

No. 83682-5

SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, Respondent

v.

THEODORE M. KOSEWICZ, Petitioner

SUPPLEMENTAL BRIEF

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INDEX

A. ISSUE.....1

B. STATEMENT OF THE CASE1

C. ARGUMENT4

 1. THE COURT OF APPEALS SHOULD HAVE
 REVERSED THE SPECIAL VERDICT FINDING
 THAT THE MURDER WAS COMMITTED IN
 THE COURSE OF, IN FURTHERANCE OF, OR
 FLIGHT FROM FIRST DEGREE KIDNAPPING4

D. CONCLUSION.....10

TABLE OF AUTHORITIES

WASHINGTON CASES

IN RE HOWERTON, 109 Wn. App. 494,
36 P.3d 565 (2001)..... 8

STATE V. MANUSSIÉR, 129 Wn.2d 652,
921 P.2d 473 (1996)..... 7

STATE V. MORIN, 100 Wn. App. 25,
995 P.2d 113 (2000)..... 7, 8

STATE V. PILLATOS, 159 Wn.2d 459,
150 P.3d 1130 (2007)..... 4

STATE V. PINEDA-PINEDA, 154 Wn. App. 653,
226 P.3d 164 (2010)..... 8

STATE V. ROBERTS, 142 Wn.2d 471,
14 P.3d 713 (2000)..... 5, 7, 8

STATE V. THOMAS, 166 Wn.2d 380,
208 P.3d 1107 (2009)..... 6, 7

STATE V. VANGERPEN, 125 Wn.2d 782,
888 P.2d 1177 (1995)..... 4

SUPREME COURT CASES

GRAHAM V. FLORIDA, 2010 WL 1946731, 8 (U.S.) (U.S., 2010) 6

HARMELIN V. MICHIGAN, 501 U.S. 957,
111 S. Ct. 2680, 115 L. Ed. 2d 836 (1991)..... 6

CONSTITUTIONAL PROVISIONS

CONST. ART 1, § 14..... 7, 8

EIGHTH AMENDMENT..... 5, 6

FOURTEENTH AMENDMENT 5

STATUTES

RCW 9A.08.020 8
RCW 10.95.020 5, 8

COURT RULES

CrR 2.1(a)(1)..... 4

A. ISSUE

1. Whether the Court of Appeals, having reversed the defendant's first degree kidnapping conviction on grounds that the jury was instructed on an uncharged means, should also have reversed the special verdict finding that the murder was committed in the course of, in furtherance of, or flight from first degree kidnapping

B. STATEMENT OF THE CASE

The State charged Theodore Kosewicz and two codefendants, as actors or as Levoy Burnham's accomplices, with aggravated premeditated murder committed in the course of a first degree kidnapping:

COUNT I: PREMEDITATED MURDER IN THE FIRST DEGREE, WITH AGGRAVATING CIRCUMSTANCES, committed as follows: That the defendants, THEODORE M. KOSEWICZ and CARLTON JAMES HRITSCO, as actors and/or accomplices of Levov G. Burnham, in the State of Washington, on or about between June 01, 2005 and June 30, 2005, with premeditated intent to cause the death of another person, did cause the death of SEBASTIAN L ESQUIBEL, a human being, said death occurring on or about on or about between June 1, 2005 and June 30, 2005, and the murder was committed in the course of, in furtherance of or in immediate flight from the crime of Kidnapping in the First Degree, . . .

(CP 35-36) The State also charged Mr. Kosewicz and three other individuals with complicity in first degree kidnapping committed with intent to inflict bodily injury:

COUNT II: KIDNAPPING IN THE FIRST DEGREE, committed as follows: That the defendants, THEODORE M. KOSEWICZ, ROBERT ALAN BROWN and CARLTON

JAMES HRITSCO, as actors and/or accomplices of Levov G. Burnham. in the State of Washington, on or about between June 1, 2005 and June 30, 2005 did, with intent to inflict bodily injury on SEBASTIAN ESQUIBEL, intentionally abduct such person . . .

(CP 36)

Following a trial in which the evidence showed that Mr. Burnham had kidnapped Sebastian Esquibel and then asked Mr. Kosewicz to become involved, and in which Mr. Kosewicz's intent was less than apparent, the trial court instructed the jury that it could find Mr. Kosewicz guilty of both premeditated murder and kidnapping either as a principal or an accomplice.¹

(CP 93, 98) The court's instruction defined kidnapping to include the

¹

INSTRUCTION NO. 13

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 on a third person.

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:

- (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 intentionally abducted SEBASTIAN L. ESQUIBEL;
- (2) That the defendant as an actor and/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.

If you find from the evidence that elements (1) and (3), and any of the alternative elements (2)(a), or (2)(b) have been proved beyond a reasonable doubt, then it will be your duty to return a verdict of guilty. To return a verdict of guilty, the jury need not be unanimous as to which of alternatives (2)(a), or (2)(b), has been proved beyond a reasonable doubt, as long as each juror finds that at least one alternative has been proved beyond a reasonable doubt.

