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NO. 66924-9-I

COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION I

STATE OF WASHINGTON,

Respondent,

v.

MICHAEL EMERIC MOCKOVAK,

Appellant.

APPEAL FROM THE SUPERIOR COURT FOR KING COUNTY

THE HONORABLE PALMER ROBINSON

BRIEF OF RESPONDENT

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A. ISSUES PRESENTED

1. Whether the investigation of a solicitation of murder using an undercover agent who provides empathy and an opportunity to commit the crime is reasonable government action and not outrageous conduct in violation of due process.

2. Whether Mockovak is precluded from challenging the entrapment instruction because he proposed that instruction and any error was invited.

3. Whether Mockovak has failed to establish ineffective assistance of counsel when his attorney proposed the WPIC instruction on entrapment and the instruction is an accurate statement of the law.

4. Whether Mockovak has failed to establish ineffective assistance of counsel based on his attorney's failing to object to the prosecutor's statement of the law of entrapment, in closing argument, when that statement of law reflected the court's instruction to the jury on the law.

5. Whether the crimes of solicitation to commit murder and attempted murder, charged on separate dates, were not the same offense, and the resulting convictions did not violate double jeopardy.

6. Whether the crimes of conspiracy to commit theft and attempted theft, charged on separate dates, were not the same offense, and the resulting convictions did not violate double jeopardy.

7. Whether a conspiracy charge that alleges that a conspirator "perform[ed] an overt act pursuant to the agreement" sufficiently conveys the element of taking a substantial step in pursuance of the agreement as it is defined for purposes of criminal conspiracy.

8. Whether there is no requirement that co-conspirators be identified by name in a charging document alleging criminal conspiracy?

9. Whether Mockovak has failed to prove beyond a reasonable doubt that an amendment to the conspiracy statute, providing that it is not a defense if the co-conspirator is a law enforcement officer who did not intend that a crime be committed, violates due process or the constitutional prohibition on cruel punishment.

10. Whether sufficient evidence supports Mockovak's conviction for conspiracy to commit theft in the first degree.

B. STATEMENT OF THE CASE

1. PROCEDURAL FACTS

The defendant, Michael Mockovak, was charged with solicitation to commit murder in the first degree of Dr. Joseph King, attempted murder in the first degree of Dr. Joseph King, conspiracy to commit theft in the first degree, attempted theft in the first degree (from Prudential Life Insurance), and solicitation to commit the murder of Brad Klock. CP 412-14. Mockovak was tried in King County Superior Court, the Honorable Palmer Robinson presiding. 5RP 1.¹ A jury found Mockovak guilty as charged of the first four charges, and he was acquitted of the solicitation to murder Brad Klock. CP 604-08.

The trial court concluded that Counts 2 and 3 (solicitation to commit and attempted murder of Dr. King) constituted the same course of criminal conduct. CP 873. It also concluded that Counts 4 and 5 (conspiracy to commit theft and attempted theft) constituted the same course of criminal conduct. CP 873. Based on these conclusions, the standard range sentence for Counts 2 and 3 was

¹ The Verbatim Record of Proceedings will be cited by volume, consecutively numbered. A table listing the volumes and the hearing dates included in each is attached as Appendix 1.

187.5 to 249.75 months, and the standard range sentence for Counts 4 and 5 was 1.5 to 4.5 months.

Mockovak requested an exceptional sentence of two to five years based on a failed entrapment defense as well as other claimed mitigating factors. 20RP 85-117. The court rejected that request. 20RP 121.

The court imposed concurrent sentences of 240 months for the crimes of solicitation to commit murder and attempted murder in the first degree. CP 872-76. It imposed concurrent terms of four months for the conspiracy to commit theft and attempted theft convictions. CP 872-76.

After sentencing, Mockovak retained new counsel, James Lobsenz, who moved for the trial judge to recuse herself from the case based on the former law partnership and good friendship of Lobsenz with the judge. Supp. CP __ (sub. #131, 9-6-11 Motion for Recusal). The trial judge did recuse herself. Supp. CP __ (sub. 139, 9-8-11 Recusal Order). Thus, the restitution hearings were before the Honorable Michael Hayden. Supp. CP __ (sub. #145, 9-22-11 Restitution Hearing - Clerk's Minutes). The restitution ordered is the subject of a separate appeal and cross-appeal, No. 68020-0-I.

