

K  
FILED  
MAR 30 2010  
CLERK OF THE SUPREME COURT  
STATE OF WASHINGTON  
*[Signature]*

83682-5

FILED  
MAR 25 2010  
COURT OF APPEALS  
DIVISION III  
STATE OF WASHINGTON  
By \_\_\_\_\_

IN THE SUPREME COURT  
OF THE STATE OF WASHINGTON

---

STATE OF WASHINGTON,

Respondent,

v.

THEODORE M. KOSEWICZ,

Petitioner.

---

ANSWER TO PETITION FOR REVIEW

---

STEVEN J. TUCKER  
Prosecuting Attorney  
Spokane County

Mark E. Lindsey  
Deputy Prosecuting Attorney

Attorneys for Respondent

County-City Public Safety Building  
West 1100 Mallon  
Spokane, Washington 99260  
(509) 477-3662

**INDEX**

I. ISSUES PRESENTED..... 1

II. STATEMENT OF THE CASE ..... 1

III. ARGUMENT..... 4

    A. PETITIONER HAS NOT SATISFIED HIS BURDEN  
        PURSUANT TO RAP 13.4(b)..... 4

    B. THE TRIAL COURT HAD NO RESPONSIBILITY  
        TO FIND THAT DEFENSE COUNSEL HAD  
        PROVIDED INEFFECTIVE ASSISTANCE IN  
        LIGHT OF THE DEFENSE THEORY OF THE  
        CASE ..... 6

    C. THE TRIAL COURT PROPERLY INSTRUCTED  
        THE JURY WITH REGARD TO THE AGGRAVATED  
        FIRST DEGREE MURDER CHARGE ..... 8

F. CONCLUSION..... 12

**TABLE OF AUTHORITIES**

**WASHINGTON CASES**

STATE V. DANA, 73 Wn.2d 533,  
439 P.2d 403 (1968)..... 8

STATE V. HENDRICKSON, 129 Wn.2d 61,  
917 P.2d 563 (1996)..... 7

STATE V. JOHNSON, 124 Wn.2d 57,  
873 P.2d 514 (1994)..... 10

STATE V. MILLS, 154 Wn.2d 1,  
109 P.3d 415 (2005)..... 8

STATE V. NICHOLS, 161 Wn.2d 1,  
162 P.3d 1122 (2007)..... 6

STATE V. O'DONNELL, 142 Wn. App. 314,  
174 P.3d 1205 (2007)..... 8, 9

STATE V. PRADO, 144 Wn. App. 227,  
181 P.3d 901 (2008)..... 8

STATE V. SCOTT, 110 Wn.2d 682,  
757 P.2d 492 (1988)..... 4

STATE V. THOMAS, 109 Wn.2d 222,  
743 P.2d 816 (1987)..... 6, 7

**SUPREME COURT CASES**

STRICKLAND V. WASHINGTON, 466 U.S. 668,  
104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984)..... 5, 7

**COURT RULES**

RAP 13.4(b)..... 4

I.

ISSUES PRESENTED

1. Did the Court of Appeals examine Petitioner's claim of ineffective assistance of counsel based upon the lack of objection to the giving of the definitional instruction regarding homicide to the jury.
2. Did the trial court's instructions to the jury regarding the crime of aggravated first degree murder violate defendant's right to notice of the nature and cause of the accusation based upon the definition of kidnapping.

II.

STATEMENT OF THE CASE<sup>1</sup>

In the Spring of 2005, Sebastian Esquibel owed Levoy Burnham about \$800 for illegal drugs. Mr. Burnham wanted payment, so he brought Mr. Esquibel to his trailer where Mr. Burnham assaulted Mr. Esquibel. Mr. Burnham forced Mr. Esquibel to remove all his clothing except his shorts, then secured him in the trailer with duct tape. Petitioner, Mr. Kosewicz, was owed money by Mr. Burnham and visited the trailer while Mr. Esquibel was secured therein.

