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NO. 54287-7-I

IN THE COURT OF APPEALS
OF THE STATE OF WASHINGTON
DIVISION I

STATE OF WASHINGTON,

Respondent,

v.

MITCHELL VARNELL,

Appellant.

BRIEF OF RESPONDENT

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I. ISSUES

1. The defendant was charged with soliciting the murder of his ex-wife, her parents, and her brother. a jury convicted him of separate counts for each intended victim, and he received consecutive sentences on each.

Were these victim-specific sentences lawful, when RCW 9.94A.589(1)(b) requires consecutive sentences for separate and distinct criminal conduct?

2. Were these sentences constitutional, when soliciting the death of each intended, specifically named victim comprises a separate “unit of prosecution?”

3. The defense to the charge was that the defendant still loved his ex-wife and only met with the “hit” man (an undercover officer) in order to turn the latter in and thereby impress his ex-wife. Upon his conviction the defendant sought a new trial, alleging his attorneys were ineffective by failing to call his relatives to testify he had told them he still loved his wife. Did the trial court err in denying the motion for new trial, when trial counsel made a tactical decision not to call the relatives, to avoid opening the door to allegations made during the divorce, and the evidence was cumulative of what the jury had already heard?

4. After new counsel had prepared a sentencing memorandum, the defendant elected to represent himself at sentencing. He had threatened to do so often before. The court permitted him to do so after warning him of the risks, and said it would still consider the defense memorandum. Was the defendant's waiver valid, when he was informed of the maximum possible penalty he faced on these facts?

II. STATEMENT OF THE CASE

A. DEFENDANT'S SOLICITING THE MURDER OF HIS EX-WIFE AND HER FAMILY

Karen Varnell and the defendant Mitchell Varnell obtained a divorce after 17 years of marriage. They separated in 2000, and the divorce became final in 2001. 3 Verbatim Record of Trial (hereafter "TRP") 140-41.¹ They had two children, both boys. 4 TRP 141; 6 TRP 459-60. The split was not amicable: the dissolution went to trial. The issue of child custody was especially contentious. When it was done, Karen Varnell got full custody and the defendant was ordered to pay a \$300,000 settlement and \$1,645/month in child support. He got visitation every other

¹ Counsel for appellant designates all seven volumes of trial as "11 RP." Respondent lists them as "1 TRP," "2 TRP," etc.

weekend. 3 TRP 140-45. According to Mrs. Varnell, relations remained acrimonious after the divorce. Id.

Karen Varnell's parents, Jack and Juanita Worbass, live in Arlington, one and one-half blocks from the house Karen moved into after the divorce. 3 TRP 154, 156-59. Her brother, Steven Worbass, lives in Lacey but frequently visits his parents in Arlington. 3 TRP 154; 4 TRP 231-33.

The defendant was a self-employed excavator and landscaper. 3 TRP 141; 6 TRP 451-58. During the marriage, Karen Varnell had kept the books and managed the paperwork. 3 TRP 141; 6 TRP 454. After the breakup the defendant hired Mary Wilson to do these tasks. 3 TRP 146. Mary Wilson worked for the defendant from August 2001 until mid-February 2002. 3 TRP 161, 165. She not only did his business books and filing, but also helped him with personal paperwork, like prescription bills. 3 TRP 161-62. The defendant continued to live and work out of the family home. That is where Mary Wilson helped him on a part-time basis. 3 TRP 143-44, 161-62.

Ms. Wilson recalled the defendant talked about how much he still loved his wife, and how he hoped for a reconciliation. 3 TRP 165, 195; 4 TRP 226. Sometime he did so at length. 4 TRP 226.

Ms. Wilson also heard him express frustration and anger towards Karen Varnell. Id. By late January/early February 2002 the anger predominated; Ms. Wilson recalled the defendant no longer was talking about how he wanted to reconcile with his ex-wife. 3 TRP 165-66; 4 TRP 226.

Sometime around the beginning of February 2002 Mary Wilson found a series of Post-It “sticky” notes in among some papers of the defendant she was going through. They were in the defendant’s handwriting. 3 TRP 167-77; Exhs. 5A-5F; 5 RP 351, 362. (The defendant was inordinately fond of Post-It sticky notes. 3 TRP 148, 163.) She thought them bizarre, perhaps an imagined movie plot. 3 TRP 167. The Post-Its (with his misspellings) said:

“buy wig, hat, glasses gloves Bike car no prints, '83 Ford escort \$600 Tim 403-7006 Licenses rebuilt Mark 653-5339 girlfriend”

“glasses/hat/gloves to buy all items 1 boots 1 tenns 12 1/2 , 14, plastic wrap – no blood at Ho, no signs door in, purse, keys, coat, door opener (no phone);”

“2 pubbic hair blonde/black rubbers used no woman / [illeg.];”

“her beater bike at spot, have car there birch birch bay motorhome parking lot, check in tavern meet lots people, tell camped in lot – car to spot, bike to bushes, her to spot, her car to North w/ bike, dump car and get bike, pull plates, la # North, bike to mo ho done OK;”

"wam out of house all done. Wrist ties worn to bleed/struggle, stocking hat glasses weight toes 2 different sizes 12-14 old tennis into house Big rubbers? Big tennis shoes Rope neck/plastic bag no sign struggle house Knock out – House."

Exhs. 5A-5F.

