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26910-8-III

COURT OF APPEALS
DIVISION III

OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, RESPONDENT

v.

THEODORE M. KOSEWICZ, APPELLANT

APPEAL FROM THE SUPERIOR COURT

OF SPOKANE COUNTY

APPELLANT'S BRIEF

FILED

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COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON
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A. ASSIGNMENTS OF ERROR

1. The court erred in giving jury instruction no 5, defining the term "homicide." (1/28/08 RP 67)
2. Defense counsel provided ineffective assistance by failing to object to the giving of instruction no. 5.
3. The court erred in giving jury instruction no. 13, defining the offense of kidnapping in the first degree. (RP 70)
4. The court erred in giving jury instruction no. 14, setting forth the elements of first degree kidnapping.
5. The court erred in entering judgment on the jury verdict finding Mr. Kosewicz guilty of aggravated premeditated first degree murder. (CP 163-177)

B. ISSUES

1. When the defendant is charged with first degree murder as an accomplice, and the word homicide does not appear in any of the other instructions, is it prejudicial error to give the jury an instruction defining homicide to include the killing of another human by failure to act and to constitute, *inter alia*, murder?

2. Under the Sixth Amendment and Const. art. 1, § 22 (amend 10) when the defendant is charged with first degree murder as an accomplice and the State proposes an instruction defining homicide as killing a human being by failing to act, does defense counsel provide ineffective assistance by failing to object to the giving of the instruction?
3. Under the Sixth Amendment and the Fourteenth Amendment to the federal constitution and Const. art. 1, § 22, when the information charges kidnapping as abduction with intent to inflict bodily injury, do jury instructions that permit conviction on the uncharged alternative of intent to inflict extreme mental distress, violate the due process right to notice of the charge?
4. Under U.S. Const. amend 14 and Const. art. 1, § 3, when the defendant is charged with premeditated first degree murder, does conviction on the charge violate due process in the absence of any evidence the defendant knew the victim, was aware that anyone had a gun or had any knowledge that anyone had any intent, or reason to form an intent, to kill the victim?

C. STATEMENT OF THE CASE

Shannon Burnham and her husband Levoy were living in a trailer behind Rob Brown's house for about three months in the spring of 2004 or 2005. (RP 270-75, 310, 313) During this time Mr. Burnham was selling methamphetamine and he and his wife were both using. (RP 275) Mr. Burnham obtained his methamphetamine supply primarily from Carlton Hritsco and also from Amber Johnson. (RP 275, 278)

One day Mr. Burnham brought Sebastian Esquibel to the trailer with him while they were discussing a drug deal. (RP 279, 282) The Burnhams and Mr. Esquibel used some methamphetamine and then the two men left in Mr. Burnham's car. (RP 280) A while later Mr. Hritsco showed up at the trailer with a gun, asking Ms. Burnham if she was okay and saying someone had stolen money from him. (RP 280-81) While he was still there, Mr. Burnham and Mr. Esquibel returned to the trailer. (RP 281) Mr. Burnham was yelling at Mr. Esquibel, kicking him, and asking him where the money went. (RP 282-83) At some point Theodore Kosewicz arrived at the trailer and saw Mr. Esquibel who had been tied up and apparently beaten. (RP 285-88, 1/28/08 RP 20) Mr. Burnham explained to Mr. Kosewicz that Mr. Esquibel had stolen money from him. (1/28/08 RP 20) After inquiring about Mr. Brown's whereabouts, Mr. Kosewicz left. (RP 288; 1/28/08 RP 21)

Mr. Hritsco left the trailer, leaving his gun behind, and Mr. Brown showed up. (RP 284) Mr. Brown and Mr. Burnham ordered Mr. Esquibel to strip down to his shorts. (RP 284) They put duct tape around his ankles. (RP 286)

This situation continued on into the next day, when Mr. Burnham then called Ms. Johnson and asked her to give him a ride in her van. (RP 288, 313) When Ms. Johnson and her boyfriend, David Collins, arrived at the trailer they found the Burnhams with Mr. Esquibel., who by that time was bound and gagged. (RP 311, 314-5) Mr. Burnham told Ms. Johnson that Mr. Esquibel owed him and Mr. Hritsco \$800 for drugs. (RP 316) He asked her to take them to Mr. Hritsco's house. (RP 317)