2. SUBSTANTIVE FACTS

a. Summary.

Early in 2009, Daniel Kultin worked at Clearly Lasik, a business owned by two doctors, defendant Michael Mockovak and victim Joseph King. 11RP 104. Kultin became concerned that Mockovak intended to have a former employee, who was suing the business, killed. 11RP 121-25. Kultin contacted the FBI, and FBI agents convinced him to cooperate with an investigation of that crime. 10RP 69; 11RP 127.

Kultin and Mockovak had a number of conversations about the availability and costs of hit men. Tr. 8/5; Tr. 8/11; Tr. 10/20; Tr. 10/22.² By October of 2009, the two doctors were involved in a heated dispute about splitting up the business and Mockovak had decided to hire hit men to kill King. Tr. 10/20 at 61-64. Mockovak intended to collect the proceeds of a four-million-dollar insurance policy he owned insuring King's life. Tr. 11/6 at 93.

On November 7, 2009, Mockovak took a portrait of King and his family from one of the offices, wrote down the details of King's flight to Australia that evening, and turned over both of those items

² The transcript of the recordings admitted into evidence, itself admitted as Exhibit 54, will be cited as "Tr." followed by the date of the recording and page number.

along with a \$10,000 cash down payment to Kultin, to provide to hit men in order to have King murdered while King was in Australia over the next week. 13RP 43-44, 47. Mockovak had previously instructed Kultin that he wanted to have King's body discovered, to make sure there was no problem with the life insurance claim. Tr. 11/06 at 54.

b. Mockovak's Initiation Of The Crimes.

Daniel Kultin is an immigrant from Russia. 11RP 113. Kultin was hired by Clearly Lasik in 2005, as the director of information technologies. 11RP 104. Mockovak joked with Kultin about Kultin being associated with Russian criminal activity. 11RP 114-15. Kultin had not been involved in any criminal activity in Russia, which he left about 11 years before he was hired by Clearly Lasik. 11RP 105-06. The teasing ended, but Mockovak continued to discuss Russian culture and economics with Kultin. 11RP 115-16.

Brad Klock was a former CEO of Clearly Lasik, who had been terminated in 2006. 8RP 9; 9RP 85, 179. In January of 2009, Klock filed suit against the business for wrongful termination, seeking \$750,000 in damages. 9RP 180. In late 2008 or very early 2009, Mockovak made comments to Kultin about Brad Klock,

asking whether Kultin had friends in Russia who could do something that would put an end to the civil case, get rid of the problem. 10RP 68-69; 11RP 117-19. Kultin interpreted this as a joke that was not funny. 11RP 119.

Then in March or April of 2009, Mockovak told Kultin that Klock was going to be traveling to Europe soon and suggested that this would be a good opportunity for something to happen to Klock. 11RP 120-25. Suddenly, Kultin had the feeling that Mockovak was serious about having Klock killed. 11RP 121-22. Kultin contacted the FBI. 10RP 68-69; 11RP 127.

FBI Special Agent Carr contacted Kultin and they discussed Mockovak's comments. 11RP 128. Agent Carr instructed Kultin not to bring up the subject of murder with Mockovak. 10RP 70. Kultin did not bring up the subject - it was Mockovak who raised it again that August. 10RP 77; 11RP 131-33; 14 RP47, 60.

- c. August And September 2009: Mockovak Considers Plans For The Murders Of Klock And King And Starts Secreting Cash To Pay The Hit Men.

On August 3, Mockovak called Kultin and said that he would like to talk about "that thing we talked about before," which Kultin

understood to mean having Klock murdered. 10RP 76; 11RP 131-33. Kultin quickly informed Agent Carr, and Carr provided guidance about how to respond. 10RP 79-83. Carr told Kultin that if Mockovak brought up the subject of having something done to Klock, Kultin was to reply that he knew people and would make some calls. 11RP 133.