---

<sup>1</sup> The Statement of the Case is based upon the recitation of facts contained in the Court of Appeals, Division III, unpublished opinion. A copy is attached as Appendix A.

Petitioner asked Mr. Esquibel about the money because petitioner knew that he could only obtain the money that he was owed from Burnham if he could get Esquibel to pay Burnham. Petitioner kicked Mr. Esquibel a couple of times while he was bound. Mr. Esquibel was held in Burnham's trailer throughout that day and into the next when Amber Johnson arrived with her van. Burnham then placed the bound Esquibel into the Johnson van and they all left.

Initially, Johnson drove to another house before arriving at her home. Burnham then phoned petitioner and asked for help to recover money from Esquibel. Burnham loaded Esquibel back into the van and picked up petitioner, then headed to Esquibel's Grandmother's house to get the money. However, *petitioner* gave Johnson directions which headed the van into the South Spokane County countryside. Ms. Johnson eventually stopped the van at *petitioner's* direction. Burnham and *petitioner* then exited the van and took Esquibel along. Shortly thereafter, Ms. Johnson heard a gunshot. *Petitioner* and Burnham then placed Esquibel's dead body in a wood slash pile before returning to the van a few minutes later. *Petitioner* described how he planned to dispose of the gun by melting it down.

The next day, *petitioner* arrived at Ms. Johnson's house to replace the carpet in her van "[i]n case there was any blood or hairs." RP at 339. In the Winter of 2006, Esquibel's body was discovered under the wood in the

debris pile. Subsequent to the investigation, petitioner was charged with aggravated first degree murder, first degree kidnapping, conspiracy to commit first degree kidnapping, and several counts of assault. A jury convicted petitioner of aggravated first degree murder, first degree kidnapping, and conspiracy to commit first degree kidnapping. Defendant appealed.

The Court of Appeals found that the trial court's giving of the definitional instruction regarding homicide was harmless error in light of the trial court's proper instructions regarding the charged crime of aggravated first degree murder. The Court of Appeals reversed and remanded the separate specific charge of first degree kidnapping because the trial court erred in instructing the jury of the uncharged alternative means of committing the crime. Finally, the Court of Appeals found that the evidence of petitioner's complicity in the kidnapping and murder was so overwhelming that it affirmed the convictions for aggravated first degree murder and conspiracy to commit first degree kidnapping. Petitioner filed this petition seeking discretionary review of the Court of Appeals' decision.

III.

ARGUMENT

A. PETITIONER HAS NOT SATISFIED HIS BURDEN  
PURSUANT TO RAP 13.4(b).

RAP 13.4(b) provides, in pertinent part:

A petition...will be accepted...only: (1) If the decision of the Court of Appeals is in conflict with a decision of the Supreme Court; or (2) If the decision of the Court of Appeals is in conflict with another decision of the Court of Appeals; or (3) If a significant question of law under the Constitution of the State of Washington or of the United States is involved; or (4) If the petition involves an issue of substantial public interest that should be determined by the Supreme Court.

RAP 13.4(b).

The State respectfully submits that the petition does not satisfy the requirements of RAP 13.4(b) as set forth above. Petitioner has gone to great lengths to set up the existence of a conflict between how the Court of Appeals addressed the claim of ineffective assistance of counsel based upon counsel's decision not to object to the trial court giving a harmless definitional instruction. Generally, the failure to object to a trial court's jury instruction precludes appellate review. *State v. Scott*, 110 Wn.2d 682, 685-6, 757 P.2d 492 (1988). Neither the defendant nor his counsel objected to the jury instructions that he subsequently contends were erroneous. Petitioner contends that the Court of Appeals applied the wrong standard of review, yet

couched the issue before the Court of Appeals as one of ineffective assistance of counsel, instead of an instructional error, to avoid the well settled case law that would bar defendant from relief on appeal for an instructional error to which he did not object at trial. Only by combining the two arguments did petitioner get the Court of Appeals to override the legal bar to the appeal and hear his appeal regarding the instructional errors. Petitioner's arguments before the Court of Appeals and this Court contend that the jury's verdicts should be disregarded and thrown out because of trial court instructional errors. Finally, petitioner contends that this petition should be granted because disregarding the implications of instructional error such a case presents an issue of substantial public interest.

