COURT OF APPEALS
DECISION
DATED AND RELEASED

December 12, 1996

NOTICE

No. 96-1882-CR

STATE OF WISCONSIN **IN COURT OF APPEALS**
DISTRICT IV

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

FLOYD WORTH,

Defendant-Appellant.

APPEAL from a judgment of the circuit court for Dane County: MICHAEL N. NOWAKOWSKI, Judge. *Affirmed*.

EICH, C.J.[1] Floyd Worth appeals from a judgment convicting him of practicing law without a license. He raises a single issue: Whether the trial court erred when it failed to instruct the jury on the effect of his failure to testify, as he requested it to do. We see no error, for we agree with the State that Worth did not make an appropriate request for the instruction. And even if the lack of such an instruction could be considered error, it was harmless beyond a reasonable doubt in light of the overwhelming evidence of Worth's guilt.

[1] This appeal is decided by one judge pursuant to § 752.31(2)(f), STATS.

As Worth correctly states, a trial court, upon a timely and proper request from the defendant, has a constitutional obligation to instruct the jury that it is to draw no adverse inferences from the defendant's election not to testify. ***Carter v. Kentucky***, 450 U.S. 288, 305 (1981).

On the day before the trial, Worth filed a written "Request for Jury Instructions" listing several pattern instructions by number, including WIS J I-CRIMINAL 315, which states: "A defendant in a criminal case has the absolute constitutional right not to testify. The defendant's decision not to testify must not be considered by you in any way and must not influence your verdict in any manner." The cover page to the "request" stated that Worth reserved his right to "withdraw this request or any part thereof or include additional instructions at any time prior to summation to the jury." Indeed, at the jury-draw on the same day, Worth's counsel, when asked by the court to name his potential witnesses, stated: "No potential witnesses but the defendant, your Honor."

Early in the trial—at the first morning recess—the trial court asked counsel to go over the instructions the court had prepared, indicating that both attorneys had received copies. The court's packet did not include WIS J I-CRIMINAL 315. The trial proceeded until sometime after noon, when the State rested its case. At that time, Worth's attorney informed the court that Worth would be neither testifying himself nor calling any witnesses in his defense. The court then asked counsel whether they had any objections to the instructions the court had prepared, to which Worth's attorney replied: "I have no objections to the instructions, your Honor." After some discussion, the prosecutor indicated his assent and Worth's counsel again stated: "No objection, your Honor." The court then perused the packet and, after noting and correcting a typographical error, stated: "Other than that, that's the way they will be given to the jury." Worth's attorney replied: "Very good."

After counsel's closing arguments, the court read the instructions to the jury. They did not contain WIS J I-CRIMINAL 315. When the reading was completed, and before the jury retired, the court asked: "Counsel, do you believe we need to retire [to chambers] to discuss any errors or omissions in the instructions as they have been given to the jury?" Both Worth's attorney and the prosecutor responded: "No, your Honor." Finally, after the jury left to begin its deliberations, the court asked whether there was "[a]nything either counsel

wishes to put on the record before we recess." Worth's counsel replied: "Nothing."

Worth states his argument briefly, in little more than two pages in his brief. Citing ***Carter***, he maintains the trial court "failed to honor [his] request that the jury be instructed that [it must not consider his failure to testify]." As the State points out, however, the trial judge in ***Carter*** expressly rejected the defendant's request for such an instruction. ***Carter***, 450 U.S. at 294. Here, while Worth submitted a number of the Wisconsin pattern instruction on the subject as part of a conditional pretrial submission—at a time when counsel was also indicating Worth as a potential witnesses—his attorney expressly approved the trial court's proposed packet of instructions which omitted WIS J I-CRIMINAL 315, and he did so not just once, but several times. We note in this regard that the supreme court has indicated that, because the giving of such an instruction is a matter of trial strategy, the preferred practice is not to give the instruction unless the defendant specifically requests it. *See* WIS J I-CRIMINAL 315 n.1; ***Champlain v. State***, 53 Wis.2d 751, 758, 193 N.W.2d 868, 873 (1972).

Moreover, § 972.10(5), STATS., states, "When the evidence is concluded ... if either party desires special instructions to be given to the jury, the[y] ... shall be reduced to writing ... and filed ....," and when the trial court, as the court did here, "advise[s] the parties of the instructions to be given," counsel is required to state "[a]ll objections ... on the record." In light of the expressly noted tentative nature of the instruction list filed by Worth prior to trial, the plain provisions of § 972.10(5), counsel's repeated approval of the court's instruction packet, and his affirmative statement that he had no objections to the instructions as given, we do not consider Worth to have "requested" the instruction within the meaning of ***Carter*** and similar cases.

Beyond that, the State points out that a harmless-error analysis is applicable to the failure to give a "no-adverse-inference" instruction, ***Hunter v. Clark***, 934 F.2d 856, 860 (7th Cir.), *cert. denied*, 502 U.S. 945 (1991), and argues persuasively that the evidence of Worth's guilt is so overwhelming that the failure to give the instruction in this case must be considered harmless beyond a reasonable doubt. Worth elected not to respond to the argument in a reply brief, and we have frequently said that, just as a proposition advanced by an appellant is taken as confessed when the respondents do not undertake to refute it, ***State ex rel. Sahagian v. Young***, 141 Wis.2d 495, 500, 415 N.W.2d 568,

570 (Ct. App. 1987), the same principle applies when the appellant fails in its reply brief to dispute the grounds relied on by the respondent. ***Schlieper v. DNR***, 188 Wis.2d 318, 322, 525 N.W.2d 99, 101 (Ct. App. 1994).[2]

By the Court.—Judgment affirmed.

This opinion will not be published. *See* RULE 809.23(1)(b)4, STATS.

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[2] Section 757.30, STATS., penalizes one who, without being licensed to do so, "practices law"; the term is defined to include appearing "as agent, representative or attorney" on behalf of another person before any court or court commissioner in any proceeding. The incident giving rise to the charge in this case was Worth's representation of a "client" at a hearing before an assistant family court commissioner. In its harmless-error argument, the State points to the testimony of the commissioner and the assistant corporation counsel appearing in the case that Worth handed the commissioner a business card identifying him as an "attorney," and went on to advocate the client's position at the hearing. He told the corporation counsel that he had represented the client in his divorce, and, when he was referred to during the hearing as the client's "attorney," he did nothing to correct the misnomer.

There was also evidence that, on at least two past occasions, Worth had appeared with clients in criminal proceedings—stating in one of them that he was a member of the Wisconsin Bar—and had been convicted of practicing law without a license for those episodes as well. There is no question that Worth is not licensed to practice law in Wisconsin, and never has been.

The test for harmless error "whether of omission or commission, whether of constitutional proportions or not, [is] ... whether there is a reasonable possibility that the error contributed to the conviction." ***State v. Dyess***, 124 Wis.2d 525, 543, 370 N.W.2d 222, 231-32 (1985) (footnote omitted). We see no such possibility with respect to the court's failure to give the "no-adverse-inference" instruction in this case.