Kultin met with Mockovak on August 5 at the Clearly Lasik office and they talked in the parking lot. 10RP 84. Mockovak talked about wanting something done to Klock, and Kultin understood that Mockovak was trying to see if Kultin was on Mockovak's side in his frustration with Klock. 11RP 136-37. Mockovak asked about how these things work and Kultin said that he would make calls and find out. 11RP 140-41.

Mockovak also talked about being upset with King and mentioned that there was a five-million-dollar insurance policy on King's life that would be paid to the business. 11RP 134. Mockovak said that King was greedy and wanted to split up the business. 11RP 138-40. After Mockovak mentioned the insurance policy on King, Mockovak said something like "maybe we can look after Joe later," indicating that he was not just interested in getting rid of Klock, but also King. 11RP 141.

After hearing the nature of that conversation, Agent Carr provided a back story to Kultin, for Kultin to use in responding to Mockovak's request. 10RP 88-90. Mockovak having opened the door, Carr intended to provide the path to walk down, if Mockovak chose to do that. 10RP 89.

The next meeting Mockovak had with Kultin was on August 11; the two went to a teriyaki restaurant near the office to talk. 11RP 144, 152. This meeting was audio recorded at the direction of the FBI. 11RP 145-46.

All of the recordings of meetings that Mockovak had with Kultin were introduced in full at trial as Exhibit 53. A transcript of the recordings also was admitted, including corrections by Kultin. Ex. 54; 11RP 146.

At the August 11th meeting, Kultin raised "the thing" about Klock and told Mockovak that Kultin had made some calls and told them that "you're interested," and they said "they can do it." Tr. 8/11 at 34. Mockovak responded, "Oh, good, good, good" and asked if it could be done in Canada or the United States. Id.

Kultin described generally the people who would do the killing and explained that payment would be in two parts. Id. at 36-39. Kultin explained that the killing was usually disguised as a

street robbery and that the men would make sure the victim was dead. Id. at 39-40. Kultin said that men would shoot the victim in the head unless they were specifically asked to do something else. Id. at 40. Mockovak responded with a laugh, saying "I don't care." Id. at 41.

Mockovak asked how much the killing would cost and Kultin explained that it would be \$10,000 now and \$10,000 afterward. Id. at 41. Mockovak asked what Kultin would be getting, and Kultin said he would get a little of it from them--Mockovak said, "you need to." Id. at 41. Then Mockovak brought up the issue of laundering the money, saying it would look bad if he just pulled \$10,000 from a checking account. Id. at 42.

Mockovak forcefully said that he did not want it to be done immediately, that he wanted to wait until after depositions in Klock's lawsuit occurred, in September. Id. at 43-45. If it appeared the lawsuit was going away, he implied he would not go through with the hit. Id. at 43-46. Mockovak and Kultin discussed possible plans for the killing and methods of money laundering, at length. Id. at 47-56, 63-65, 67-69, 78-80.

There were two brief discussions about the possibility of having King killed for the proceeds of the insurance policy. Id. at

69-70, 80-82. (King is usually referred to in the recordings as Joe.) Mockovak informed Kultin that the insurance money would only be available to them if King's death occurred before the business was split up. Id. at 69-70, 81-82. Near the end of this conversation, Mockovak repeated that he would wait to make a decision until after the depositions. Id. at 83.

After the conversation about the killing concluded, Mockovak mentioned a very capable attorney and Kultin asked if that attorney could negotiate with Klock. Id. at 91. Mockovak laughingly responded that Kultin "has the right attorneys for that" and "that's the kind of negotiation that gets results." Id. at 91-92.

After the meeting on August 11, the FBI waited for Mockovak to make the next step. 10RP 97. In late August or early September, Mockovak mentioned to Kultin that he had started to stash cash. 12RP 37.

