

29120-1-III  
COURT OF APPEALS  
DIVISION III  
OF THE STATE OF WASHINGTON

**FILED**

AUG 23 2012

COURT OF APPEALS  
DIVISION III  
STATE OF WASHINGTON  
By \_\_\_\_\_

STATE OF WASHINGTON, RESPONDENT

v.

DAVID K. BREWCZYNSKI, APPELLANT

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APPEAL FROM THE SUPERIOR COURT  
OF SPOKANE COUNTY

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SUPPLEMENTAL BRIEF OF RESPONDENT

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Prosecuting Attorney

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I.

ISSUE PRESENTED

1. Do the holdings in *State v. Kosewicz* and *Brown* apply to the case herein?

II.

STATEMENT OF THE CASE

The facts are set forth in the initial briefs by the Appellant and Respondent and are incorporated herein by this reference. Any additional pertinent facts will be addressed in the Argument section as appropriate.

III.

ARGUMENT

- A. THE HOLDINGS IN *STATE V. KOSEWICZ* AND *BROWN* AFFIRMED THAT THE STATE NEED NOT SPECIFY WHICH ALTERNATIVE MEANS OF COMMITTING THE PREDICATE FELONY SUPPORTS AN AGGRAVATED MURDER CHARGE.

In *State v. Kosewicz*, \_\_ Wn.2d \_\_, 278 P.3d 184 (2012), the Supreme Court advised that it granted review solely on the issues of whether the validity of the felony murder and aggravated murder convictions were affected by the reversal of the kidnapping convictions. *Id.*, at 189. Accordingly, the State's supplemental brief regarding the applicability of *State v. Kosewicz* herein focuses

upon the validity of defendant's premeditated first degree murder with aggravating circumstances conviction.

Here, defendant challenges the validity of his aggravated premeditated first degree murder conviction based upon the trial court providing the jury with the definition of first degree burglary which included the alternative means of committing the predicate felony. The decisions in *Kosewicz* and *Brown* apply herein to resolve this issue.

In *Kosewicz*, the defendant was charged separately with premeditated murder in the first degree with aggravating circumstances and first degree kidnapping. The aggravating circumstance being that the murder was committed during the first degree kidnapping. The trial court defined first degree kidnapping as including the alternative means of committing the crime for the purpose of determining whether the premeditated murder charge was aggravated thereby. The Supreme Court noted that the information therein alleged that defendant murdered the victim "in the course of, in furtherance of or immediate flight from the crime of first degree kidnapping." The Supreme Court cited to its holding in *State v. Siers*, \_\_ Wn.2d \_\_, 274 P.3d 358 (2012), that "due process is satisfied when the defendant received sufficient notice from the State to prepare a defense against the aggravating circumstances that the State will seek to prove to support an exceptional sentence." *Id.*, at 362. The Supreme Court concluded that the information filed against Kosewicz properly pleaded the elements of premeditated

murder in the first degree and identified first degree kidnapping as the aggravating circumstance. Accordingly, the Supreme Court held that Kosewicz was afforded sufficient notice of the essential elements of the murder charge and its aggravating circumstance to satisfy the notice requirements of due process. *Kosewicz*, 278 P.3d at 190.

Here, the information filed against Mr. Brewczynski pleaded the essential elements of premeditated first degree murder and notified him that the State was pleading an aggravating circumstance. Specifically, that the State alleged that the premeditated murder was aggravated by the fact that it “was committed in the course of, in furtherance of or in immediate flight from the crime of Burglary in the First Degree.” CP 48-49. Pursuant to the holding in *Kosewicz*, vis-à-vis the premeditated murder with aggravating circumstance, defendant was afforded due process.

In *Kosewicz*, the Supreme Court noted that when a defendant challenges the information for the first time on appeal, the Court applies the liberal construction rule as set out in *State v. Kjorsvik*, 117 Wn.2d 93, 812 P.2d 86 (1991). The Court uses a two-prong test to determine whether the elements:

appear in any form, or by fair construction can...be found, in the charging document. *Id.* at 105. We read the information as a whole according to common sense and including facts that are implied, to see if it ‘reasonably apprises an accused of the elements of the crime charged.’ *Id.*, at 109. If it does, the defendant may

prevail only if he can show that the unartful language actually prejudiced him. *Id.*, at 106.

