

RECEIVED
SUPREME COURT
STATE OF WASHINGTON

11 FEB -1 AM 11:26

BY RONALD R. CARPENTER

CLERK

NO. 83682-5

IN THE SUPREME COURT
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

THEODORE M. KOSEWICZ
and
ROBERT A. BROWN,

Petitioners.

BRIEF OF WASHINGTON ASSOCIATION
OF PROSECUTING ATTORNEYS
AS AMICUS CURIAE

SETH A. FINE
Deputy Prosecuting Attorney
Attorney for Amicus Curiae

Snohomish County Prosecutor's Office
3000 Rockefeller Avenue, M/S #504
Everett, Washington 98201
Telephone: (425) 388-3333

ORIGINAL

FILED AS
ATTACHMENT TO EMAIL

TABLE OF CONTENTS

I. INTEREST OF AMICUS CURIAE	1
II. ISSUES	1
III. STATEMENT OF THE CASE.....	2
IV. ARGUMENT	3
A. THE INSTRUCTIONS DEFINING MURDER PROPERLY INCLUDED INTENT TO INFLICT MENTAL DISTRESS AS A MEANS OF COMMITTING THE UNDERLYING FELONY OF FIRST DEGREE KIDNAPPING.....	3
1. Under The Liberal Construction Rule Applicable When No Objections Were Raised At Trial, The Allegations In One Count Do Not Limit The Allegations In Other Counts.	3
2. Since <i>First</i> Degree Kidnapping Is Not An Element Of First Degree Felony Murder, The Inclusion Of Surplusage In The Information Did Not Require Inclusion Of That "Element" In The Jury Instructions.	8
B. SINCE THE JURY INSTRUCTIONS CORRECTLY DEFINED MURDER, THE DEFENDANTS WERE NOT PREJUDICED BY INCLUSION OF A REFERENCE TO "FAILURE TO ACT" IN AN INSTRUCTION DEFINING "HOMICIDE.".....	12
1. An Instruction That Does Not Affect The Elements Of The Crime Is Not "Manifest Constitutional Error."	13
2. Since The Court Must Assume That The Jury Followed The Instructions When Determining Whether Counsel's Performance Resulted In Prejudice, An Instruction That Does Not Affect The Elements Of The Crime Does Not Establish Ineffective Assistance.	16
V. CONCLUSION	17

TABLE OF AUTHORITIES

WASHINGTON CASES

<u>State v. Anderson</u> , 10 Wn.2d 167, 116 P.2d 346 (1941).....	3
<u>State v. Bird</u> , 31 Wn.2d 777, 198 P.2d 978 (1948), <u>cert. denied</u> , 336 U.S. 954 (1949).....	3
<u>State v. Brown</u> , 140 Wn.2d 456, 998 P.2d 321 (2000)	10
<u>State v. Bryant</u> , 65 Wn. App. 428, 828 P.2d 1121 (1992).....	4
<u>State v. Elmore</u> , 139 Wn.2d 250, 985 P.2d 289 (1999), <u>cert. denied</u> , 531 U.S. 837 (2000)	3
<u>State v. Hartz</u> , 65 Wn. App. 351, 828 P.2d 618 (1992)	4
<u>State v. Hickman</u> , 135 Wn.2d 97, 954 P.2d 900 (1998)	10
<u>State v. Kjorsvik</u> , 117 Wn.2d 93, 812 P.2d 86 (1991).....	6, 8
<u>State v. McFarland</u> , 127 Wn.2d 322, 899 P.2d 1251 (1995).....	16
<u>State v. Nonog</u> , 169 Wn.2d 220, 237 P.3d 250 (2010).....	6, 8
<u>State v. O'Hara</u> , 167 Wn.2d 91, 217 P.3d 756 (2009)	14, 15
<u>State v. Tvedt</u> , 153 Wn.2d 718, 107 P.2d 728 (2005)	9
<u>State v. Unosawa</u> , 29 Wn.2d 578, 188 P.2d 104 (1948)	5, 6

FEDERAL CASES

<u>Strickland v. Washington</u> , 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984).....	16
--	----

WASHINGTON STATUTES

RCW 10.95.020(11)(d).....	9
RCW 9A.32.030(1)(c).....	9
RCW 9A.40.020(1)(d).....	9
RCW 9A.40.030(1).....	9

COURT RULES

RAP 2.5(a)(3)	13, 15
---------------------	--------

I. INTEREST OF AMICUS CURIAE

The Washington Association of Prosecuting Attorneys ("WAPA") represents the elected prosecuting attorneys of Washington State. Those persons are responsible by law for the prosecution of all felony cases in this state and of all gross misdemeanors and misdemeanors charged under state statutes. WAPA has filed this brief at the request of the Court.