On September 16, the FBI paid Kultin \$1200, for the first two meetings he had with Mockovak. 10RP 99. Kultin was surprised by the payment and he was not promised specific future payment. 10RP 100. Kultin was told that Mockovak had to take the next step. 10RP 100. Kultin was not working much in the office during this time and he had major knee surgery that kept him out of the office

for three weeks. 12RP 34-35. He saw Mockovak only once or twice a month. 12RP 35.

d. October 2009: The Conflict Between The Doctors Escalates And The Murder Of King Takes Priority.

There were no other conversations about the possibility of a murder until another recorded conversation on October 20.

12RP 38. That meeting was at the Clearly Lasik Renton office.

12RP 39.

In the interim, the conflict between Mockovak and King was escalating. 8RP 20-21. Mockovak was unhappy with what he believed were excessive wages the business was paying to King's brother. 8RP 95-97. On September 30, King sent Mockovak a letter setting a deadline of October 31 to split the business, or King would shut down the Edmonton surgery center. 8RP 97-98.

Mockovak considered this an ultimatum and was very upset. 8RP 98.

Mockovak responded to this ultimatum letter, and in a letter of October 13, King reiterated his ultimatum. 8RP 100-03.

Computer forensics established that on October 14, Mockovak was searching for information on travel to Sydney,

Australia, to occur on November 7. 9RP 156-60, 163. The previous April, King had made plans and purchased tickets to travel to Sydney on November 7. 9RP 135-37.

On October 20, Mockovak sent an email to King, saying that King could not "bully" an agreement. 9RP 8-10. Mockovak also asked King for the specific dates of his vacation to Australia. 9RP 10.

In his conversation with Kultin on October 20, Mockovak reported that the depositions for the Klock lawsuit went "outstanding." Tr. 10/20 at 6. Mockovak quickly turned the conversation to King and the dispute about splitting the business. Id. at 9-34, 38-48. Mockovak also complained that King had tried to cheat Mockovak in the sale of a house they jointly owned. Id. at 35-37.

Mockovak concluded that he and King were at loggerheads and there was no resolution. Id. at 58. Mockovak speculated that King was negotiating side deals in splitting the business and that King was trying to force Mockovak out completely. Id. at 59-60. Mockovak said that they were at an impasse, so "it's sort of Brad's problem." Id. at 60. When Kultin referred to "the thing about Brad,"

Mockovak responded that there was nothing urgent about Klock, but that the thing with King was different. Id. at 61-62.

Mockovak immediately stated that King was going to Australia in November, and that Mockovak had done some research to pin down his departure date. Id. at 62. Mockovak showed Kultin the flight information he had found. Id. at 62-64; 12RP 51. Kultin said that Australia would probably be cheaper, referring to the cost of a murder, and then said that Australia is a wild place; Mockovak responded, "Oh good" and "That's what I'm thinking." Tr. 10/20 at 62-64.

The conversation with Mockovak ended when he left the room; when he returned, Mockovak said he would try to confirm King's flight. Id. at 106. Kultin said he would ask his friend (through whom the hit was being arranged) about how things were in Sydney. Id. at 107. Mockovak responded, "Good, because I have a little stash in my office right now." Id. Mockovak affirmed that he had enough money stashed. Id.

On October 21, Mockovak called the insurance company for a copy of the policy on King's life. 9RP 60. The policy insuring King's life was for four million dollars and Mockovak was the beneficiary. 8RP 64. When the agent sent only a copy of the

policy on Mockovak's life, Mockovak requested the policy on King's life be sent, and it was. 9RP 60-61.

Mockovak and Kultin had another recorded conversation on October 22, 2009, at the Bellevue Athletic Club. 12RP 60-61. Mockovak mentioned that King had made another proposal to split the business, and first expressed doubts about the proposal, saying he couldn't trust King, then said that he had concluded it was hopeless. Tr. 10.22 at 32-46.

Kultin said that he had spoken with his friend and Australia would be easy. Id. at 140. Mockovak said that it was good because that was far away and it would never come back here. Id.