*Kosewicz*, 278 P.3d at 191.

Upon applying the first prong of the liberal construction rule, the Supreme Court held that *Kosewicz*:

was reasonably apprised that the intent components of the alternative means of proving first degree kidnapping as an aggravating factor to premeditated murder. His premeditated murder charge itself stated that the murder was ‘committed in the course of, in furtherance of or in immediate flight from, the crime of Kidnapping in the First Degree.’...No limitation on kidnapping in the first degree was included in this charge that would restrict the prosecution’s case to proving only [one specific alternative type of intent]. Thus, by fair construction, *Kosewicz* was reasonably apprised that the State could seek to prove kidnapping with [alternative means] intents as an aggravating factor.

*Kosewicz*, 278 P.3d at 191.

Upon applying the second prong of the liberal construction rule, the Supreme Court held that *Kosewicz* did not base his defense to the premeditated murder charge on the distinction between the alternative intents of committing first degree kidnapping; rather, the defense was that the defendant was not an accomplice to either the kidnapping or the murder. The Supreme Court held that such a defense was not prejudiced by a lack of notice based upon the “unartful” charging language in the information. *Id.*, at 192. Finally, the Court noted that *Kosewicz* failed to object to the inclusion of the uncharged alternative means of committing the aggravating felony. *Id.*, at 192.

In *Kosewicz*, the Supreme Court noted that when a defendant is charged with felony murder, the State has the burden of proving that the defendant “committed the predicate felony and in the course of or in furtherance of that crime or in immediate flight therefrom, the defendant or another participant caused the death of a person.” *Id.*, at 189. The Supreme Court further noted that,

while a predicate felony...is an element of...felony murder, the defendant is not actually charged with the underlying crime...the predicate felony merely substitutes for the mental state the State is otherwise required to prove...Therefore...the elements of the predicate felony are not essential elements of felony murder and do not have to be included in the information...[and] because the elements of the predicate felony need not be pleaded, the information also does not need to specify the alternative means of committing a crime on which the State will ultimately rely.

*Id.*, at 190-191.

Here, defendant was on notice that the State was relying upon the aggravating circumstance that the defendant committed the murder in the course or furtherance of or immediate flight from the commission of the first degree burglary. The charging language and nature of the felony murder charge enabled the State to argue the alternative means of committing the first degree burglary as the basis for defendant’s conviction for the felony murder. Accordingly, the Supreme Court’s holding in *State v. Kosewicz*, applies to this case to affirm the defendant’s conviction for premeditated murder in the first degree with aggravating circumstances.

V.

CONCLUSION

For the reasons stated, the general and special verdicts rendered herein coupled with the corresponding sentencings and enhancements imposed therefrom should be affirmed.

Respectfully submitted this 8<sup>th</sup> day of August, 2012.

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 DAVID K. BREWCZYNSKI, )  
 )  
 Appellant, )

NO. 29120-1-III

CERTIFICATE OF MAILING

I certify under penalty of perjury under the laws of the State of Washington, that on August 23, 2012, I e-mailed a copy of the Respondent's Supplemental Brief in this matter, pursuant to the parties' agreement, to:

Eric J. Nielsen  
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8/23/2012  
(Date)

Spokane, WA  
(Place)

*Kathleen S. Owens*  
(Signature)

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 Appellant, )

COURT OF APPEALS  
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 STATE OF WASHINGTON  
 By \_\_\_\_\_

NO. 29120-1-III

CERTIFICATE OF MAILING

I certify under penalty of perjury under the laws of the State of Washington, that on September 4, 2012, I mailed a copy of the Respondent's Supplemental Brief in this matter, addressed to:

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 Walla Walla WA 99362

9/4/2012  
 (Date)

Spokane, WA  
 (Place)

*Kathleen B. Owens*  
 (Signature)