Mr. Burnham took Mr. Esquibel outside and pushed him into the back of Ms. Johnson's van. (RP 287-88, 318-19) Mr. Collins was in the passenger seat. (RP 318) When they arrived at Mr. Hritsco's home, he told them to leave. (RP 320) They then drove to Ms. Johnson's home where they waited to hear from Mr. Hritsco. (1/28/08 RP 22; RP 320-21) Mr. Burnham called Mr. Kosewicz and asked him if he would help him recover some money. (1/28/08 RP 22) Mr. Kosewicz agreed to help. (1/28/08 RP 22)

Eventually they loaded Mr. Esquibel back in the van, picked up Mr. Kosewicz at his home and drove to a house by the Double Eagle

pawnshop, where Mr. Esquibel had told them there was money. (RP 323, 326) Then they drove around while Mr. Burnham yelled at Mr. Esquibel, asking him where the money was. (RP 327-28) During this time Mr. Kosewicz was sitting in the passenger seat of the van. (RP 334) Eventually Ms. Johnson drove south of town out into the country and stopped on a dirt road in a deserted area. (RP 329-331)

Mr. Kosewicz and Mr. Burnham both got out of the van and in a very short time Ms. Johnson heard a gunshot. (RP 334-35) The two men got back in the van and Ms. Johnson drove them back to town. (RP 337)

On January 16, 2006, Mr. Esquibel's body was found in a woodpile in the middle of farmland south of Spokane. (RP 165, 180, 241) The State charged Mr. Burnham and Mr. Kosewicz with aggravated first degree murder and first degree kidnapping. (CP 1-2; RP 190) The State later amended the charges against Mr. Kosewicz to include conspiracy to commit first degree kidnapping. (CP 14-15)

At Mr. Kosewicz's trial, Ms. Burnham told the jury that when he came to the trailer Mr. Kosewicz told Mr. Esquibel to tell them where the money was. (RP 285-86) She said Mr. Kosewicz had kicked Mr. Esquibel once or twice but she did not see where. (RP 285-86).

Ms. Johnson told the jury that they took Mr. Esquibel downstairs into her laundry room and hit him repeatedly. (RP 322) Mr. Kosewicz

showed up at her house at some point, although she could not remember when. (RP 320-22) She recalled that Mr. Kosewicz went into the room where Mr. Esquibel was held and she heard Mr. Esquibel getting hit. (RP 323)

According to Ms. Johnson, when they left her house, they put Mr. Esquibel in the back of the van, Mr. Kosewicz and Mr. Burnham were sitting in the middle seats, she was driving and Mr. Collins was in the passenger seat. (RP 325) When they got to the house by the Double Eagle, Mr. Kosewicz and Mr. Burnham went into the house, and while they were inside, Mr. Collins got into the middle seat. (RP 326) When they left, Mr. Kosewicz was sitting in the passenger seat. (RP 330)

While they were driving around, Ms. Johnson testified, she heard Mr. Kosewicz punch Mr. Esquibel. (RP 327-28) Then Mr. Kosewicz told her to drive south, and continued to give her directions as they went out into the country. (RP 330) During this time, Mr. Burnham was in the back of the van with Mr. Esquibel. (RP 330) When they stopped, Mr. Burnham and Mr. Esquibel got out of the back of the van and Mr. Kosewicz got out of the side of the van. (RP 334) She did not see what happened during the time before Mr. Kosewicz and Mr. Burnham got back in the van. (RP 334-35)

Ms. Johnson testified that as they drove back to town she saw both Mr. Kosewicz and Mr. Burnham handle the gun and heard Mr. Kosewicz say he was going to melt it down. (RP 335-36)

After Mr. Kosewicz's arrest he was interviewed by Detective Dresback. According to the detective, Mr. Kosewicz admitted that Mr. Burnham had asked him to help scare Mr. Esquibel and he had agreed to do so. (RP 391) Mr. Kosewicz told the detective that he was still getting out of the van when he heard the gunshot and then went and saw Mr. Esquibel lying face down and saw that he had been shot in the head. (RP 391) He did not know how the plan to scare Mr. Esquibel turned into shooting him in the head. (RP 392)

Mr. Kosewicz told the jury Mr. Burnham owed him money and he agreed to help Mr. Burnham get money from Mr. Esquibel because it was the only way to get money from Mr. Burnham. (1/28/08 RP 21) He denied ever harming Mr. Esquibel and said Mr. Esquibel had never owed him any money personally. (1/28/08 RP 20, 24-25) He denied knowing Mr. Esquibel, Mr. Hritsco, Ms. Johnson or Mr. Collins. (1/28/08 RP 20-23) According to Mr. Kosewicz, after the stop at the house near the Double Eagle, Mr. Levoy suggested trying to scare Mr. Esquibel. (RP 24) When they stopped out in the county, he said he was still getting out of the van when he heard the gunshot. (1/28/08 RP 26)