This petition should be denied. The petition characterizes the claim as ineffective assistance of counsel while it argues that his constitutional rights were violated by the trial court's instructional error, yet has shown no prejudice based upon the claimed ineffective assistance of counsel. Petitioner asks this Court to apply the standard of review applicable to instructional errors instead of ineffective assistance of counsel to this case. This perspective would permit petitioner to avoid the requirement of proving that counsel's performance was deficient *and* affected the outcome of the trial. As noted, the failure to establish either prong of the test is fatal to the claim of ineffective assistance of counsel. *Strickland v. Washington*,

466 U.S. 668, 697, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984);  
*State v. Thomas*, 109 Wn.2d 222, 226, 743 P.2d 816 (1987). Accordingly,  
the State respectfully requests that this petition be denied.

B. THE TRIAL COURT HAD NO RESPONSIBILITY  
TO FIND THAT DEFENSE COUNSEL HAD  
PROVIDED INEFFECTIVE ASSISTANCE IN  
LIGHT OF THE DEFENSE THEORY OF THE  
CASE.

Petitioner claims that the trial court should have *sua sponte*  
intervened and found that defense counsel's failure to object to the inclusion  
of the definitional instruction constituted ineffective assistance of counsel.  
As previously noted, petitioner is using the claimed instructional error to  
bypass the case law that pertains to ineffective assistance of counsel.

A defendant must establish that the attorney's performance was  
deficient and that the defendant was prejudiced by that deficiency to  
establish ineffective assistance of counsel. *State v. Nichols*, 161 Wn.2d 1, 8,  
162 P.3d 1122 (2007). The defendant must prove that the trial counsel's  
performance fell below an objective standard of reasonableness based on all  
the circumstances to show deficient performance. *Id.* Prejudice is  
established where the defendant shows that but for counsel's errors, there is a  
reasonable probability that the outcome of the trial would have been  
different. *Id.* The failure to establish either prong of the test is fatal to the

claim of ineffective assistance of counsel. *Strickland v. Washington*, 466 U.S. at 697; *State v. Thomas*, 109 Wn.2d at 226.

There is a strong presumption that a trial counsel's performance was reasonable and effective. *State v. Thomas*, 109 Wn.2d at 226. A claim of ineffective assistance of counsel will not stand where the trial counsel's conduct can be characterized as legitimate trial strategy or tactics. *State v. Hendrickson*, 129 Wn.2d 61, 77-78, 917 P.2d 563 (1996). Here, the inquiry focuses upon whether counsel's failure to object to the trial court's definitional jury instruction can be characterized as illegitimate trial strategy or tactics. The record reveals that the defense theory of the case was that the defendant was merely a bystander along for the ride without any foreknowledge of what was to come. The jury instructions, read as a whole, supported such a theory of the case, did not mislead the jury, and properly advised the jury of the applicable law. There is no evidence in, or reasonable inferences to be drawn from a review of, the record to support that defendant's trial counsel was ineffective. Quite the contrary is evident from the record. The fact that the jury weighed the evidence and did not find Mr. Kosewicz's theory of the case credible does not establish that his trial counsel was ineffective.