About a week later, the defendant noticed the handgun that Ms. Wilson always carries in her purse or backpack. He asked to see it, so she unloaded it and showed it to him. He asked if he could buy or borrow it, and she said no; she said she always keeps it by her. 3 TRP 168-70. The defendant then asked her if she wanted to make \$50,000 by killing his wife Karen. Ms. Wilson's laughed; she didn't think he was serious. 3 TRP 171-72. But she recalled his demeanor was serious enough, and from taking care of the books she knew the business was profitable and that he had the cash. 3 TRP 164-65, 171.

The next day, the defendant repeated the offer to Ms. Wilson again. Mary Wilson recalled him as being almost like a salesman about it. She laughed nervously about it. An employee, Ron White, who was there too, told the defendant, "C'mon, Mitchell, we're not that kind of people." 3 TRP 172-73.

Frightened now, Ms. Wilson looked for the Post-Its again. She found them in the same place as before. She took them and

contacted Karen Varnell. 3 TRP 146-47. They had met only once before; neither characterized the other as a friend. 3 TRP 146, 175-76. Ms. Wilson showed the Post-Its to Karen Varnell, who cried when she read them. 3 TRP 146-48, 175, 178-80. They turned them over to police. 3 TRP 149, 179; 4 TRP 236-37.

The police asked Ms. Wilson if she would cooperate by calling the defendant about his offer in a recorded phone call, and she agreed. The plan was to have her offer to get the defendant in touch with a supposed friend of a friend, "Mike," who in fact would be an undercover police officer. Ms. Wilson called the defendant on February 14, 2002, from her home in a phone call that was recorded. 3 TRP 180-82; 4 TRP 237-39, 258; Exhs. 8 and 15A.²

In that conversation, the defendant said his ex-wife had screwed up his time with the boys during the past weekend. Exh. 15A at 2-5. Ms. Wilson said she had someone for him, someone who was dating a friend. Exh. 15A at 7. The defendant said they probably shouldn't be talking about it on the phone, then. He stated,

² Exh. 8, a recording on cassette, went to the jury; Exh. 15A, a transcript, was given to the jury while they listened, but did not go back for deliberations. 4 TRP 244. For ease of review, both appellant and respondent cite to the transcript.

I knew that if I had my say so and could blank somebody off of the fact of the earth I know who it would be.

Exh. 15A at 8. Ms. Wilson said she'd get this individual, "Mike," to call the defendant. Exh. 15A at 8, 10. The defendant said it'd be better if "Mike" did not call from a land line. Exh. 15A at 10. He suggested Ms. Wilson stay out of it, once it was all set up. Exh. 15A at 18. He added that meeting with "Mike" over the coming weekend would be good because he had nothing planned. Id. He concluded,

there is never gonna be any end to this until she either puts me in the ground or I put her in the ground, one or the other.

Exh. 15A. at 19.

"Mike" was actually undercover detective Terence Warren, who normally works for the Snohomish County Regional Drug Task Force. 4 TRP 255-56. He contacted the defendant to play the role of a "hit" man, noting they had a mutual friend, Mary, and talked about a "pruning job" the defendant wanted done. They agreed to meet at the Cook Book Restaurant in North Everett. 4 TRP 260-66. It took several tries for Det. Warren, posing as "Mike," to reach the defendant again to set a time for the meeting; they agreed to meet at the restaurant later that day, Saturday, February 16, 2002, at

4:00 p.m. 4 TRP 266, 270, 280. Det. Warren got there and waited for the defendant, who came late. Police videotaped and recorded the encounter. 4 TRP 272-75, 279, 335-36; Exhs. 4A, 10, 16A (see footnote 2).

When the defendant got there, he was wearing a black knit cap and his face was obscured by sunglasses and a scarf. He never removed the sunglasses, even as it got dark. 4 TRP 278. He walked past the restaurant windows with a Post-It note saying "Mike?" When they made eye contact, Det. Warren as "Mike" motioned the defendant inside, but the defendant indicated he wanted to meet outside, so that is what they did. 4 TRP 276-78.

In their hour-long recorded conversation, the defendant talked about not only having his wife killed, but her brother Steven and parents Jack and Juanita as well. This was to prevent their getting custody once Karen was gone. Exh. 16A at 18, 28. He talked about how, now that Karen had moved, the parents and his ex-wife lived only one and one-half blocks away from each other, and about the logistics of getting into the parents' home, and into Karen's home past an alarm system. Exh. 16A at 3-4, 10-16, 18-19, 21-23, 31-36, 43, 44-47; 4 TRP 321-22, 328. Possible scenarios he suggested included following Karen into her garage

and knocking her out, and then going over to the parents' home, getting all four unconscious and belted into a car and then rolling the car into the Snohomish River. Id.

As for how he felt about his ex-wife, the defendant said she had had it easy; her attitude changed, and she sought a divorce, only once there was less money coming in. Exh. 16A at 28-29, 40. He felt she treated the boys badly, and had unfairly shut him out as their father. Exh. 16A at 5, 9, 16-18, 24-25, 38-39, 40-44. He felt his own mother had done the same thing to him – driving his biological father away, and depriving him of his childhood with his dad – and he didn't want to see it happen again with his boys. Id.

He told "Mike" he couldn't find a picture of the intended victims. Exh. 16A at 43. He agreed with "Mike" that killing four people would have to involve more money, \$60,000 instead of \$50,000, but he did not offer a down payment. Exh. 16A at 29-30. When "Mike" said at least buy me dinner, the defendant gave him a \$100 bill. Exh. 16A at 44; 4 TRP 322. Pressed by "Mike" about money, the defendant said he could always do the job himself. Exh. 16A at 46. They agreed to talk the following day, and the defendant would show "Mike" where the two houses were. Exh.

16A at 46-47. The defendant was arrested minutes thereafter. 4 TRP 280.