II. ISSUES

(1) The defendants were charged with murder, with first degree kidnapping as an underlying felony. The charging language for the murder did not limit the underlying crime to any specific means. In a separate count, the defendants were charged with first degree kidnapping. The charging language for the kidnapping did specify a particular means. Does the charging language in the kidnapping count limit the scope of the murder count?

(2) The defendant Brown was convicted of first degree felony murder. That crime may be committed in the course of kidnapping in either degree. If the information is construed as alleging a particular means of committing first degree kidnapping, were the jury instructions required to include that "element," even though *first*

degree kidnapping is not an element of the crime of first degree felony murder?

(3) A jury instruction defined "homicide" as including "failure to act." The instruction said that "homicide" could be several things other than murder. The instructions setting out the elements of murder made it clear that inaction is not sufficient. Did the definition of "homicide" constitute manifest error affecting a constitutional right, so that it can be challenged for the first time on appeal? [This issue is raised by Brown only.]

(4) Has the defendant shown that defense counsel's failure to object to this instruction resulted in prejudice, so as to establish that this failure constituted ineffective assistance of counsel? [This issue is raised by Kosewicz only.]

III. STATEMENT OF THE CASE

The facts are set out in the Court of Appeals opinion and the parties' briefs.

IV. ARGUMENT

A. THE INSTRUCTIONS DEFINING MURDER PROPERLY INCLUDED INTENT TO INFLICT MENTAL DISTRESS AS A MEANS OF COMMITTING THE UNDERLYING FELONY OF FIRST DEGREE KIDNAPPING.

1. Under The Liberal Construction Rule Applicable When No Objections Were Raised At Trial, The Allegations In One Count Do Not Limit The Allegations In Other Counts.

Each defendant in this case was charged in the alternative with aggravated first degree murder and first degree felony murder. Kosewicz was convicted of aggravated murder, while Brown was convicted of only first degree murder. Each of these charges rested on an allegation that the murder was committed in the course and furtherance of first degree kidnapping. In neither case did the murder charge include any allegation of the means by which the kidnapping was committed. CP (Kosewicz) 33-34; CP (Brown) 147-48.

These charges were constitutionally adequate. As the Court of Appeals pointed out, there is no requirement that the information set out the elements of the underlying crime. State v. Anderson, 10 Wn.2d 167, 180, 116 P.2d 346 (1941); see State v. Bird, 31 Wn.2d 777, 778-79, 198 P.2d 978 (1948), cert. denied, 336 U.S. 954 (1949); State v. Elmore, 139 Wn.2d 250, 266-68, 985 P.2d 289 (1999), cert. denied, 531 U.S. 837 (2000). Accordingly, there is no

requirement that the information allege the specific means by which the underlying crime was committed. State v. Bryant, 65 Wn. App. 428, 438, 828 P.2d 1121 (1992); State v. Hartz, 65 Wn. App. 351, 354-55, 828 P.2d 618 (1992). Consequently, the charging language of the murder counts in this case covered all possible means of committing the underlying crime of kidnapping. If the defendants had been charged only with murder, the State would clearly have been entitled to instructions on any means that were supported by the evidence.

The issue in the present case arises because the defendants were *not* charged solely with murder. They were also separately charged with first degree kidnapping. The kidnapping counts specified one means of committing that crime: by intending to inflict bodily injury on the victim. CP (Kosewicz) 34; CP (Brown) 148. This case therefore presents the following issue: Under the Washington constitution, do the allegations in one count of an information *necessarily* limit the allegations in another count? To answer this question, it is necessary to examine this court's decisions concerning the construction of multi-count informations.

An early case took a strict approach. The defendant was charged with manslaughter. The charging language on that count

omitted an essential allegation. The necessary allegation was, however, contained in a separate count that charged abortion. The court nevertheless held the manslaughter charge insufficient. It refused to consider the allegations in a separate count as part of the manslaughter charge: "Each count should contain all allegations necessary to state the offense sought to be charged in each count, since, in the absence of express reference, one count is not aided by others." State v. Unosawa, 29 Wn.2d 578, 588, 188 P.2d 104 (1948).