C. THE TRIAL COURT PROPERLY INSTRUCTED THE JURY WITH REGARD TO THE AGGRAVATED FIRST DEGREE MURDER CHARGE.

Petitioner claims the trial court committed error of constitutional magnitude instructing the jury regarding the elements of first degree kidnapping as the crime “in the course of or furtherance of such crime” that the murder was committed. Jury instructions satisfy the constitutional demands of a fair trial, when read as a whole, the instructions provide the jury with the applicable law, are not misleading, and permit the defendant to present his theory of the case. *State v. Prado*, 144 Wn. App. 227, 241, 181 P.3d 901 (2008) (citing *State v. Mills*, 154 Wn.2d 1, 7, 109 P.3d 415 (2005); *State v. Dana*, 73 Wn.2d 533, 536-37, 439 P.2d 403 (1968)). Erroneous jury instructions are subject to *de novo* review by the appellate court. *State v. O'Donnell*, 142 Wn. App. 314, 322, 174 P.3d 1205 (2007).

Here, the trial court faced the difficult task of instructing the jury concerning the *separate* specific kidnapping charge while also instructing with regard to the general crime that was the subject crime of the murder and conspiracy charges. The trial court had to provide both definitions to fulfill its responsibility based upon the crimes charged, to-wit: murder committed during or in the furtherance of a kidnapping and conspiracy to commit a kidnapping. The error, if any, was in the failure to include language that

directed the jury how to apply the instructions to the evidence. For example, that the general definition of kidnapping was only to be applied to the murder and conspiracy charges (e.g. “as charged in count...”) while the more specific definition of kidnapping only applied to the separately charged offense. No objection to the inclusion of the general definition of kidnapping was made because it had no effect on the defendant’s theory of the case that there was insufficient evidence of premeditation or planning of the kidnapping to render him criminally liable for the murder of Mr. Esquibel.

Defendant contends that the trial court deprived him of his constitutional right to due process and a fair trial by providing the jury the means of finding him guilty of murder and conspiracy to commit kidnapping based upon an uncharged alternative of first degree kidnapping. The United State and Washington State Constitutions mandate that the jury be instructed regarding all essential elements of the crime charged. *State v. O’Donnell*, 142 Wn. App. at 322. Here, as noted, the trial court instructed the jury regarding the definition and elements of first degree kidnapping based on the charging language in the amended information. That charging language mandated that the trial court instruct the jury on the law to be applied to each of the separate charged offenses. Such is precisely what the trial court accomplished by providing the specific and general definitions of

kidnapping. As petitioner concedes, the jury was provided more than sufficient evidence to support the finding of the commission of either or both means of first degree kidnapping. Hence, the trial court was required to instruct on the general definition of first degree kidnapping for purposes of the murder and conspiracy charges. The inclusion of the alternative means of first degree kidnapping in the context of the charged crimes and the evidence before the jury worked to properly inform the jury of the applicable law, were not misleading, and were readily understood.

A jury is presumed to follow the law as instructed by the trial court. *State v. Johnson*, 124 Wn.2d 57, 77, 873 P.2d 514 (1994). Here, the instructions stated the applicable law accurately, did not mislead, and afforded Mr. Kosewicz the basis upon which to argue his theory of the case. The record reflects that the jury considered defendant's theory of the case carefully prior to entering a finding of guilty. Petitioner has not shown that the jury's verdicts were affected by the inclusion of the general definition of kidnapping in its instructions since no clarification was sought. Clearly, the trial court's inclusion of the general definition of kidnapping had no bearing on the defendant's theory of the case, did not mislead the jury, and properly advised the jury of the applicable law.

The evidence presented at trial clearly demonstrated Mr. Kosewicz had knowledge of the “taxing” of Mr. Esquibel for a debt owed to a known drug dealer. Mr. Kosewicz himself testified that the drug dealer, Mr. Burnham, called upon him to help collect the money from Mr. Esquibel. The defendant was not forced to participate in the “taxing” and took no action to either stop or disassociate himself from the actions taken against Mr. Esquibel. The evidence before the jury was that Mr. Kosewicz willingly participated in the assault, abduction and eventual murder of Mr. Esquibel. The evidence of the extent of Petitioner’s participation included: his choosing the location of the murder; the dragging of Mr. Esquibel out of the van at that location; the murder and then hiding of the body in the debris pile; his disposal of the gun, and his replacement of the carpet in the van to cover up the kidnapping and murder. Accordingly, the jury’s verdicts convicting petitioner of the conspiracy to commit kidnapping and murder of Mr. Esquibel did not violate his constitutional rights.