Four months after the arrest, when Karen Varnell was cleaning out the original family residence for new owners, she found a picture of her parent's home and a floor plan of it tucked in the defendant's divorce file. 3 TRP 150-53.

The defendant was charged with five counts of solicitation to commit first-degree murder. 4 CP 617-18. Count I involved the offer made to Mary Wilson to kill Karen Varnell; Counts II through V involved the offer to "Mike" to kill Karen Varnell, her brother Steve, and her parents Jack and Juanita. Id.

At trial an expert for the defense, Dr. August Piper, testified that the defendant suffered from "personality disorder – narcissism" and "delusional disorder – erotomania." The former is characterized by extreme self-centeredness; the latter by a persistent belief, despite considerable evidence to the contrary, that another person is in love with the individual holding the delusion. 6 TRP 399-403. The defendant told him he was only meeting with "Mike" in order to turn "Mike" in, save Karen, and have her love him anew as a hero; this was, in Dr. Piper's opinion, consistent with a diagnosis of erotomaniac delusional disorder. 6 TRP 427-29.

Dr. Piper acknowledged neither diagnosis – narcissism or erotomania – indicated psychosis, and neither diagnosis precluded the defendant from forming intent, either to “rescue” his wife or have her killed. 6 TRP 400, 413. He recognized a person with narcissistic personality disorder has a self-centered but fragile sense of self; when that is punctured, such a person could do harm. 6 TRP 411. And a person with erotomanic delusion could become “rageful” if the love object strongly and unequivocally rejected the person. 6 TRP 408-09, 423.

Asked how the defendant’s arranging to have Karen’s parents and brother killed as well somehow fit into the defendant’s “rescue” plan to impress Karen, Dr. Piper expressed some surprise, and asked if this was in the transcript of the meeting at the restaurant. In response he could only say the defendant hadn’t discussed that with him. 6 TRP 436.

As for the Post-Its, the defendant told Dr. Piper they were about somebody else, not Karen. 6 TRP 437-38. Dr. Piper found them “troublesome.” 6 TRP 445. And he candidly was unable to reach any conclusion as to whether the defendant actually intended to kill his wife, or have her killed. 6 TRP 445.

The defendant told the jury he was afraid of and concerned about “Mike,” and met with him only to get ‘Mike’ in trouble, and thereby impress Karen. 6 TRP 460-72. He still loved Karen, and believed she still loved him. 6 TRP 479.

He told “Mike” about needing to kill Jack, Juanita, and Steve Worbass simply to get Mike’s reaction, “to keep him [“Mike”] on the hook so he doesn’t decide to get cold feet and bail himself.” 6 TRP 505-06. He admitted the Post-Its were about Karen and that he made up something different when he talked to Dr. Piper. 6 TRP 494, 496. He denied ever offering Mary Wilson money to kill his ex-wife. 6 TRP 489. Asked how he was going to carry out his “rescue” plan, the defendant said he didn’t really know. 6 TRP 501, 503.

As indicated above, the defendant was charged with five counts. Since Count I involved one charge but two factual scenarios – the offer made to Mary Wilson and the identical second offer made to her the next day, in front of employee Ron White – the jury was given an standard Petrich³ instruction, that they needed to be unanimous as to which set of facts comprised the crime in Count I. 6 TRP 537-40; compare 3 TRP 171-72 (first time)

³ State v. Petrich, 101 Wn.2d 566, 683 P.2d 173 (1984).

with 3 TRP 172-73 (second time). The court and counsel agreed no Petrich instruction was needed for Counts II to V, which did not have separate factual scenarios.

The jury convicted on all five counts. 3 CP 536-40. After delays brought about by numerous defendant-generated motions and letters, the defendant was sentenced within the standard range. 1 CP 19-31; Report of Proceedings of Sentencing Hearing of 4/19/04 (identified by appellant as "20RP;" hereafter "Sent. Hrg. .RP") at 47-51. As required by the Sentencing Reform Act for "serious violent offenses," and as discussed below, the sentences on each count ran consecutively to those on the other counts. 1 CP 19-31; Sent. Hrg. RP 17, 47-51.

B. MOTION FOR NEW TRIAL

Some seven months after the verdict the court heard a motion for new trial, with new counsel. See Report of Proceeding for Motion for New Trial of February 27, 2004 (identified by appellant as "17RP;" hereafter "New Trial Motion Hrg. RP"). Former trial counsel testified he and co-counsel had contacted defendant's family members and understood they would say the defendant told them pre-arrest he still loved Karen, but did not use them because they feared this testimony would "open the door" to

all the problems in the divorce. New Trial Motion Hrg. RP 48-49, 52. Trial counsel noted there were “terrible declarations” in the “box of divorce,” such things as the defendant allegedly pointing a gun at his wife, and throwing her off a horse. New Trial Motion Hrg. RP 48-49. The relatives all testified that the defendant told them that he still loved Karen Varnell, and wanted to reconcile, and would disagree when family members expressed anger about her. New Trial Motion Hrg. RP 55-56, 61-62 (Diana DeMarie), 66-67 (Dorothy Richardson), 68-69 (Roxanne Burkett), 77-78 (Rob Schmalz). In closing argument, the prosecution indicated the testimony was self-serving hearsay, but the State would have been happy to have that “divorce box” opened. New Trial Motion Hrg. RP 97-98. The defense responded that the statements would come in as excited utterance, state of mind, or res gestae. New Trial Motion Hrg. RP 105. The trial court denied the motion for new trial:

Mr. Varnell has claimed that his attorneys were ineffective because they did not present the testimony of family and friends who could confirm that he was still in love with his ex-wife, Karen Varnell, at the time he was arrested and the he still hoped to reconcile with her. Mr. White [trial counsel] testified he and Mr. Chamberlain [trial co-counsel] elected not to present this testimony, because it was cumulative of the testimony they did present and presented a concern

about opening the door to allow the State to present evidence inconsistent with such a claim. In particular, that it might allow the State to present evidence of bad acts directed forward Karen Varnell, which the defense had [successfully] moved in limine to exclude. a strategic decision not to present certain evidence including the decision not to call certain witnesses is generally not sufficient to establish ineffective assistance of counsel.