On the other hand, if, after weighing all the evidence, you have a reasonable doubt to any one of elements (1), (2) or (3), then it will be your duty to return a verdict of not guilty.

(CP 98)

alternative means of kidnapping with intent to inflict extreme mental distress as well as intent to inflict injury, the means charged in the information. (CP 36, 98)

The court provided the jury with a special verdict form addressing the aggravating factor of first degree kidnapping:

We, the jury, having found the defendant guilty of murder in the first degree [as defined in Instruction 9], make the following answers to the questions: submitted by the court:

QUESTION; Has the State proven the existence of the following aggravating circumstance beyond a reasonable doubt?

Was the murder committed in the course of, in furtherance of or immediate flight from the crime of First Degree Kidnapping?

(CP 132)

The jury found Mr. Kosewicz guilty of kidnapping and premeditated murder and answered the court's interrogatory in the affirmative. (CP 125, 129, 132) Mr. Kosewicz was sentenced to life imprisonment without the possibility of parole. (CP 151) The Court of Appeals reversed the kidnapping conviction because of the inclusion of the uncharged alternative means in the "to convict" instruction, but declined to reverse the sentence which had been imposed on the basis of the kidnapping as an aggravating factor.

C. ARGUMENT

1. THE COURT OF APPEALS SHOULD HAVE REVERSED THE SPECIAL VERDICT FINDING THAT THE MURDER WAS COMMITTED IN THE COURSE OF, IN FURTHERANCE OF, OR FLIGHT FROM FIRST DEGREE KIDNAPPING.

Washington law requires the charging document to provide a concise statement of the essential facts constituting the offense, including any aggravating circumstances, so that the defendant is apprised of the charges against him or her and allowed to prepare a defense. *State v. Pillatos*, 159 Wn.2d 459, 481-82, 150 P.3d 1130 (2007) (Sanders, J. dissenting); *State v. Vangerpen*, 125 Wn.2d 782, 787, 888 P.2d 1177 (1995); CrR 2.1(a)(1).

A reasonable person reading the charging document in this case would conclude that a penalty of life imprisonment without the possibility of parole could be imposed only if, after finding him guilty of premeditated murder, a jury found that he had committed or been complicit in the crime of first degree kidnapping committed with the intent to inflict bodily injury.

Based on the jury instructions defining accomplice liability, premeditated murder and first degree kidnapping, and on the evidence admitted at trial, the jury could have answered the special interrogatory in the affirmative based solely on finding that Mr. Burnham committed premeditated murder in the course of kidnapping Mr. Esquibel with the intent to inflict extreme mental distress and that Mr. Kosewicz had

participated in these offenses by encouraging or agreeing to aid Mr. Burnham in the commission of these offenses.

Mr. Kosewicz contends that his sentence should be reversed because the jury instructions permitted the jury to find as an aggravating factor a felony with which he was not charged and which he did not personally commit.

The legislature has established a list of aggravating factors, any of which will support imposition of a sentence of either death or life without the possibility of parole following a conviction for premeditated first degree murder. RCW 10.95.020. Although the death penalty is not implicated in the present case, this court's construction of RCW 10.95.020 is instructive, since the same factors apply to both sentencing alternatives.

The State cannot impose the death penalty in a case where the accused is convicted as an accomplice to the murder unless he "was a major participant in acts that caused the death of the victim, and [] the aggravating factors under the statute specifically apply to the defendant." *State v. Roberts*, 142 Wn.2d 471, 508-09, 14 P.3d 713 (2000).

The *Roberts* standard implemented proportionality requirements of the Eighth and Fourteenth Amendments and the cruel punishment clause of our State Constitution. 142 Wn. 2d at 505-06. This court has yet to determine whether these principles apply when the State seeks a penalty of

life without the possibility of parole. *State v. Thomas*, 166 Wn.2d 380, 388, 208 P.3d 1107 (2009) (Thomas II)

The United States Supreme Court declined to find that a statute imposing life without the possibility of parole constituted cruel and unusual punishment under the Eighth Amendment in *Harmelin v. Michigan*, 501 U.S. 957, 1001, 111 S. Ct. 2680, 115 L. Ed. 2d 836 (1991). “The controlling opinion concluded that the Eighth Amendment contains a ‘narrow proportionality principle’ that ‘does not require strict proportionality between crime and sentence’ but rather ‘forbids only extreme sentences that are “grossly disproportionate” to the crime.’” *Graham v. Florida*, 2010 WL 1946731, 8 (U.S.) (U.S., 2010) quoting *Harmelin*, 501 US at 1000-1001 (KENNEDY, J., concurring in part and concurring in judgment).