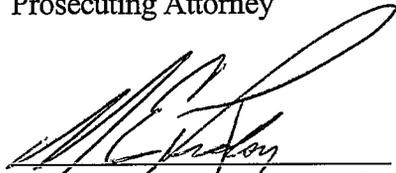
IV.

CONCLUSION

For the reasons stated, the petition should be denied.

Respectfully submitted this 25<sup>th</sup> day of March, 2008.

STEVEN J. TUCKER  
Prosecuting Attorney



---

Mark E. Lindsey #18272  
Deputy Prosecuting Attorney  
Attorney for Respondent

# APPENDIX A

**FILED**

JUN 23 2009

In the Office of the Clerk of Court  
WA State Court of Appeals, Division III

**IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON**

<b>STATE OF WASHINGTON,</b>	)	<b>No. 26910-8-III</b>
	)	
<b>Respondent,</b>	)	
	)	<b>Division Three</b>
<b>v.</b>	)	
	)	
<b>THEODORE M. KOSEWICZ,</b>	)	<b>UNPUBLISHED OPINION</b>
	)	
<b>Appellant.</b>	)	

KULIK, A.C.J. — This appeal follows convictions for aggravated first degree murder, first degree kidnapping, and conspiracy to commit first degree kidnapping. Theodore Kosewicz challenges the sufficiency of the evidence to support his conviction for first degree murder. We conclude that the evidence here easily supports the inference that the murder was intentional and premeditated, and that Mr. Kosewicz was criminally culpable.

Mr. Kosewicz also assigns error to the court's definition of "homicide," which included the phrase "failure to act." Mr. Kosewicz had no duty to act. This definition does not apply to the facts of this case, and it was error to use this instruction. The court, however, properly instructed the jury on both the elements of first degree murder and the

elements for accomplice liability. And no one argued that Mr. Kosewicz had any duty to act. We, therefore, conclude that any error was harmless. The court also instructed the jury on an uncharged alternative means of first degree kidnapping, and the State concedes as much. Thus, we reverse the conviction for first degree kidnapping and remand for trial. We affirm the convictions for aggravated first degree murder and conspiracy to commit first degree kidnapping.

#### FACTS

Sebastian Esquibel failed to pay Levoy Burnham for illicit drugs. Mr. Burnham wanted payment. Mr. Burnham took Mr. Esquibel to the Burnhams' trailer and assaulted him. Mr. Burnham forced Mr. Esquibel to remove all of his clothing, except his shorts. Theodore Kosewicz came to the trailer. He asked Mr. Esquibel about the location of the money. Mr. Kosewicz kicked Mr. Esquibel once or twice. Mr. Burnham tied Mr. Esquibel's ankles together with duct tape.

They held Mr. Esquibel at the Burnhams' trailer throughout the day and into the next day. Amber Johnson arrived at the trailer in her van with a companion. Mr. Burnham pushed Mr. Esquibel, bound and maybe gagged, into Ms. Johnson's van, got in, and they all left.

Ms. Johnson first drove to another house and ultimately to her house. Mr. Kosewicz met up with them later, either at Ms. Johnson's house or in the van. Mr. Burnham and Mr. Kosewicz moved Mr. Esquibel into Ms. Johnson's laundry room where they again beat him. They then put him back into Ms. Johnson's van and left.

Ms. Johnson drove to a house where Mr. Esquibel claimed there was money to repay his debt. Mr. Burnham and Mr. Kosewicz got out of the van and went to the house. Mr. Esquibel had no money there. The men returned to the van. Mr. Kosewicz asked Mr. Esquibel where the money was. Mr. Kosewicz struck Mr. Esquibel.

