IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

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THEODORE M. KOSEWICZ,	)	**UNPUBLISHED OPINION**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

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.

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.

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Kulik, A.C.J.

WE CONCUR:

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Sweeney, J.

_____
Brown, J.