

83682-5

FILED

SEP 23 2009

COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON
By _____

Supreme Ct No. _____

COA No. 26910-8-III

FILED
SEP 29 2009

CLERK OF THE SUPREME COURT
STATE OF WASHINGTON



SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, Respondent

THEODORE M. KOSEWICZ, Petitioner

PETITION FOR REVIEW

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FILED
COURT OF APPEALS DIV. III
STATE OF WASHINGTON
2009 SEP 18 PM 12:30

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A. IDENTITY OF PETITIONER

Theodore Kosewicz asks this court to accept review of the decision of Division Three of the Court of Appeals terminating review designated in Part B of this petition.

B. COURT OF APPEALS DECISION

The opinion filed on June 23, 2009, and the order denying reconsideration filed on August 19, 2009. Copies of the decisions are in the Appendix at pages A-1 through A-13.

C. ISSUE PRESENTED FOR REVIEW

1. Defendant was convicted as an accomplice to first degree murder after the jury was instructed, *inter alia*, that the term homicide includes killing by failure to act, and may be murder. In concluding that counsel's failure to object to the instruction did not constitute ineffective assistance of counsel under U.S. Const. Amend 6, did the Court of Appeals err in failing to determine whether defense counsel's deficient representation prejudiced the defendant?

2. The State charged the defendant with kidnapping the victim with intent to inflict bodily injury. Defendant was convicted of aggravated first degree murder under instructions that permitted the jury to find an aggravating circumstance based on the uncharged alternative means of committing the predicate felony of kidnapping. Did the conviction violate the defendant's right to notice of "the nature and cause of the accusation" under U.S. Const. amend. 6 and Const. art. 1, § 22 (amend. 10).

D. STATEMENT OF THE CASE

Shannon Burnham and her husband Levoy were living in a trailer behind Rob Brown's. (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)

Mr. Burnham claimed Sebastian Esquibel owed him money. (1/28/08 RP 20) One day Mr. Burnham brought Mr. Esquibel to the trailer. (RP 279, 282) In the ensuing day, Mr. Burnham, Mr. Hritsco and Mr. Brown participated in duct taping Mr. Esquibel and repeatedly

assaulting him. (RP 282-86) The next day, Amber Johnson and her boyfriend David Collins, arrived at the trailer and they found the Burnhams with Mr. Esquibel, who by that time was bound and gagged. (RP 311, 314-5) (RP 288, 313) Mr. Burnham told Ms. Johnson that Mr. Esquibel owed him and Mr. Hritsco \$800 for drugs. (RP 316)

Mr. Burnham took Mr. Esquibel outside and pushed him into the back of Ms. Johnson's van. (RP 287-88, 318-19) 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 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) Finally, 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)

The State charged Mr. Kosewicz with aggravated first degree murder, conspiracy to commit first degree kidnapping and first degree kidnapping. (CP 35-37) After his arrest, he admitted to a police detective 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. (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, Mr. Burnham suggested trying to scare Mr. Esquibel. (1/28/08 RP 24) He said when they stopped out in the country, he was still getting out of the van when he heard the gunshot. (1/28/08 RP 26)

The court instructed the jury that the jury instructions are “all important” and must be “considered as a whole.” (1/28/08 RP 65) The court provided the jury with an instruction defining the term 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) (emphasis added)

The court instructed the jury on the definitions of first degree murder and kidnapping: “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 caused the death of such person or a third person, unless the killing is excusable or justifiable.” (1/28/08 RP 67-68) 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)

The court’s instruction on accomplice liability provided in part:

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 . . . aids . . . another person in . . . committing the crime. The word "aid" means all assistance given by . . . 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 an accomplice in the commission of a crime is guilty of that crime . . .

(1/28/08 RP 75)

Mr. Kosewicz was found guilty of kidnapping in the first degree, premeditated first degree murder and conspiracy to commit first degree kidnapping. (CP 125, 129-30) The jury returned a special verdict finding the murder was committed in the course of the first-degree kidnapping. (CP 132) Mr. Kosewicz was sentenced to confinement for life, without parole. (CP 125-130, 170)

The Court of Appeals found that it was error to instruct the jury on the definition of homicide, but held the error was harmless. *State v. Kosewicz*, No. 26910-8-III, slip op. at 7 (June 23, 2009). The court held that the inconsistency between the charging document and the jury instruction required reversal of the first-degree kidnapping charge but declined to reverse the special verdict finding the kidnapping as an aggravating factor in the murder conviction. *State v. Kosewicz, supra* at 10-11; Order Denying Reconsideration.