Mr. Esquibel said he had money at his grandmother's house. Mr. Kosewicz gave Ms. Johnson directions. But he gave her directions to the South Hill area of Spokane, Washington, and away from Mr. Esquibel's grandmother's house. By following Mr. Kosewicz's directions, they ended up in the countryside outside Spokane. Ms. Johnson stopped the van at someone's direction. Mr. Burnham and Mr. Kosewicz got out of the van and took Mr. Esquibel with them. Ms. Johnson heard a gunshot. Mr. Kosewicz and Mr. Burnham returned to the van a few minutes later. Mr. Kosewicz then talked about how he planned to melt the gun down. Both Mr. Kosewicz and Mr. Burnham handled the gun when they got back in the van.

Mr. Kosewicz came to Ms. Johnson's house the day after the murder and replaced the carpet in the van "[i]n case there was any blood or hairs." Report of Proceedings at 339. All of this took place in the spring of 2005. In January 2006, a passerby saw the body under some wood and called the police, who found Mr. Esquibel's body. The State charged Mr. Kosewicz with aggravated first degree murder, first degree kidnapping, conspiracy to commit first degree kidnapping, and several counts of assault. A jury convicted Mr. Kosewicz of aggravated first degree murder, first degree kidnapping, and conspiracy to commit first degree kidnapping. Mr. Kosewicz appeals.

#### ANALYSIS

*Sufficiency of the Evidence—Intent to Cause the Death of Another.* Mr. Kosewicz first contends the evidence was insufficient to support his conviction for aggravated first degree murder. Specifically, he asserts the evidence was insufficient to establish that he intended Mr. Esquibel's murder. Mr. Kosewicz essentially argues his version of the facts. This approach ignores the standard of review we apply to his assignment of error.

The standard of review is substantial evidence. That is whether there is evidence, or inferences from that evidence, that would support the elements of the crimes for which Mr. Kosewicz was convicted. *See State v. Salinas*, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992). We view that evidence and any inferences that flow from that evidence in the light most favorable to the State, since a jury has already concluded the evidence was

sufficient to support the elements of the crimes here. *Id.* The issue is whether the State has met its burden of production not whether the State has meet its burden of persuasion. *State v. Henjum*, 136 Wn. App. 807, 810, 150 P.3d 1170 ( 2007). The State must establish that it has produced sufficient evidence to support the elements of the crimes here. *Id.*

The State elected to charge Mr. Kosewicz as a principal or alternatively as an accomplice. Accordingly, the court instructed the jury that it could find Mr. Kosewicz guilty, “as an actor or accomplice, [if he] acted with intent to cause the death of [Mr. Esquibel]” and “[t]hat the intent to cause death was premeditated.” Clerk’s Papers (CP) at 93.

Here the State showed, by direct evidence or reasonable inferences from that evidence, that Mr. Kosewicz agreed to assist Mr. Burnham in getting money from Mr. Esquibel. The State showed that Mr. Kosewicz went to Mr. Burnham’s house on two successive days and assaulted Mr. Esquibel while asking him about money. Mr. Esquibel was bound. Mr. Kosewicz got into Ms. Johnson’s van with others and again assaulted Mr. Esquibel and again asked about the money owed to Mr. Burnham.

The State showed that Mr. Kosewicz directed Ms. Johnson to drive to the Spokane County countryside. The State showed that he helped Mr. Burnham pull Mr. Esquibel from the van while Mr. Esquibel was still bound and maybe gagged. The State also

showed that a shot was then fired outside the van. Mr. Kosewicz returned to the van and openly planned to destroy the gun. The State showed that Mr. Esquibel died from a gunshot. We conclude that the State produced sufficient evidence to support the conclusion that Mr. Kosewicz's murder of Mr. Esquibel—whether as the actor or as an accomplice—was both intentional and premeditated.