In this case such a decision was not only a strategic one, it also appears to be a sound one. The claim that Mr. Varnell was still in love with his ex-wife, and hoped to reconcile, was persuasively presented though not only his own testimony but that of Dr. August Piper. Presenting additional testimony of friends and family who might be expected to have knowledge of some of the difficulties during and after the divorce, certainly carried a significant risk of opening the door to such matters during rebuttal. Such evidence could have been extremely detrimental to Mr. Varnell's defense. The Court does not find that it has been established that there was ineffective assistance of counsel by failing to call the witnesses[.]

Report of Proceedings of Court's Ruling on Motion for New Trial of March 5, 2004 (designated by appellant as "18 RP;" hereafter "New Trial Motion Ruling RP") at 15-16. This appeal followed. 1 CP 3, 4-18.

III. ARGUMENT

A. COUNSEL WAS NOT INEFFECTIVE IN DECLINING TO PRESENT EVIDENCE FROM THE DEFENDANT'S RELATIVES WHEN THAT EVIDENCE WAS CUMULATIVE AND CARRIED SPECIAL RISKS, AND COUNSEL'S DECISION WAS A TACTICAL CHOICE.

The defendant argues that trial counsel was ineffective in failing to call as witnesses his mother, Diana DeMarie, his maternal grandmother, Dorothy Richardson, his sister, Roxanne Burkett, and his former stepdad, Rob Schmalz. BOA 24-29.

To prevail in a claim of ineffective assistance of counsel, the defendant must demonstrate that (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) this deficient performance resulted in *actual prejudice*. State v. Hendrickson, 129 Wn.2d 61, 77-78, 917 P.2d 563 (1996); Strickland v. Washington, 466 U.S. 668, 687, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). Both "prongs" must be established to prevail on the claim. Under the latter prong, the defendant must show a reasonable probability that, except for counsel's unprofessional errors, the results of the proceedings would have been different. Hendrickson, 129 Wn.2d at 78.

Strickland cautions reviewing courts not to succumb to the temptation of second-guessing defense counsel's particular acts or omissions after the fact with the benefit of hindsight. Strickland v. Washington, 466 U.S. at 689. Rather, a reviewing court "must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance." Strickland, 466 U.S. at 689. "[S]trategic choices made after thorough investigation of law and facts relevant to plausible options are virtually unchallengeable . . ." Strickland, 466 U.S. at 690. A court may not sustain a claim of ineffective assistance if there was a legitimate tactical reason for the allegedly incompetent act. State v. Garrett, 124 Wn.2d 504, 520, 881 P.2d 185 (1994).

There are several reasons the trial court correctly denied the motion for new trial.

First, as the trial prosecutor indicated, the testimony likely was inadmissible self-serving hearsay – an out of court statement offered for the truth of the matter. See ER 801(c). On appeal, the defendant does not identify what exceptions to the hearsay rule might apply. As a retelling of how the defendant felt about the breakup of his marriage, it would not qualify as an excited utterance in response to a startling event, contrary to counsel's argument

below. E.g., State v. Sellers, 39 Wn. App. 399, 804-05, 695 P.2d 1014, review denied, 103 Wn.2d 1036 (1985) (narrative of past completed affair is not excited utterance). As for “res gestae,” also argued below, that concept governs the admissibility of prior bad acts or other misconduct if these are so connected to the current crime that their proof is necessary to describe the crime. State v. Tharp, 96 Wn.2d 591, 637 P.2d 961 (1981). It does not apply to hearsay. There is no such thing as a “res gestae” hearsay exception.

Perhaps the defendant’s statements of love and desire for reconciliation, made to his relatives, could have qualified as statements of the declarant’s then existing mental or emotional condition under ER 803(a)(3). Even if they did not, the prosecution likely would not have objected to their admission, in order to open the “divorce box.” See New Trial Motion Hrg. RP 48-49, 52, 97-98. Defense trial counsel was acutely aware of that danger, and consequently had made the strategic decision not to use the relatives’ testimony. New Trial Motion Hrg. RP 48-49, 52. Such a strategic decision by counsel is virtually unchallengeable on appeal. Strickland, 466 U.S. at 690; State v. Garrett, 124 Wn.2d at 520.

The defendant disagrees, asserting that trial counsel was wrong: *post-divorce* statements by the defendant that he loved Karen and sought reconciliation would not, he claims, have opened the door to problems *during the marriage*. BOA 28-29. But deciding to call a witness is a trial tactic and by itself will not support a claim of ineffective assistance of counsel. State v. Maurice, 79 Wn. App. 544, 552, 903 P .2d 514 (1995). The defendant cannot second-guess that tactical decision. Moreover, that decision was sound: the relatives' testimony was not so neatly compartmentalized as he claims; and Karen Varnell, at least, would have willingly testified that bad things continued post-divorce. See 3 TRP 140-45; see also her statement at sentencing, Sent. Hrg. RP 26-30. Contrary to appellate counsel's assertions, the "divorce box" would still have been opened. Certainly the very real risk was there.