More recently, this court took a more relaxed approach. The court held that allegations in one count can sometimes be used to supply deficiencies in other counts. This is part of the "liberal construction rule" used when an information is challenged for the first time on appeal:

Liberal construction balances the defendant's right to notice against the risk of ... "sandbagging" – that is, that a defendant might keep quiet about defects in the information only to challenge them after the State has rested and can no longer amend it. When a defendant challenges the information for the first time on appeal, we determine if the elements appear in any form, or by fair construction can they be found, in the charging document. 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. If it does, the defendant may prevail only if he can show

that the unartful charging language actually prejudiced him.

State v. Nonog, 169 Wn.2d 220, 226-27 ¶ 11, 237 P.3d 250 (2010), citing State v. Kjorsvik, 117 Wn.2d 93, 812 P.2d 86 (1991). The court distinguished Unosawa as “predat[ing] our recognition in Kjorsvik of the liberal construction standard applicable when a charging document is challenged for the first time on appeal.” Nonog, 169 Wn.2d at 231 n. 5.

In the present case, as in Nonog, the defendants raised no challenges at trial. Consequently, the informations are subject to liberal construction. In this context, however, “liberal construction” applies differently than it did in Nonog. There, because the allegations of each individual count were arguably inadequate, “liberal construction” meant construing the counts together. Here, because each count is adequate by itself, “liberal construction” means construing each count separately, without imposing limitations based on the allegations of other counts.

Accepting the defendants’ arguments would create exactly the problem that concerned the court in Nonog – It would reward sandbagging. In the present cases, the State’s theory was clear from the beginning – the victim was abducted with the intent to

frighten him into paying a drug debt. RP (Kosewicz) 141-45; RP (Brown) 370-72. Neither defendant ever disputed that fact – they simply claimed that *they* did not participate in that plan. RP (Kosewicz) 151 (“The theory of our case is very simple. It’s that Theodore Kosewicz didn’t participate in the murder of Sebastian Esquibel and wasn’t responsible for the kidnapping”); RP (Brown) 384 (“The things you are going to hear from the evidence today are that Mr. Brown was not part of this group” that committed the kidnapping and murder).

Had any objection been raised at trial, the problem could have been dealt with easily. The State could have clarified that the charging language of the murder counts encompassed both means of committing first degree kidnapping. Or, if necessary, it could have limited that charge to specify that the kidnapping was based on intent to inflict bodily harm. There was overwhelming evidence that the victim was abducted with the intent to inflict *both* bodily injury and mental distress. There is no reason to believe that the verdict would have been different if the instructions had been limited to the theory of intent to inflict bodily harm.

By remaining silent and raising no objections, the defendants have already received a large windfall. They had a full

opportunity to present their defense that they were not involved in the kidnapping and murder. With regard to the kidnapping charge, they will now have an opportunity to repeat that defense to new juries. If this court accepts the arguments they are raising now, they would be given the further opportunity to repeat their defense to the murder charges as well. Under the principles of Nonog and Kjorsvik, they are not entitled to such a great reward for withholding arguments at trial.

The charging language of the murder counts encompassed all means of committing the underlying felony of first degree kidnapping. Those charges were not limited by the allegations in other counts. Consequently, the trial court did not err in allowing the jury to consider multiple means for committing kidnapping as a basis for the murder conviction. Since there was no error with regard to the murder convictions, those convictions should be upheld.

2. Since *First Degree Kidnapping Is Not An Element Of First Degree Felony Murder*, The Inclusion Of Surplusage In The Information Did Not Require Inclusion Of That "Element" In The Jury Instructions.

With regard to Brown, there is an additional reason to uphold the murder conviction. Brown was convicted of first degree felony

murder. That charge can be based on a killing committed in the course of first *or second* degree kidnapping. RCW 9A.32.030(1)(c). This is different than the aggravating circumstance for aggravated murder, which requires premeditated murder in the course of *first* degree kidnapping. RCW 10.95.020(11)(d).

The error identified by the Court of Appeals was instructing the jury on intent to inflict mental distress. This is an element of first degree kidnapping only, not second degree. RCW 9A.40.020(1)(d), 9A.40.030(1). This element was therefore unnecessary to prove first degree felony murder. Consequently, including it in the "to convict" instruction was not prejudicial to the defendant.