Definition of "Homicide"—Failure to Act. Mr. Kosewicz next assigns error to the court's instruction defining "homicide." Jury instruction 5 reads: "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 at 89 (emphasis added).

The problem here is that the definition of "homicide" includes "failure to act," when Mr. Kosewicz had no legal obligation to affirmatively act. *State v. Jackson*, 137 Wn.2d 712, 724-25, 976 P.2d 1229 (1999). Mr. Kosewicz's attorney did not object to the instruction at trial. And so, generally, he would not have the right to complain about the instruction on appeal. *State v. Bledsoe*, 33 Wn. App. 720, 726, 658 P.2d 674 (1983). But Mr. Kosewicz couches his assignment of error as one of ineffective assistance of counsel, contending his lawyer should have objected to the instruction. As a result, we must consider this issue, despite his failure to object at trial. Our review is de novo as to

whether the claim is ineffective assistance of counsel, for failing to object to the instruction. *See State v. Curtis*, 110 Wn. App. 6, 11, 37 P.3d 1274 (2002).

But no matter what the basis for the constitutional challenge, we conclude that any error here was harmless for a number of reasons. First, the State did not try to show that Mr. Kosewicz was criminally liable for Mr. Esquibel's murder because he failed to act. Instead, the State showed that Mr. Kosewicz killed Mr. Esquibel by shooting him or aiding and abetting Mr. Burnham in shooting Mr. Esquibel. The State did not argue to the jury that Mr. Kosewicz failed to act or that Mr. Kosewicz was guilty of murder because of a failure to act.

Moreover, the court's elements instructions are accurate statements of the law. These instructions do not refer to the flawed definitional instruction and the flawed definitional instruction is not implicated by the court's instructions on the elements of first degree murder or related instructions. The court instructed correctly on the definition of first degree murder:

**INSTRUCTION NO. 7**

A person commits the crime of murder in the first degree when, with a premeditated intent to cause the death of another person, he or she causes the death of such person or of a third person unless the killing is excusable or justifiable.

CP at 91.

The court instructed correctly on the elements the State had to prove to convict

Mr. Kosewicz of first degree murder:

INSTRUCTION NO. 9

To convict the defendant of the crime of murder in the first degree, each of the following elements of the crime must be proved beyond a reasonable doubt:

- (1) That on or about the 18th day of May 2005, and the 13th day of June 2005, the defendant as an actor or accomplice killed SEBASTIAN L. ESQUIBEL;
- (2) That the defendant as an actor or accomplice, acted with intent to cause the death of SEBASTIAN L. ESQUIBEL;
- (3) That the intent to cause the death was premeditated.

CP at 93. And the court correctly instructed the jury on the requirements for accomplice liability:

INSTRUCTION NO. 27

A person is guilty of a crime if it is committed by the conduct of another person for which he or she is legally accountable. A person is legally accountable for the conduct of another person when he or she is an accomplice of such person in the commission of the crime.

A person is an accomplice in the commission of a crime if, with knowledge that it will promote or facilitate the commission of the crime, he or she either:

- (1) solicits, commands, encourages, or requests another person to commit the crime; or
- (2) aids or agrees to aid another person in planning or committing the crime.

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.

A person who is an accomplice in the commission of a crime is guilty of that crime whether present at the scene or not.

CP at 111.

The State was not then relieved of its burden to prove every element of first degree murder. *State v. King*, 113 Wn. App. 243, 265 n.2, 54 P.3d 1218 (2002). And, finally, our review of this record convinces us that the evidence of Mr. Kosewicz's criminal culpability here is overwhelming and for that reason alone any error would be harmless. *State v. Brown*, 147 Wn.2d 330, 341, 58 P.3d 889 (2002).

*Kidnapping Uncharged Alternative—Inflict Extreme Mental Distress.* Mr.

Kosewicz next contends the court erred by instructing the jury that it could consider convicting him of kidnapping with intent "to inflict extreme mental distress." CP at 98. But the State did not charge that alternative. And, accordingly, Mr. Kosewicz did not have notice of the charge.

