closely aligned. But these principles serve different functions, and we cannot say that the jury would not have derived “significant additional guidance,” *Taylor v. Kentucky*, 436 U.S. 478, 484, 98 S.Ct. 1930, 1934, 56 L.Ed.2d 468, from the instruction requested.

*Carter*, 450 U.S. at 304.

Here, there were no instructions given that adequately protected Appellant's constitutional rights under the Fifth Amendment.

**D. The Court Does Not Need to Speculate to Know that the Jury Drew Adverse Inferences from Appellant's Failure to Testify**

The State argues that Appellant's position relies on “speculation” about the jury's likelihood of drawing adverse inferences from the defendant's failure to testify. Response at 12 (“[h]e argues 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 selective quote from the State does not accurately reflect widespread recognition, as discussed by Appellant at 16-20 of his Opening Brief, that the jury will *undoubtedly* give negative weight to the defendant's silence.

As explained in *Carter*, the jury

can be expected to notice a defendant's failure to testify, and, without limiting instruction, to speculate about incriminating inferences from a defendant's silence.

*Carter*, 450 U.S. at 303-04 (emphasis supplied). *See also Lakeside*, 435 U.S. at 340, n.10 (“[t]he layman’s natural first suggestion would probably be that the resort to [the Fifth Amendment privilege] in each instance is a clear confession of crime”); *East*, 3 Wn.App. at 133 (“...in the absence of instruction, nothing could be more natural for them to draw an adverse inference from the lack of testimony by the very person who should know the facts best”).

To assume that the jury will not notice – or that the jury will notice but will beneficently decline to draw any negative implication from – the defendant’s failure to testify is unrealistic and unsupported by the caselaw.

**E. Reversal is Warranted Even Under a Harmless Error Analysis**

Although there was evidence Mr. Daniels received injuries on October 10, 2009, according to Michael Daniels, he and Mr. McCallum were the only two people inside the trailer at the time of the alleged assault. Mr. McCallum did not testify. Absent an instruction from the Court that it was not permitted to consider Mr. McCallum’s decision not to testify, the jury surely concluded that Mr. McCallum’s silence was an admission of guilt as to the circumstances surrounding the alleged assault.

Because the only testimony regarding the events inside the trailer came from Mr. Daniels himself, this Court cannot conclude that the trial court's error in failing to give a *Carter* instruction was harmless beyond a reasonable doubt. Therefore, the Court should reverse Mr. McCallum's conviction even under a harmless error standard.

**II. CONCLUSION**

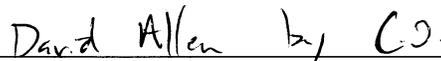
For the foregoing reasons, and for those stated in Appellant's Opening Brief, this Court should vacate Mr. McCallum's conviction and remand to the trial court for a new trial.

RESPECTFULLY SUBMITTED this 16<sup>th</sup> day of March, 2015.



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**PROOF OF SERVICE**

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

On the 16<sup>th</sup> day of March, 2015, I sent by United States Mail, postage prepaid one true copy of Appellant's Reply Brief directed to attorney for Respondent:

Kathleen Webber  
Snohomish County Prosecutor's Office  
Snohomish County Courthouse  
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And mailed to Appellant:

Gary McCallum  
[Address Intentionally Withheld]

DATED at Seattle, Washington this 16<sup>th</sup> day of March, 2015.

  
SARAH CONGER  
Legal Assistant

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