Mr. Kosewicz was found guilty of premeditated first degree murder committed in the course of first-degree kidnapping, kidnapping in the first degree, and conspiracy to commit first degree kidnapping, and sentenced to confinement for life, without parole. (CP 125-130, 170)

D. ARGUMENT

1. NO EVIDENCE SUPPORTED THE MURDER CONVICTION.

Under the Due Process clauses of the state and federal constitutions, the State must prove every fact necessary to support each element of the charged offense beyond a reasonable doubt. U.S. Const. amend 14; Const. art. 1, § 3; *In re Winship*, 397 U.S. 358, 364, 90 S. Ct. 1068, 25 L. Ed. 2d 368 (1970).

Evidence of a charge or an element of a charge is sufficient if, viewed in the light most favorable to the state, a rational trier of fact could have found guilt beyond a reasonable doubt. All reasonable inferences from the evidence must be drawn in favor of the state and interpreted most strongly against the defendant. Premeditation may be proved by circumstantial evidence where the inferences drawn by the jury are reasonable and the evidence supporting the jury's finding is substantial.

State v. Clark, 143 Wn.2d 731, 769, 24 P.3d 1006 (citing *State v. Gentry*, 125 Wn.2d 570, 596-598, 888 P.2d 1105 (1995)), cert. denied, 534 U.S. 1000, 122 S. Ct. 475, 151 L. Ed. 2d 389 (2001).

Mr. Kosewicz was convicted of premeditated first degree murder of Mr. Esquibel, not first degree felony murder. (CP 94-95, 125-26) Intent to cause the death of another person is an essential element of murder. RCW 9A.32.030 and .050. “[F]or accomplice liability to attach, the defendant must not merely aid in any crime, but must knowingly aid in the commission of the specific crime charged.” *State v. Borrero*, 147 Wn.2d 353, 364, 58 P.3d 245 (2002).

No one testified that Mr. Kosewicz had ever met Mr. Esquibel before the day he encountered him in the Burnhams’ trailer. No one testified that Mr. Kosewicz saw the gun or was aware of its presence prior to the actual shooting. No one testified to any conversation or discussion about killing or shooting Mr. Esquibel.

Although Ms. Burnham testified that when he first came to the trailer she thought she saw Mr. Kosewicz kick Mr. Esquibel, she admitted that she didn’t actually see where Mr. Esquibel was kicked. Ms. Johnson testified that she saw Mr. Kosewicz strike Mr. Esquibel but in each case she then acknowledged that she could not have seen it happen and changed her testimony to state that she heard Mr. Esquibel being hit. At one point she testified that Mr. Kosewicz was sitting beside her in the passenger seat and that during the same time she heard him hitting Mr. Esquibel who was in the back of the van.

Nothing in this record supports the inference that Mr. Kosewicz formed an intent to kill Mr. Esquibel or knew that Mr. Burnham intended to kill Mr. Esquibel.

2. THE JURY INSTRUCTION DEFINING HOMICIDE WAS MISLEADING AND PREJUDICIAL.

The aggravated murder conviction, in the face of a total absence of evidence to support the jury's verdict, may be explained by an instruction, proposed by the State, and to which defense counsel made no objection. (CP 45, 89) The court instructed the jury on the definition of 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." (1/28/08 RP 67)

Trial courts must define technical words and expressions used in jury instructions, *State v. Allen*, 101 Wn.2d 355, 358, 678 P.2d 798 (1984). But the term "homicide" does not appear anywhere else in the court's instructions and did not, therefore, require definition. And the facts of this case would not, under any circumstances, justify a definition of homicide in terms of "failure to act."

By giving this instruction, the court opened the door to the possibility the jury could understand that the killing of a human being by the failure to act is murder. The evidence would support finding that Mr. Kosewicz's failure to actively intervene on Mr. Esquibel's behalf with respect to the kidnapping or assaults contributed to his death, and the erroneous conclusion that he was thus guilty of murder.