E. ARGUMENT WHY REVIEW SHOULD BE ACCEPTED

Review should be granted when a decision of the Court of Appeals conflicts with a decision of the Supreme Court or another division of the

Court of Appeals, or involves a significant question of constitutional law or an issue of substantial public interest. RAP 13.4(b).

The Court of Appeals' failure to apply the relevant standard for analyzing whether counsel's ineffective assistance was prejudicial conflicts with *State v. McFarland*, 127 Wn.2d 322, 899 P.2d 1251 (1995) and virtually every other case in which the issue of ineffective assistance of counsel is presented. This issue involves substantial rights guaranteed by the Sixth Amendment to the United States Constitution and Const. art. 1, § 22 (amend 10)

The defendant's right to notice of the nature of the accusation against him is protected by U.S. Const. amend. 6 and Const. art. 1, § 22 (amend. 10). Whether his conviction violated that right is a substantial constitutional issue. In light of the severity of punishment for aggravated first degree murder, the implications of disregarding the effect instructional error on the jury's finding of aggravating circumstances presents an issue of substantial public interest.

1. THE COURT OF APPEALS FAILED TO DETERMINE WHETHER COUNSEL'S FAILURE TO OBJECT TO AN ERRONEOUS INSTRUCTION PREJUDICED THE DEFENDANT.

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*, *supra*. 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.

Jury instructions are proper when they (1) permit the parties to argue their theories of the case, (2) do not mislead the jury, and (3) properly inform the jury of the applicable law. *State v. Barnes*, 153 Wn.2d 378, 382, 103 P.3d 1219 (2005). Inclusion of the erroneous definition of homicide may readily have misled the jury.

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."

Read together, relevant portions of the court's instructions provide that a person commits the crime of Murder in the First Degree when, with a premeditated intent to cause the death of another person, he caused the death of such person; another person is guilty of that crime if, knowing that it will facilitate the crime, he aids the other person in committing the crime; the word "aid" includes assistance given by presence, so long as *something more* than mere presence and knowledge of the criminal activity is shown; and homicide is the killing of a human being by the voluntary *failure to act* of another and *is murder*.

The instruction defining homicide permitted the jury to reason that if Mr. Burnham killed Mr. Esquivel with premeditated intent, and Mr. Kosewicz was present and aided Mr. Burnham by failing to act to prevent the killing, then Mr. Kosewicz was guilty of murder.

In closing argument, the prosecutor argued to the jury that a person who is present at the scene and ready to assist is guilty as an accomplice, and that Mr. Kosewicz was guilty of murder since he had agreed to assist Mr. Burnham in getting money from the victim. (RP 82) Regardless of whether this argument was a correct statement of the law, it was entirely consistent with the foregoing hypothetical analysis: that Mr. Kosewicz

was complicit in the murder because he was present and failed to act to prevent the killing.

In failing to object to giving the proposed instruction defining homicide, defense counsel permitted the jury to find Mr. Kosewicz guilty based on his presence at the scene of a premeditated murder coupled with his failure to act to prevent the killing. Such representation was unreasonable and prejudicial.

The Court of Appeals held that any error was harmless, utilizing an inapposite standard of review.

First, the court concluded the erroneous instruction was harmless because the prosecutor did not refer to it in closing argument. Then, the court's analysis focused on whether the court's instructions defining the offense of first degree murder were correct statements of the law and, found any error harmless because those instructions required the State to prove every element of the offense.. *State v. Kosewicz, supra* at 7-9. Finally, the court concluded that the error was harmless because the evidence of "criminal culpability" was overwhelming.

The court failed to apply the only relevant standard of review, namely whether there is a reasonable probability that, except for counsel's failure to object to the erroneous "failure to act", the result of the proceeding would have been different. *See Strickland*, 466 U.S. at 687.

The evidence that Mr. Kosewicz knowingly and intentionally participated in assaulting and conspiring to kidnap Mr. Esquibel is overwhelming. But Mr. Kosewicz was not convicted of felony murder, he was convicted of premeditated murder. And while there was evidence from which a jury could infer that Mr. Kosewicz knowingly aided in the murder, there was also evidence from which a jury could find that Mr. Kosewicz had no knowledge that Mr. Esquibel would be killed and did not aid in the killing beyond his mere presence. The jury instructions, however, permitted the jury to find Mr. Kosewicz guilty even if it believed the latter version of the facts.