The State may charge one or more alternatives when the crime may be committed in more than one way. *State v. Bray*, 52 Wn. App. 30, 34, 756 P.2d 1332 (1988). But the court cannot allow the jury to convict a defendant on an alternative means of committing a crime, here kidnapping, when the State's information fails to charge the defendant with committing the crime by that alternative. *See id.* The problem is that the jury is invited

to convict the defendant on a crime, or a means of committing that crime, for which he was not charged. *State v. Doogan*, 82 Wn. App. 185, 189, 917 P.2d 155 (1996).

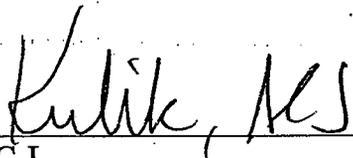
Here, the amended information charged Mr. Kosewicz with first degree kidnapping: “[A]s actors and/or accomplices of Levoy G. Burnham . . . did, with intent to inflict bodily injury on [Mr. Esquibel], intentionally abduct such person.” CP at 36. Jury instructions 13 and 14, which define the offense and set forth the elements of kidnapping, instructed the jury that kidnapping could be completed by either intentionally abducting another person with intent “to inflict bodily injury,” or “to inflict extreme mental distress.” CP at 97-98.

The evidence supporting even the uncharged alternative—intent to inflict extreme mental distress—is certainly substantial here. But this fact is not dispositive. *See State v. Severns*, 13 Wn.2d 542, 548, 125 P.2d 659 (1942); *State v. Chino*, 117 Wn. App. 531, 540, 72 P.3d 256 (2003). The error is harmless only if other instructions clearly and specifically define the uncharged alternative. *Chino*, 117 Wn. App. at 540-41. Said another way, we must be able to conclude that there is no possibility that Mr. Kosewicz was impermissibly convicted on an uncharged alternative. *State v. Nicholas*, 55 Wn. App. 261, 273, 776 P.2d 1385 (1989). We conclude there is no way analytically to isolate this error from the jury’s verdict on the kidnapping charge. We are constrained to reverse and remand for a new trial on that charge.

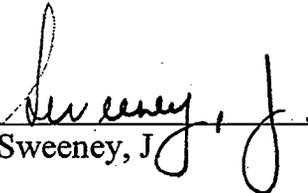
No. 26910-8-III  
*State v. Kosewicz*

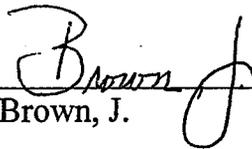
We affirm the aggravated first degree murder and conspiracy to commit first degree kidnapping convictions, and reverse and remand the first degree kidnapping conviction for a new trial.

A majority of the panel has determined this opinion will not be printed in the Washington Appellate Reports, but it will be filed for public record pursuant to RCW 2.06.040.

  
\_\_\_\_\_  
Kulik, A.C.J.

WE CONCUR:

  
\_\_\_\_\_  
Sweeney, J.

  
\_\_\_\_\_  
Brown, J.

**FILED**  
MAR 30 2010  
CLERK OF THE SUPREME COURT  
STATE OF WASHINGTON

**FILED**

MAR 25 2010

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

THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, )

Respondent, )

v. )

THEODORE M. KOSEWICZ, )

Petitioner, )

No. 83682-5

CERTIFICATE OF MAILING

**CERTIFICATE**

Kathleen L. Owens states: That I am a citizen of the United States of America and of the State of Washington, over the age of 21 years, not a party to the above-entitled action, and competent to be a witness therein; that on March 25, 2010, I mailed a true and correct copy of Answer to Petition for Review, addressed to:

Janet G. Gemberling  
Attorney at Law  
2920 South Grand Blvd, #132  
Spokane WA 99203

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

3/25/2010  
(Date)

Spokane, WA  
(Place)

*Kathleen L. Owens*  
(Signature)