The Sixth Amendment to the United States Constitution and Const. art. 1, § 22 (amend 10) guarantee the accused the right to effective assistance of counsel. *Strickland v. Washington*, 466 U.S. 668, 80 L. Ed. 2d 674, 104 S. Ct. 2052 (1984); *State v. McFarland*, 127 Wn.2d 322, 899 P.2d 1251 (1995) Defense counsel provides ineffective assistance if (1) defense counsel's representation was deficient, *i.e.*, it fell below an objective standard of reasonableness based on consideration of all the circumstances; and (2) defense counsel's deficient representation prejudiced the defendant, *i.e.*, there is a reasonable probability that, except for counsel's unprofessional errors, the result of the proceeding would have been different. 466 U.S. at 687; 127 Wn.2d at 334-35, (*citing State v. Thomas*, 109 Wn.2d 222, 225-26, 743 P.2d 816 (1987)). The basis for a claim of ineffective assistance must be apparent from the record. *McFarland*, 127 Wn.2d at 333.

By failing to object to giving the proposed instruction defining homicide defense counsel permitted the jury to consider a basis for finding Mr. Kosewicz guilty despite the absence of evidence to support a murder conviction as that crime is defined by law. Mr. Kosewicz's conviction on the basis of insufficient evidence demonstrates the prejudicial effect of counsel's failure to object to the instruction.

3. THE COURT INSTRUCTIONS PERMITTED
CONVICTION BASED ON AN UNCHARGED
ALTERNATIVE MEANS OF COMMITTING
FIRST DEGREE KIDNAPPING.

The Sixth Amendment and the Fourteenth Amendment to the federal constitution and Const. art. 1, § 22 embody the due process right to notice of the charges against the accused. A defendant cannot be tried for an uncharged offense. *State v. Brown*, 45 Wn. App. 571, 576, 726 P.2d 60 (1986). "It is reversible error to try a defendant under an uncharged statutory alternative because it violates the defendant's right to notice of the crime charged." *State v. Doogan*, 82 Wn. App. 185, 188, 917 P.2d 155 (1996). Such error is prejudicial if "the jury might have convicted the defendant under the uncharged alternative." *Doogan*, 82 Wn. App. at 189.

In this case, the trial court gave an instruction that included both a charged means of committing the offense of first degree kidnapping

(intent to inflict bodily injury) and an uncharged means (intent to inflict extreme emotional distress. (1/28/08 RP 70) The amended information charged:

That the defendants, Theodore M. Kosewicz, Robert Alan Brown and Carlton James Hritsko, as actors and/or accomplices of Levoy G. Burnham, in the State of Washington, on or about between May 18, 2005 and June 13, 2005, did, with intent to inflict bodily injury on Sebastian L. Esquibeluibel, intentionally abduct such person, and the defendant being at said time armed with a firearm under the provisions of 9.94A.602 and 9.94A.533(3) . . .

(CP 36)

The court instructed the jury:

A person commits the crime of Kidnapping in the First Degree when he or she intentionally abducts another person with intent to inflict bodily injury on the person or to inflict extreme mental distress on that person or a third person.

(1/28/08 RP 70)

To convict the defendant of the crime of Kidnapping in the First Degree, each of the following elements of the crime must be proved beyond a reasonable doubt:

That on or about the 18th of may, 2005, and the 13th day of June, 2005, the defendant, as an actor or accomplice, intentionally abducted Sebastian L. Esquibel;

That the defendant, as an actor or accomplice, abducted that person with intent:

- (a) to inflict bodily injury on the person; or
- (b) to inflict extreme mental distress on that person or a third person; and

3. That any of these acts occurred in the State of Washington.

(1/28/08 RP 70-71) The State argued both means to the jury.

(1/28/08 RP 92-93) There is no special verdict or other evidence indicating which means the jury relied on for its verdict.

Because the jury could have convicted Mr. Kosewicz on the uncharged means, the first degree kidnapping conviction should be reversed.

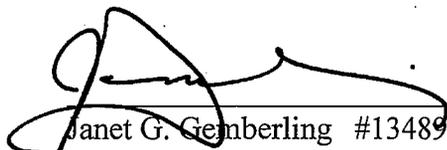
E. CONCLUSION

The evidence does not support the murder conviction, and the conviction should be reversed and the charge dismissed. Alternatively, because defense counsel failed to object to an unnecessary and highly prejudicial jury instruction, the conviction should be reversed and remanded for retrial.

The first degree kidnapping conviction violated due process and should be reversed.

Dated this 29th day of September, 2008.

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IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON,

DIVISION III

STATE OF WASHINGTON,)	
)	
Respondent,)	No. 26910-8-III
)	
vs.)	CERTIFICATE
)	OF MAILING
THEODORE M. KOSEWICZ,)	
)	
Appellant.)	

I certify under penalty of perjury under the laws of the State of Washington that on September 29, 2008, I mailed copies of the Appellant's Brief in this matter to:

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