The Court of Appeals' failure to apply the relevant standard of review requires reversal of its decision.

2. THE ERRONEOUS JURY INSTRUCTION ON AN UNCHARGED MEANS OF COMMITTING FIRST DEGREE KIDNAPPING REQUIRES REVERSAL OF THE AGGRAVATED MURDER SPECIAL VERDICT AS WELL AS THE KIDNAPPING CONVICTION.

The amended information charged the aggravating factor of the commission of the murder “in the course of, in furtherance of, or in immediate flight from *the* crime of Kidnapping in the First Degree . . .” (CP 36) The information charge the crime of kidnapping in the first degree as abduction “with the intent to inflict bodily injury . . .” (CP 36) The

court's instructions, however, permitted the jury to find both the kidnapping offense and the aggravating factor based on the uncharged alternative of kidnapping with intent "to inflict extreme mental distress . . ." (CP 97)

The Court of Appeals reversed the kidnapping conviction but declined, on reconsideration, to reverse the aggravating circumstances special verdict.

An accused is entitled to notice in the charging document of the nature and cause of the accusation against him, including all essential elements of the crime. *State v. Leach*, 113 Wn.2d 679, 689, 782 P.2d 552 (1989). The information serves to "give the accused notice of the charges and allow the accused to prepare a defense. *State v. Kjorsvik*, 117 Wn.2d 93, 97, 812 P.2d 86 (1991); *Leach*, 113 Wn.2d at 688.

"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.

The information gave Mr. Kosewicz notice that he was charged with the crime of first degree kidnapping by abducting Mr. Esquibel with

intent to inflict bodily injury. An accused would reasonably believe that this charge would not support a conviction based on abduction with intent to scare the victim.

The information charged Mr. Kosewicz with murder and alleged, as an aggravating circumstance, that the murder was committed in the course of the crime of kidnapping. An accused would reasonably believe that this charge would not support an aggravated first degree murder conviction based on a murder committed in the course of an abduction with intent to scare the victim.

Here, the information charged a single instance of first degree kidnapping, and alleged the commission of a murder in the course of the kidnapping. The evidence supported finding only one kidnapping: the abduction of Mr. Esquivel. The jury was instructed on a single definition of kidnapping, abduction with intent to commit bodily injury or extreme mental distress. And the jury was permitted to find, as an aggravating circumstance, that the murder was committed in the course of an abduction with intent to inflict extreme emotional distress. The information failed to give any notice that abduction with intent to inflict emotional distress could constitute an aggravating circumstance for the murder charge.

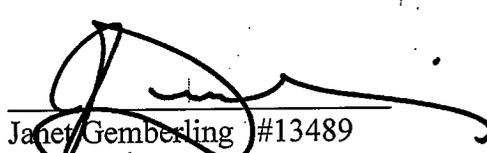
The erroneous instruction on the elements of kidnapping prejudiced Mr. Kosewicz not only with respect to the resulting kidnapping conviction but also with respect to the jury's finding of an aggravating circumstance that immeasurably increased the penalty for Mr. Kosewicz's alleged offense. Review should be granted to reverse the finding of the aggravating circumstance.

F. CONCLUSION

Review should be granted and the Court of Appeals decision affirming the aggravated murder conviction should be reversed.

Dated this 17th day of September, 2009.

Respectfully submitted,



Janet Gemberling #13489
Attorney for Petitioner

APPENDIX

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,

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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

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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

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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

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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

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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

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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.

Kulik, A.C.J.

WE CONCUR:

Sweeney, J.

Brown, J.

IN THE SUPREME COURT OF THE STATE OF WASHINGTON,

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

I certify under penalty of perjury under the laws of the State of Washington that on September 18, 2009, I sent copies of the Petition for Review in this matter by pre-paid first class mail addressed to:

Mark Lindsey
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and

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FILED
SEP 29 2009
CLERK OF THE SUPREME COURT
STATE OF WASHINGTON



Signed at Seattle, Washington on September 18, 2009.

GEMBERLING & DOORIS, P.S.



Catlin Gibson
Legal Assistant