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COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON
By gfa

83682-5
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 REPLY BRIEF

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WPIC 25.011

A. ARGUMENT

1. THE IRRELEVANT, MISLEADING AND PREJUDICIAL JURY INSTRUCTION DEFINING HOMICIDE MISSTATED THE LAW

At the State's request, the court gave a jury instruction defining 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)

The proposed instruction is no longer an accepted pattern instruction because: "Under the current statutes . . . there is no longer any crime whose definition incorporates the definition of 'homicide.'" Comment, 11 Wash. Prac., Pattern Jury Instr. Crim. WPIC 25.01 (3d Ed) Accordingly, the instruction has been withdrawn. *Id.*

Some states continue to criminalize failure to act as homicide, particularly with respect to the deaths of children. *See* D. C. Barrett, Homicide: failure to provide medical or surgical attention, 100 A.L.R.2d 483 (2008); Baruch Gitlin, J.D., Parents' Criminal Liability for Failure to Provide Medical Attention to Their Children, 118 A.L.R.5th 253 (2008). In Washington, failure to act is neither homicide nor a basis for accomplice liability. *See State v. Berube*, 150 Wn.2d 498, 79 P.3d 1144 (2003); *State v. Jackson*, 137 Wn.2d 712, 723-24, 976 P.2d 1229 (1999).

Thus, in a case involving accomplice liability for murder, an instruction defining homicide to include the failure to act is a misleading and incorrect statement of the law.

The State contends the instruction was necessary in light of Mr. Kosewicz's testimony that he was merely present and did not participate in the kidnapping or murder. (Resp. Br. at 4) The argument demonstrates the State's failure to appreciate the law in Washington with respect to a defendant's failure to act. The instruction was not a correct statement of the law and in the circumstances of this case it was highly misleading and prejudicial.

Defense counsel's failure to object to a jury instruction that misstates the law and, in light of the evidence at trial, is likely to mislead the jury, deprived Mr. Kosewicz of the effective assistance of counsel required the by Fifth Amendment.

B. CONCLUSION

Ineffective assistance of counsel and the resulting, highly prejudicial, instructional error require reversal of the murder conviction.

Dated this 30th day of January, 2009.

GEMBERLING & DOORIS, P.S.


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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.)	

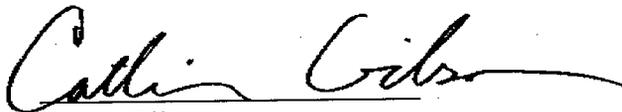
I certify under penalty of perjury under the laws of the State of Washington that on January 30, 2009, I mailed copies of Appellant's Brief in this matter to:

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Signed at Seattle, Washington on January 30, 2009.



Catlin Gibson
Legal Assistant