In *Graham*, the court found that a term of life without the possibility of parole imposed on juveniles who had not committed homicide violated the Eighth Amendment on the grounds that juveniles have lessened culpability because of their immaturity, and “that defendants who do not kill, intend to kill, or foresee that life will be taken are categorically less deserving of the most serious forms of punishment than are murderers.” *Graham*, slip op. at 13-14.

Washington’s constitution is more restrictive than the Eighth Amendment: the federal amendment bars punishments that are cruel *and*

unusual; the State provision prohibits cruel punishments. *State v. Marussier*, 129 Wn.2d 652, 674, 921 P.2d 473 (1996); Const. Art 1, § 14. “A sentence violates article I, section 14 of the Washington State constitution when it is grossly disproportionate to the crime for which it is imposed.” *State v. Morin*, 100 Wn. App. 25, 29, 995 P.2d 113 (2000). Accordingly, when jury instructions permit the accused to be convicted of premeditated first degree murder under a theory of accomplice liability, the aggravating factors that would support imposition of a life sentence without the possibility of parole should be narrowly construed to ensure that “one of the most serious forms of punishment” is not imposed on the basis of factors that do not specifically apply to the defendant. *Roberts*, 142 Wn. 2d at 509.

One of the aggravating factors discussed in *Thomas I*, like the second aggravating factor rejected in *Roberts*, similarly required no act on the part of the defendant because it was worded in the passive voice. 150 Wn. 2d at 841-42. Such an instruction relieves the State of its burden of proving the factor specifically applies to the defendant. 150 Wn.2d at 842.

In *Thomas II* the court found the instructional errors were corrected when the jury was “specifically asked if the defendant, Thomas, personally committed the aggravating factors.” 166 Wn. 2d at 389-90. The court approved an instruction that framed the commission of an aggravating felony in the active voice: “Did the defendant commit the murder in the course of,

in furtherance of, or in immediate flight from robbery in the first degree?”

Id.

The proportionality requirement of the cruel punishment provision, Const. Art 1, § 14, supports a construction of RCW 10.95.020 that requires the State to prove that the aggravating factor specifically applies to a defendant who is convicted as an accomplice. *See State v. Morin*. When the defendant is convicted of premeditated first degree murder as an accomplice, and the State is not required to prove that the aggravating factor applies specifically to him, then the defendant has, in effect, been found to be less culpable than one as to whom the aggravating factors of RCW 10.95.020 had been found to specifically apply. As construed by *Roberts* and *Thomas*, RCW 10.95.020 sets forth only one aggravating factor would specifically apply to an accomplice to premeditated murder: subsection five, which applies to a defendant who specifically solicits and agrees to pay for the murder. The remaining factors can only apply to the person who acted as the murderer.

This result is consistent with *In re Howerton*, 109 Wn. App. 494, 36 P.3d 565 (2001), in which, the Court of Appeals reached a similar result based on its analysis of the accomplice liability statute, RCW 9A.08.020. The court recognized that while an accomplice may be liable for a substantive offense committed by another, “any sentence enhancement must depend on the accused’s own misconduct.” 109 Wn. App. at 501; *see also*

State v. Pineda-Pineda, 154 Wn. App. 653, 664, 226 P.3d 164 (2010) (“where there is no explicit statutory authorization for imposition of a sentence enhancement on an accomplice, the defendants’ own acts must form the basis for the enhancement.”)

The evidence in this case consisted in large part of the testimony of witnesses who were admittedly intoxicated throughout the events about which they testified. (RP 280, 300) The evidence may have been sufficient to permit the inference that Mr. Kosewicz personally committed the murder and was an active participant in the kidnapping, acting with the intent to inflict bodily injury. But depending on the degree to which one credits the testimony of the witnesses who were present during the commission of the offenses, the evidence could also be construed as establishing that Mr. Kosewicz’s role in these events was primarily that of a passive bystander whose primary function was to appear intimidating, thus aiding and encouraging Mr. Burnham and others in the commission of both the murder and kidnapping. (RP 391-92, 1/28/08 RP 20, 24-25) Numerous other individuals were implicated in the commission of these offenses. (CP 35-36; RP 279-88)

The “to convict” instruction permitted the jury to find Mr. Kosewicz guilty of premeditated murder as an accomplice. The wording of the special verdict interrogatory in the passive voice further permitted the jury to find that the aggravating factor of first degree kidnapping applied to Mr.

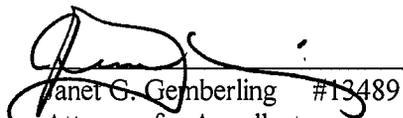
Kosewicz without finding he personally committed the kidnapping. Combined with the jury instruction defining kidnapping to include intent to inflict extreme mental distress, the special interrogatory permitted the jury to find as an aggravating factor an offense that did not specifically apply to Mr. Kosewicz and with which he had been led to believe he was not even charged.

D. CONCLUSION

The decision of the Court of Appeals affirming the sentence of aggravated first degree murder should be reversed.

Dated this 3rd day of June, 2010.

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