The language of the information does not change this result. The information did allege that the felony murder was committed in the scope of *first* degree kidnapping. CP (Brown) 148. The allegation of *first* degree kidnapping was, however, surplusage. The inclusion of a surplus allegation in an information does not transform the surplusage into an element of the crime State v. Tvedt, 153 Wn.2d 718, 107 P.2d 728 (2005).

This result is not changed by the inclusion of extra elements in the jury instructions. It is true that unchallenged instructions

become the "law of the case," requiring the State to prove the elements set out in them. State v. Hickman, 135 Wn.2d 97, 954 P.2d 900 (1998). This obligation arises from the jury instructions, not the information. Here, the State did introduce evidence that the defendants committed the crimes in the manner set out in the jury instructions. The inclusion of extra elements in the jury instructions does not require the State to prove still more elements that are *not* set out in the jury instructions.

The situation in the present case is analogous to that in State v. Brown, 140 Wn.2d 456, 998 P.2d 321 (2000). The defendant there was charged with third degree assault. The information alleged that the defendant "kn[ew] that [the victim] was a law enforcement officer ... who was performing official duties at the time of the assault." Id. at 459. The jury instructions included an element that the defendant knew that the victim was a law enforcement officer. The instructions omitted, however, any element that the defendant knew that the victim was performing official duties. Id. at 462. On appeal, the defendant claimed that the instructions were erroneous for their omission of this element.

This court held that *neither* type of knowledge is an element of third degree assault. Id. at 467. Consequently, neither element

needed to be included in the jury instructions. Insofar as the instructions required the State to prove knowledge that the victim was a law enforcement officer, the instruction was erroneous. This error, however, was prejudicial to the State, not the defendant. Since there was no requirement that the State prove that the defendant knew that the victim was performing official duties, omission of that "element" from the instructions was not error. *Id.* at 468-69. Thus, the inclusion in jury instructions of one surplus element (knowledge that the victim was a law enforcement officer) did not require inclusion of a second surplus element (knowledge that the victim was performing official duties).

The situation in the present case is essentially the same. With respect to first degree murder, the information included a surplus element – that the killing was committed in the course of *first* degree kidnapping. This element was included in the jury instructions. The defendant argues that the information should be interpreted as including a second surplus element – that the kidnapping was committed with intent to inflict bodily injury. That "element" was not included in the jury instructions, but this does not matter. Because it was surplusage, it did not need to be. Even if the information is construed as alleging *two* surplus elements, and

even though *one* of them was included in the jury instructions, omission of the *second* surplus element was not error.

In short, to prove first degree felony murder, the State was not required to prove that the kidnapping was committed with intent to inflict *either* bodily injury or mental distress. The inclusion in the information of either or both alternatives did not make them elements of the crime. To the extent that the jury instructions required the State to prove *either* of these alternatives, that was error prejudicial to the State and helpful to the defendant. The omission of *further* requirements with regard to these elements was not error.

B. SINCE THE JURY INSTRUCTIONS CORRECTLY DEFINED MURDER, THE DEFENDANTS WERE NOT PREJUDICED BY INCLUSION OF A REFERENCE TO "FAILURE TO ACT" IN AN INSTRUCTION DEFINING "HOMICIDE."

In each case, the jury was given the following instruction defining "homicide"

Homicide is the killing of a human being by the voluntary act, procurement, or failure to act of another and is either murder, homicide by abuse, manslaughter, excusable homicide or justifiable homicide.

CP (Brown) 347, inst. no. 5; CP (Kosewicz) 89, inst. no. 5.

In each case, the instructions contained no further reference to "homicide." The defendants nevertheless contend that the

reference to "failure to act" constitutes reversible error. This argument is formulated differently for the two defendants. Brown claims that the instruction of itself is constitutional error. Petition for Review (Brown) at 11-13. Kosewicz claims that defense counsel's failure to object to the instruction constituted ineffective assistance. Petition for Review (Kosewicz) at 7-11. Neither claim is correct.