Mockovak asked whether the flight information would be enough to find King. Id. When Kultin asked whether they were just getting rid of Joe and not his wife, Holly, Mockovak definitively responded that he did not want Holly killed. Id. at 143. Mockovak again explained that he was slowly secreting cash and had \$11,000 so far. Id. at 145. (In a meeting on November 6, Mockovak said that he had been taking out \$1000 per week, Tr. 11.6 at 12.) The price of the murder had now risen to \$25,000. Tr. 10.22 at 145. They discussed when the post-murder payment would be needed. Id. at 146.

Mockovak exclaimed that Australia was perfect for the murder because it would never come back here. Id. at 154-55. Mockovak described how he would try to get additional flight and lodging information, saying "I love this thing!" Id. at 157-59, 162-64. When Kultin said that he was sure they could make King disappear in the ocean, Mockovak responded, "That's awesome." Id. at 160.

e. November 1-6, 2009: Mockovak Makes Final Decisions About The Murder Of King.

The business conflict continued into November. King sent hostile emails rejecting Mockovak's proposal. 9RP 12-15. Both doctors threatened to fire a scheduler in the Renton office because she could not follow the conflicting directives they imposed for scheduling surgeries for the two doctors in Renton. 9RP 16-19, 99-109; Tr. 11/6 at 46-47. One staff member described Mockovak during this conflict as angrier than she had ever seen him before. 9RP 104-05.

Mockovak and Kultin had another recorded conversation on November 6, beginning at Maggiano's restaurant. 13RP 17. Mockovak described his efforts to get the flight and lodging details for King's trip, and a picture of King's wife. Tr. 11/6 at 7-9.

Mockovak said that he and King were communicating only through their attorneys and that he had no question that King was going to try to "screw" Mockovak. Id. at 11, 14. Mockovak reported that he already was trying to sell one of the businesses (in anticipation of King's death) and had an interested buyer. Id. at 14-15.

Mockovak said that he was excited about running the business without the "crazy interference" of King. Id. at 45. Asked how he would like it to be done, Mockovak proposed that King be killed while he ran on the beach. Id. at 53. Asked if he would like King's body to be found, Mockovak said yes, that it probably would be better for purposes of the insurance. Id. at 54.

Asked whether he wanted to send a message, Mockovak said he did not care, "I just want him the fuck out of my way." Id. at 58.

Kultin told Mockovak that he wanted to make sure that Mockovak was okay with it. Id. at 61. Mockovak said that a part of him was uneasy, but any other way he was at the mercy of an arbitrator or judge. Id. at 61-62. He concluded, "The only sure way is this." Id. at 67, 71. He added that King really had this coming. Id. at 67. As the conversation continued, Mockovak looked for reassurance that he would not be caught. Id. at 72.

Mockovak and King discussed how to launder the post-killing payment, so that Mockovak's bank account activity would not look suspicious. Id. at 73-76, 83-85. Kultin emphasized that the post-killing payment must be made, or the killers would do something very unpleasant. Id. at 86.

Mockovak asked about Kultin's expectations, and said that he would hire Kultin as the director of marketing. Id. at 91. Mockovak explained how he planned to use the insurance proceeds and said that he hoped at the end there would be \$100,000 for Kultin. Id. at 93. He concluded that at that point, there would be no further obligation. Id.

Mockovak concluded the conversation by reiterating how good the choice of Australia was, because no responsibility could come back to this country. Id. at 102.

- f. November 7, 2009: Mockovak Appropriates A Photograph Of King And Provides That Photograph, King's Flight Details, And The \$10,000 Down Payment To Kultin To Provide To Hit Men For The Murder Of King.

On November 7, Mockovak and Kultin had a recorded phone conversation. 13RP 36-37. Mockovak was in the Portland airport

and reported that he had taken the portrait of the King family from the Vancouver office. Tr. 11/7 (phone call) at 3.

Mockovak said that he was very glad they went out the night before, because it gave him time to contemplate, it gave him 24 hours to think about it. Id. at 3-4. Mockovak said, "It's absolutely the right thing to do." Id. at 4. Staff members at the clinic testified that Mockovak was unusually cheerful that day and in the days following. 14RP 94, 123.