The defendant also argues that *pre-arrest* declarations made to the relatives would have carried more weight than *post-arrest* declarations made to Dr. Piper and at trial. BOA 28-29. But the jury already had heard about such pre-arrest statements: Not only had both the defendant and Dr Piper testified about the defendant's alleged continued love for, and desire for a reconciliation with,

Karen Varnell, but so had Mary Wilson. Ms. Wilson testified that up until a few weeks before the crime the defendant had talked a lot about reconciliation. 3 TRP 165, 195; 4 TRP 226. This testimony from a disinterested witness was more credible, and carried more weight, than the same thing coming from the defendant's mother or sister. With that evidence having already gone to the jury, *mostly through the State's case in chief* – so that the State could not claim any door had been opened⁴ – defense counsel would have risked a great deal, and for little additional advantage, by seeking to elicit more of the same through less compelling witnesses that could open the door to all the nastiness of the divorce. This was not ineffective assistance. Quite the contrary.

Lastly, as indicated immediately above, the evidence the relatives had to offer was merely cumulative. Thus, even if counsel's performance had been deficient – a point not conceded – the defendant cannot show that this allegedly deficient performance would have altered the outcome of the trial.

⁴ Under the "opening the door" doctrine, a party may examine a witness within the scope of the *opposing party's* previous examination. State v. Jones, 26 Wn. App. 1, 8, 612 P.2d 404, review denied, 94 Wn.2d 1013 (1980). Thus, a party cannot "open his own door."

B. CONSECUTIVE SENTENCES FOR THE DEFENDANT'S SERIOUS VIOLENT OFFENSES WERE LAWFUL.

1. The Presumption Of Concurrent Sentences Does Not Apply To Serious Violent Offenses Involving Separate And Distinct Criminal Conduct; Sentences For Such Crimes Must Be Consecutive.

RCW 9.94A.589(1)(a) (former RCW 9.94A.400(1)(a)) expresses a presumption under the SRA that current offenses—multiple offenses for which an offender is being sentenced on the same day – will be served concurrently. RCW 9.94A.589(1)(a); e.g., State v. Jacobs, 154 Wn.2d 596, 602-03, 115 P.3d 281 (2005); State v. Moore, 63 Wn. App. 466, 471, 820 P.2d 59 (1991); Sentencing Guidelines Comm'n, Adult Sentencing Guidelines Manual, cmt. at II-90 (2004). For each crime, other current offenses separately count in the offender score the same as prior convictions, unless they comprise the same criminal conduct. RCW 9.94A.589(1)(a). (If the latter, they all together count as one single crime in the offender score. Id.) Thus, an offender with no prior history being sentenced for four nonviolent felonies, such as four separate forgeries, would be sentenced to four concurrent terms on an offender score of 3.

If the current offenses come within the definition of “serious violent offenses,” however, the rule is the reverse: as long as

crimes of this category arise from “separate and distinct criminal conduct,” the sentences must be served consecutively. RCW 9.94A.589(1)(b); State v. Cubias, __ Wn.2d __, 120 P.3d 929, 930-31 (2005); Jacobs, 154 Wn.2d at 603. Such crimes do not count against each other in the offender score, however. RCW 9.94A.589(1)(b). Thus, an offender with no prior history being sentenced for four “serious violent offenses,” such as first-degree murder, would be sentenced to four consecutive terms on an offender score of 0. Id.

2. These Criminal Solicitations To Murder Four People Were Serious Violent Offenses Comprising Separate And Distinct Criminal Conduct.

RCW 9.94A.030(37) lists eight violent felonies that fall in the subcategory of “serious violent offenses.” First-degree murder is one of them. RCW 9.94A.030(37)(a)(i). The statute further provides that the definition of “serious violent offense” also includes “[a]n attempt, criminal solicitation, or criminal conspiracy to commit one of these felonies.” RCW 9.94A.030(37)(a)(ix). Thus, the defendant’s crimes – solicitation to commit first-degree murder of his ex-wife, her brother, and her mother and father – are “serious violent offenses,” squarely within the definition.

As discussed in the previous subsection, serious violent offenses that involve "separate and distinct criminal conduct" require consecutive sentences. RCW 9.94A.589(1)(b). In RCW 9.94A.589(1)(b) "separate and distinct criminal conduct" is not given a statutory definition. However, the Supreme Court has construed the phrase as the absence of "same criminal conduct." State v. Tilj, 139 Wn.2d 107, 122, 985 P.2d 365 (1999). "Same criminal conduct" is defined as "two or more crimes that require the same criminal intent, are committed at the same time and place, *and involve the same victim.*" RCW 9.94A.589(1)(a) (emphasis added). All three "prongs" -- same intent, same victim, same time and place -- must be met for crimes to involve the same criminal conduct. State v. Deharo, 136 Wn.2d 856, 858, 966 P.2d 1269 (1998).

Thus, the defendants multiple solicitations to commit first-degree murder will comprise "separate and distinct criminal conduct, requiring consecutive sentences, if they are not the "same criminal conduct." Applying this test, of what constitutes "same criminal conduct," shows the defendant's crimes are indeed separate and distinct.

Count I was committed on or before February 13, 2002, at the defendant's home/office when he solicited his secretary, Mary Wilson, to kill his wife. Counts II through V were committed on February 16, 2002 at the Cook Book Restaurant, when he solicited undercover detective Terence Warren, whom he knew as "Mike," to kill his wife and his three in-laws. Thus, Counts II-V were not committed at the same time and place as Count I. Crimes committed at different times, even if against the same victim and driven by the same purpose, do not comprise the same criminal conduct. State v. Young, 97 Wn. App. 235, 241, 984 P.2d 1050 (1999) (multiple forgeries, same victim, different days); State v. Lewis, 115 Wn.2d 294, 302-03, 797 P.2d 1141 (1990) (multiple drug deliveries on different days to same undercover buyer). This takes Count I out of the analysis altogether.