1. An Instruction That Does Not Affect The Elements Of The Crime Is Not "Manifest Constitutional Error."

With regard to Brown's claim, he (like Kosewicz) did not object at trial to the instruction defining "homicide." Consequently, to obtain review, he must demonstrate that this instruction constituted "manifest error affecting a constitutional right." RAP 2.5(a)(3). Not every instructional error in a criminal case affects a constitutional right:

In analyzing the asserted constitutional interest, we do not assume the alleged error is of constitutional magnitude. We look to the asserted claim and assess whether, if correct, it implicates a constitutional interest as compared to another form of trial error. In instances where the allegation is that the defendant's due process rights were violated because he or she was denied a fair trial, the court will look at the defendant's allegation of a constitutional violation, and the facts alleged by the defendant, to determine whether, if true, the defendant's right to a fair trial has been violated.

State v. O'Hara, 167 Wn.2d 91, 98-99 ¶ 13, 217 P.3d 756 (2009)
(citations omitted).

Brown claims that this instruction denied him a fair trial because "[i]t allowed the jury to convict him based upon his failure to contact law enforcement." Petition for Review (Brown) at 11. This is not true. The challenged instruction did not set out an element of the charged crime. It did not even define a term used in those elements. As defined in the instruction, "homicide" is not always a crime – it could be excusable or justifiable. When it is a crime, it is not always murder – it could be homicide by abuse or manslaughter. It was thus clear to the jury that proof of "homicide" (if relevant at all) is not sufficient to prove murder.

To prove murder, the State had to show that the defendant, "as an actor and/or accomplice" committed or attempted to commit first degree kidnapping and caused the victim's death in the course of that crime. CP (Brown) 356, inst. no. 14. To be an "accomplice," the defendant had to solicit or encourage commission of the crime or aid in its commission.

The word "aid" means all assistance whether given by words, acts, encouragement, support, or presence. A person who is present at the scene and ready to assist by his or her presence is aiding in the commission of the crime. However, more than mere

presence and knowledge of the criminal activity of another must be shown to establish that a person present is an accomplice.

CP (Brown) 352, inst. no. 10. The instruction thus made it clear that failure to notify law enforcement is not sufficient to render someone an accomplice. Since the instruction did not deny the defendant a fair trial, and no other constitutional right has been identified, the defendant has not shown that it "affected a constitutional right." Consequently, the issue cannot be raised for the first time on appeal.

For much the same reason, the defendant has not shown that any error was "manifest."

"Manifest" in RAP 2.5(a)(3) requires a showing of actual prejudice. To demonstrate actual prejudice, there must be a plausible showing by the appellant that the asserted error had practical and identifiable consequences in the trial of the case.

O'Hara, 167 Wn.2d at 99 ¶ 14. Here, the instructions defining first degree murder and accomplice liability correctly set out the elements that the State was required to prove. The instruction defining "homicide" did not alter those elements. Any error in that instruction had no practical or identifiable consequences in the trial. Consequently, it does not constitute "manifest" error that can be raised for the first time on review.

2. Since The Court Must Assume That The Jury Followed The Instructions When Determining Whether Counsel's Performance Resulted In Prejudice, An Instruction That Does Not Affect The Elements Of The Crime Does Not Establish Ineffective Assistance.

Kosewicz argues that defense counsel's failure to object to the same "homicide" instruction constituted ineffective assistance. To establish ineffective assistance, the defendant must show that counsel's deficient performance resulted in prejudice. This requires a showing of "a reasonable probability that, except for counsel's unprofessional errors, the result of the proceeding would have been different." State v. McFarland, 127 Wn.2d 322, 334-35, 899 P.2d 1251 (1995); Strickland v. Washington, 466 U.S. 668, 694, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984). "The assessment of prejudice should proceed on the assumption that the decisionmaker is reasonably, conscientiously, and impartially applying the standards that govern the decision." Strickland, 466 U.S. at 695.

In Kosewicz's case, the instruction defining murder required the State to prove "[t]hat the defendant as an actor or accomplice, acted with intent to cause the death" of the victim. CP (Kosewicz) 93, inst. no. 9. The instruction on accomplice liability was identical to the one used at Brown's trial. CP (Kosewicz) 111, inst. no. 27. These instructions made it clear that inaction is not sufficient to

make a person guilty of murder. The court must assume that the jury followed these instructions. Consequently, the defendant cannot establish that any deficient performance by counsel resulted in prejudice.

V. CONCLUSION

The murder convictions in both cases should be affirmed.

Respectfully submitted on February 1, 2011.



SETH A. FINE, WSBA # 10937
Deputy Prosecuting Attorney
Attorney for Respondent