That night, the two met at a soccer park and that meeting was audio and video recorded. 13RP 37-38. The men went to a restroom where Mockovak gave Kultin \$10,000 in cash, and they agreed that when the murder was done, Mockovak would make a credit card purchase that would cover the balance. 13RP 43; Tr. 11/7 (park) at 16-17. Mockovak gave Kultin the photograph of King's family and explained that it was a little out of date, that King now had three children, and the children were a little older. 13RP 43-44; Tr. 11/7 (park) at 20. Mockovak also turned over a paper on which he had handwritten the Kings' flight information. 13RP 48; Tr. 11/7 (park) at 17-18.

On November 11, Kultin called Mockovak to tell him that King had been located in Australia and they should hear in a couple

of days that the job was done. Tr. 11/11 at 2, 4. Mockovak responded, "That sounds good," and the conversation turned to dating and business. Id. at 4-12.

C. ARGUMENT

1. THE INVESTIGATION OF MOCKOVAK'S SOLICITATION OF MURDER WAS REALISTICALLY TAILORED TO MOCKOVAK'S ACTIONS AND DID NOT VIOLATE DUE PROCESS.

Mockovak argues that the actions of Daniel Kultin were outrageous and, because Kultin was acting as an agent of the government, those actions violated due process and require dismissal of all charges. This argument should be rejected. The actions of Kultin were necessary to investigate whether Mockovak intended to have Brad Klock and Joseph King murdered and, if so, to prevent Mockovak from accomplishing that end. Because Kultin's actions included no coercion and simply provided the opportunity for Mockovak to carry out the crimes, the government actions in this case were not the egregious circumstances, shocking to the universal sense of fairness, that constitute outrageous conduct warranting dismissal.

To obtain dismissal of criminal charges on the basis of outrageous government conduct, the conduct must shock the universal sense of fairness. State v. Lively, 130 Wn.2d 1, 19, 921 P.2d 1035 (1996) (citing United States v. Russell, 411 U.S. 423, 432, 93 S. Ct. 1637, 36 L. Ed. 2d 366 (1973)). Dismissal is reserved for only the most egregious circumstances. Lively, 130 Wn.2d at 20.

Whether the government has engaged in outrageous conduct that will bar any prosecution is reviewed as a matter of law. Id. at 19. The evidence is viewed in the light most favorable to the government and trial court findings of fact will be accepted unless they are clearly erroneous. United States v. Fernandez, 388 F.3d 1199, 1238 (9th Cir. 2004), modified on other grounds, 425 F.3d 1248, cert. denied, 544 U.S. 1043 (2005).

Mockovak has not cited the constitutional basis for his argument, but the Lively analysis, on which he relies, is premised on the Fifth and Fourteenth Amendments of the United States Constitution. U.S. Const. amend. V, XIV; Lively, 130 Wn.2d at 18-19. The doctrine originated in dictum in United States v. Russell, supra, which noted the possibility that there could be a situation in which law enforcement conduct would be "so outrageous that due

process principles would absolutely bar the government from invoking judicial processes to obtain a conviction." Id. at 431-32. A majority of the United States Supreme Court has not approved the defense, and thus that Court has not established a test for evaluating possible outrageous conduct. See State v. Rundquist, 79 Wn. App. 786, 794-95, 905 P.2d 922 (1995), rev. denied, 129 Wn.2d 1003 (1996) (reviewing U.S. Supreme Court cases).

The Washington Supreme Court most recently has adopted the following standard for evaluating a claim of a violation of due process based on outrageous government conduct:

[T]he court should evaluate the conduct based on the "totality of the circumstances." *United States v. Tobias*, 662 F.2d 381, 387 ([5th Cir.] 1981), *cert. denied*, 457 U.S. 1108, 102 S.Ct. 2908, 73 L.Ed.2d 1317 (1982); *State v. Hohensee*, 650 S.W.2d 268 (Mo.App.1982). Each case must be resolved on its own unique set of facts and each component of the conduct must be submitted to scrutiny bearing in mind "proper law enforcement objectives—the prevention of crime and the apprehension of violators, rather than the encouragement of and participation in sheer lawlessness." *People v. Isaacson*, 44 N.Y.2d 511, 406 N.Y.S.2d 714, 378 N.E.2d 78, 83 (N.Y.1978); [*United States v. Bogart*, 783 F.2d [1428] at 1438 [(9th Cir. 1986)]].