Counts II through V all were committed at the same time and place. At first blush, all appear to involve the same criminal intent – to hire a killer to murder four individuals who were competitors to the defendant's obtaining custody of his sons. However, the same subjective purpose will never involve the same criminal conduct if it involves separate victims. State v. Dunaway, 109 Wn.2d 207, 215, 743 P.2d 1237, 749 P.2d 160 (1987) (kidnap and robbery of two

women); State v. Garnier, 52 Wn. App. 657, 66-61, 763 P.2d 209 (1988) (burglaries of 18 apartments in same building same night).⁵ Thus, the intent is not the same.

Offenses involving separate victims will always comprise separate and distinct, rather than the same, criminal conduct. In re Pers. Restraint of Orange, 152 Wn.2d 795, 821, 100 P.3d 291 (2004) (citing State v. Wilson, 125 Wn.2d 212, 220, 883 P.2d 320 (1994); State v. Vike, 125 Wn.2d 407, 410, 885 P.2d 824 (1994)); see also State v. Dunaway, 109 Wn.2d 207, 215, 743 P.2d 1237, 749 P.2d 160 (1987). Because Counts I was committed at a different time and place, and because Counts II-V involve separate named victims, none of these crimes are the "same criminal conduct." When an offense does not constitute the "same criminal conduct," the offense is necessarily "separate and distinct." Cubias, ___ Wn.2d at ___, 120 P.3d at 131 (citing State v. Lessley, 118 Wn.2d 773, 778, 827 P.2d 996 (1992)). The imposition of consecutive sentences for these solicitations to commit murder was not only lawful, but also mandatory. RCW 9.94A.589(1)(b).

⁵ Overruled on other grounds, State v. Stephens, 116 Wn.2d 238, 803 P.3d 319 (1991) (offender score above 9 insufficient to justify exceptional sentence unless coupled with other current offenses).

3. Cubias Is Dispositive Of Defendant's Blakely Claim

The defendant argues that even if these crimes did not constitute the same criminal conduct, consecutive sentences could not be imposed because they were premised on a factual finding of "separate and distinct criminal conduct" that was not contained within the jury's verdicts, and thus violated the rule in Blakely v. Washington, 542 U.S. 296, 124 S. Ct. 2531, 159 L. Ed. 2d 403 (2004). He is wrong. State v. Cubias, decided after he submitted his brief, has rejected the same argument. State v. Cubias, ___ Wn.2d ___, 120 P.3d 929 (2005).

Blakely holds that "[o]ther than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt." Blakely v. Washington, 542 U.S. at ___, 124 S. Ct. at 2536. Because the judge-imposed exceptional sentence "upward" involved in that case required an additional factual determination per RCW 9.94A.535(2) that was not found within the jury's verdict, it was constitutionally infirm. Blakely holds that the maximum sentence a judge may impose is that based solely on "facts reflected in the jury verdict or admitted by the defendant." Blakely, 542 U.S. at ___, 124 S. Ct. at 2537.

In other words, the relevant "statutory maximum" is not the maximum sentence a judge may impose after finding additional facts, but the maximum he may impose *without* any additional findings.

Id. (emphasis in original).

The defendant argues that a finding that the five counts were not the "same criminal conduct" – the prerequisite to imposing consecutive sentences – went beyond what the jury verdicts found and authorized. Our Supreme Court in Cubias has recently rejected that argument. The five-member majority found that Blakely analysis did not apply to multiple sentences. Cubias, ___ Wn.2d at ___, 120 P.3d at 931-32 (citing this Court's recent decision in State v. Kinney, 125 Wn. App. 778, 106 P.3d 274 (2005)). "[S]o long as the sentence for *any single offense* does not exceed the statutory maximum for that offense . . . Blakely is satisfied." Id. at 932 (emphasis in original). As was the case in Cubias, each sentence imposed here does not exceed the "statutory maximum," – the standard range – for that offense.

The four-member concurrence found that Blakely analysis did apply to multiple sentences, but its rule not violated, because the finding of "separate and distinct criminal conduct" was premised on the jury's separate verdicts, and required no fact-finding outside

it. Id. at 935-36; see also majority, id. at 932 n.4. Here, the jury's separate verdicts similarly require no additional fact-finding. Thus, the rationale of both the majority and the concurrence in Cubias applies here. There is no Blakely violation.

4. The Imposition Of Consecutive Sentences Did Not Violate The Constitutional Prohibition Against Double Jeopardy.

The double jeopardy clause of the Fifth Amendment protects a defendant from being punished multiple times for the same offense. State v. Adel, 136 Wn.2d 629, 632, 965 P.2d 1072 (1998). The Washington Constitution provides the same protection. Adel, 136 Wn.2d at 632. The question of whether a defendant's double jeopardy protection has been violated is a question of law reviewed de novo. State v. Froderf, 84 Wn. App. 20, 25, 924 P.2d 933 (1996).

