

FILED

AUG 21 2012

COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON
By _____

86241-9

IN THE SUPREME COURT
OF THE STATE OF WASHINGTON

IN RE THE PERSONAL RESTRAINT OF
BENJAMIN BROCKIE

FILED
SUPREME COURT
STATE OF WASHINGTON
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BY ROBERT D. CARPENTER
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SUPPLEMENTAL RESPONSE TO PERSONAL RESTRAINT PETITION

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I.

ARGUMENT

(1) THE DEFENDANT'S PRP LACKS MERIT.

Under *State v. Kosewicz*, __ Wn.2d __, 278 P.3d 184 (2012), the kidnapping convictions remain viable. The basic problem in this case is a mistake in the robbery instructions. The amended information charges First Degree Robbery by way of display of a deadly weapon. The jury instructions charge both display of a deadly weapon and being armed with a deadly weapon.

There are a few predicate facts in this case that lead the analysis to its current point. The defendant did not object to the instructions. RP 772. Thus, the more liberal standard is applied. If the required information appears in any form, the rules are satisfied. When a defendant challenges the information for the first time on appeal, we determine if the elements “appear in any form, or by fair construction can they be found, in the charging document.” *State v. Kjorsvik*, 117 Wn.2d 93, 105, 812 P.2d 86 (1991). “We read the information as a whole, according to common sense and including facts that are implied, to see if it “reasonably apprise[s] an accused of the elements of the crime charged.” *Id.* at 109. “If it does, the defendant may prevail only if he can show that the unartful charging language actually prejudiced him. *Id.* at 106.

“This 2-prong standard of review strikes a balance: on the one hand it discourages the defense from postponing a challenge to the charge knowing the charging document is flawed; on the other hand, it insures that the State will have given fair notice of the charge to the defendant.” *Kjorsvik*, 117 Wn.2d at 106.

The information charges kidnapping by way of committing a felony or fleeing from a felony. In *Kosewicz*, the Court states that the kidnapping convictions stand. *Id.* at 190-91. There was no limitation placed on the charge of kidnapping by the State. Under *Kozewicz*, a separately charged kidnapping remains freestanding as the State has given notice to the defendant that the kidnapping charges could be pursued under multiple theories.

The next issue is one of prejudice to the defendant. The defendant’s defense was one of complete denial. CP 103-05. It matters not that the jury was given instructions on both display of a deadly weapon or actual use of a deadly weapon. There was ample evidence supporting either instruction. There could be no prejudice to the defendant as he denied all salient elements. The question was whether the jury believed the State’s witnesses or the defendant’s denials.

II.

CONCLUSION

For the reasons stated, the convictions of the defendant should be affirmed.

Dated this 20th day of August, 2012.

STEVEN J. TUCKER
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A handwritten signature in black ink, appearing to read "Andrew J. Metts", with a circled "P" to the left.

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