Double jeopardy principles prohibit multiple convictions under the same statute if the defendant commits only one "unit" of the crime. Adel, 136 Wn.2d at 632. Thus, when a person is charged with multiple violations of the same criminal statute, the proper inquiry is what "unit of prosecution" the Legislature intended to be punishable under the statute. Adel, 136 Wn.2d at 633-34. A "unit of prosecution" is analogous to a criminal act or course of conduct

someone can be punished for. Adel, 136 Wn.2d at 634; State v. Tvedt, 153 Wn.2d 705, 710, 107 P.3d 728 (2005), aff'g State v. Tvedt, 116 Wn. App. 316, 65 P.3d 682 (2003). A defendant can be convicted only once if he committed only one "unit of prosecution." Tvedt, 116 Wn. App. at 319.

If the Legislature has failed to denote the unit of prosecution in the statute, any ambiguity should be construed in favor of lenity. Adel, 136 Wn.2d at 634-35 (citing Bell v. United States, 349 U.S. 81, 84, 75 S. Ct. 620, 99 L. Ed. 905 (1955)). A statute is ambiguous if it is susceptible to two or more reasonable interpretations. But it is not ambiguous merely because different interpretations are conceivable, and courts are not obligated to find ambiguity by seeking out alternate interpretations. McGinnis v. State, 152 Wn.2d 639, 645, 99 P.3d 1240 (2004); State v. Hahn, 83 Wash. App. 825, 831, 924 P.2d 392 (1996)). "Without a threshold showing of ambiguity, the court derives the statute's meaning from the wording of the statute itself, and does not engage in statutory construction or consider the rule of lenity." State v. Tili, 139 Wn.2d at 115.

The criminal solicitation statute provides:

(1) A person is guilty of criminal solicitation when, with intent to promote or facilitate *the commission of a crime*, he offers to give or gives money or other thing of value to another to engage in specific conduct which would constitute such crime or which would establish complicity of such other person in its commission or attempted commission had such crime been attempted or committed.

RCW 9A.28.030 (emphasis supplied). RCW 9A.32.030(1)

provides:

A person is guilty of murder in the first degree when:
(a) With a premeditated intent to cause the death of *another person*, he or she causes the death of such person or of a third person..

RCW 9A.28.030 is clear enough: it identifies the “commission of a crime” as the criminal activity that would be measured by the “unit of prosecution.” The underlying crime sought to be committed is murder; its unit of prosecution is person-specific: when acting “with a premeditated intent to cause the death of another person, he or she causes the death of such person.” RCW 9A.32.030(1). Here, the criminal activity is Varnell’s soliciting Mary Wilson to kill his ex-wife Karen for \$50,000, in Count I, and, on a separate occasion, Varnell’s soliciting “Mike” to kill his ex-wife Karen, her brother Steve, and her parents Jack and Juanita, for \$60,000, by knocking them out and drowning them, or through some other means, in Counts II, III, IV, and V).

The defendant's earlier soliciting of Mary Wilson is a separate crime from his soliciting "Mike." By any analysis it is a separate solicitation entirely. Thus, count I is a separate 'unit of prosecution."

The defendant argues the latter four counts, at least, comprise one "unit of prosecution," because it allegedly involves one solicitation. But this is not a case of a "blanket" solicitation, where, for example, the defendant solicited "Mike" to kill his ex-wife and anyone else who might be around, such as might happen to be in her house. Rather, the defendant solicited "Mike" to perform separate and distinct acts targeting Karen Varnell as well as her parents Jack and Juanita Worbass and her brother Steven Worbass. They lived at *separate locations* and, as the defendant discussed with "Mike," *this involved separate logistical planning*. Exh. 16A at 10, 31, 33. These were separately solicited "commissions of crimes." On these facts, these comprise separate units of prosecution.

In Meyer v. State, the Maryland Court of Special Appeals addressed the same problem. There a defendant had solicited the killing of four people: his wife, a witness against him, and two detectives. All were in different locations. As here, the person he

solicited was an undercover officer. Meyer v. State, 47 Md. App. 679, 425 A.2d 664, 665-68 (1981). The Meyer court similarly defined the forbidden act as the accused's "efforts to activate another to commit a criminal offense." Meyer, 425 A.2d at 669. It rejected the notion "that merely because there is but one solicitor, one solicitee, and one conversation, only one solicitation can arise." Meyer, 425 A.2d at 670. But it also rejected a "'per capita' theory that there are necessarily as many solicitations as there are victims." Instead, it determined the issue turned on the factual circumstances. Id. Where "the solicitee is being importuned directly to commit separate and distinct acts of murder to kill, individually, several different specified victims possibly at different times and places and by different means." it concluded these are separate solicitations or incitements, each punishable on its own. Meyer, 425 A.2d at 670.

In People v. Cook, a defendant solicited a cellmate to murder a rape victim who had testified against him, as well as murder her parents, who had not prevented her from testifying, and her girlfriend, who would likely be around when the "hit" man found the victim. The California Court of Appeals defined the crime of solicitation as asking another to commit a specified crime, with the

intent the crime be committed. Citing and agreeing with Meyer, the Cook court concluded that “if the evidence and the reasonable inferences from that evidence establish that the solicitee has been asked to commit separate and distinct acts of murder, that evidence is sufficient to establish separate solicitations.” People v. Cook, 151 Cal.App.3d 1142, 199 Cal.Rptr. 269, 270, 272 (1984).

In People v. Vandelinder, a defendant offered to pay an undercover officer \$1,000 to kidnap, rape, and possibly murder his estranged wife. People v. Vandelinder, 192 Mich. App. 447, 481 N.W.2d 787, 788 (1992). The Michigan Court of Appeals defined the crime as occurring when “the solicitor purposely seeks to have someone killed and tries to engage someone to do the killing.” Vandelinder, 481 N.W.2d at 789. It agreed with Meyer and Cook that analysis should be on a case-by-case basis. Although the defendant argued on appeal that convictions for all three solicitations was precluded by double jeopardy, the Vandelinder court found the defendant had distinct motives for each crime and, notwithstanding the solicitations occurred in a single conversation with one solicitor and one person solicited, each solicitation could be separately punished. Vandelinder, 481 N.W.2d at 790.

Applying this fact-based, case-by-case analysis, and given the specificity of what the defendant asked “Mike” to do, the same result applies here. The defendant talked to “Mike” about the logistics of having to kill four people, Exh. 16A at 36, 39; explained why the parents had to be killed too, Exh. 16A at 18, 23, 28, and discussed having to go to separate houses to commit the murders. Exh. 16A at 10, 31, 33. These solicitations were separate “units of prosecution.” They were, and ought to be, properly punished separately.

C. THE DEFENDANT’S LAST-MINUTE WAIVER OF COUNSEL AT SENTENCING WAS VALID.

Lastly, citing to State v. Silva, 108 Wn. App. 536, 31 P.3d 729 (2001), the defendant argues the matter must be remanded for resentencing because when he proceeded pro se the court did not enter into an adequate colloquy to make his waiver valid.

As indicated by the size of Clerk’s Papers, the defendant had a long history, throughout this case, of disagreements with his retained counsel. The motion for new trial proceeded with different counsel, John Muenster, than the defendant had had at trial. See New Trial Motion Hrg. RP. The defendant eventually became unhappy with him, too. In a pre-sentencing hearing, the trial court

explored, as it had often before, whether the defendant wished to represent himself. Verbatim Record of Motion to Clarify Counsel of 3/15/04 (designated by defendant as "19 RP;" hereafter "3/15/04 RP") 2. The trial court opined the defendant would be better served by retaining counsel. 3/15/04 RP 5. The defendant insisted he wanted to fire his lawyer. 3/15/04 RP 9. Counsel for his part wanted to stay on, not the least because of the lengthy sentence the defendant faced, and said so. 3/15/04 RP 10, 13. Defense counsel acknowledged the defendant had a right to represent himself, but thought doing so was a bad idea. 3/15/04 RP 13-14. The trial court for its part tried to discourage him too. 3/15/04 RP 14. Asked specifically if he wanted to retain counsel, the defendant apparently indicated yes. 3/15/04 RP 15-16. He then backtracked. 3/15/04 RP 18. He then told the court to "use your judgment." 3/15/04 RP 20.

At sentencing a month later, the trial court (and the defendant) had the benefit of defense counsel's sentencing brief. Sent. Hrg. RP 4; 1 CP 33-42. It appears the parties went into the sentencing hearing on the assumption the defendant was still represented. Mr. Varnell soon raised doubts once again about whether Mr. Muenster was representing him. Sent. Hrg. RP 7. The

trial court again urged the defendant to keep his lawyer. Sent. Hrg. RP 7-8. 10. The defendant said he did not want Mr. Muenster to represent him. Sent. Hrg. RP 8-9. The court entered into a brief colloquy, referencing the many other times the defendant had been so advised before, and permitted the defendant to proceed pro se. It indicated, however, it would still consider defense counsel's sentencing memorandum.

The defendant for his part indicated he had read defense counsel's sentencing memorandum, and agreed with it. Sent. RP 15. He knew enough, presumably based on the memorandum, to ask for concurrent sentences. Sent. Hrg. RP 17. The sentencing memorandum specified the punishment the defendant was facing. 1 CP 33-42.

State v. Silva holds there is "no formula for determining a waiver's validity," but adds the preferred method is a colloquy "detailing at a minimum the seriousness of the charge, the possible maximum penalty involved, and the existence of technical and procedural rules governing the presentation of the . . . defense." Silva, 108 Wn. App. at 539. If the court does not conduct this colloquy, "a waiver may still be valid if a reviewing court determines from the record that the accused was fully apprised of these factors

and other risks associated with self-representation that would indicate that he made his decision with his 'eyes open.'" Silva, 108 Wn. App. at 540.

The defendant certainly had the benefit of knowing the existence of technical and procedural rules bearing on his defense throughout the long process of his trial and motion for new trial, and from the defense sentencing memorandum. From the same sources he was aware of the seriousness of the charges. And he was aware of the standard ranges, and the likelihood of consecutive sentences, again from the defense sentencing memorandum. He was well and repeatedly apprised of the risks of proceeding pro se as well. This was not, then, a situation where the defendant went into a sentencing "cold," or with his eyes closed.

There remains only the question of whether he was informed of the *possible* maximum penalty. Since Blakely, absent a special jury finding – which the defendant would undoubtedly have been aware of, having gone through the trial – no penalty above the top of the standard range was possible here. Thus, since Blakely, at sentencing the only possible maximum penalty, of which this defendant had to be made aware, was the top of the standard range. The defendant was informed of this in defense counsel's sentencing memorandum, which he indicated he had read.

Compare Sent. Hrg. RP 15 with 1 CP 33-42. And the State's sentencing memorandum, which presumably he also had the benefit of seeing, specified the maximum statutory penalty as life. 6 CP ___ (sub 231). Whether a defendant's waiver of counsel is valid depends on the facts and circumstances of each case. State v. DeWeese, 117 Wn.2d 369, 378, 816 P.2d 1 (1991). Because the defendant was informed of the "possible maximum penalty" as required by Silva, his waiver of counsel, on these specific facts, was valid.

IV. CONCLUSION

The judgment and sentence should be affirmed.

Respectfully submitted on November 22, 2005.

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by: 
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