Lively, 130 Wn.2d at 21-22. This standard is rooted in cases in the Fifth Circuit and the Ninth Circuit Courts. Id.

The Supreme Court in Lively listed five factors that courts should consider in evaluating such a claim:

whether the police conduct instigated a crime or merely infiltrated ongoing criminal activity; whether the defendant's reluctance to commit a crime was overcome by pleas of sympathy, promises of excessive profits, or persistent solicitation; whether the government controls the criminal activity or simply allows for the criminal activity to occur; whether the police motive was to prevent crime or protect the public; and whether the government conduct itself amounted to criminal activity or conduct "repugnant to a sense of justice."

Id. at 22 (internal citations omitted).

The court also observed that a due process claim based on outrageous government conduct requires more than a demonstration of flagrant police misconduct. Id. at 20. It noted that "[p]ublic policy allows for some deceitful conduct and violation of criminal laws by the police in order to detect and eliminate criminal activity." Id.

The Ninth Circuit, in applying the test, has recognized that "government agents may lawfully use methods that are neither appealing nor moral if judged by abstract norms of decency." United States v. Bogart, 783 F.2d 1428, 1438 (9th Cir. 1986) (citations omitted). Generally, agents may use "artifice and stratagem," and may use informants and pay them. Id.

On the other hand, government conduct that "shocks the conscience" is constitutionally unacceptable. United States v. Simpson, 813 F.2d 1462, 1465 (9th Cir.), cert. denied, 484 U.S. 898 (1987). This includes situations in which police conduct involves coercion, violence, or brutality, or where the crime is fabricated entirely by the police in order to obtain a conviction against the defendant. Id.; Bogart, 783 F.2d at 1438.

The Fifth Circuit, the other circuit applying the totality of the circumstances test, has held that the government's use of an informant of questionable character is common practice and not a violation of due process. United States v. Collins, 972 F.2d 1385, 1396 (5th Cir. 1992), cert. denied, 507 U.S. 1017 (1993) (referring to informants using racist language, vulgar and threatening language, or deceit). The court noted that the informant used must be convincing to the defendant. Id. at 1396-97.

a. Mockovak Instigated The Crimes In This Case.

The first factor identified in Lively is "whether the police conduct instigated a crime or merely infiltrated ongoing criminal activity." Lively, 130 Wn.2d at 22. In Lively, the police agent went to an AA/NA meeting to search for participants who might be

dealing drugs, struck up a romantic relationship with an addict who had recently attempted suicide, who was not dealing drugs, and persuaded that woman to sell drugs. The Court concluded that this conduct was outrageous, particularly because of the vulnerable population targeted and the special vulnerability of the specific defendant once the romantic relationship was cultivated. Lively, 130 Wn.2d at 22-27.

In this case, the uncontroverted evidence is that the plot to kill Klock and King originated with Mockovak. Kultin testified to that. 11RP 119, 121-25; 14RP 31, 47, 60. The defense conceded that Mockovak raised the subject, but argued that he was not serious. 16RP 114. However, Mockovak did not testify, so there was no evidence to contradict Kultin's interpretation of Mockovak's intentions.

Mockovak argues that a question from Mockovak in two recordings, asking why Kultin brought this to him, establishes that the criminal design originated with Kultin. However, Kultin explained that Mockovak's question was why Kultin had offered to assist him with the plan. 14RP 59-60. That is, what Kultin did bring to Mockovak was Kultin's connection with a person who could carry out the plan, and his offer to allow Mockovak to make use of that

connection. Kultin's initial report of Mockovak's plan to the FBI early in 2009 contradicts the theory that the plan to kill Klock originally was Kultin's idea.

b. Mockovak Committed These Crimes For His Own Benefit; His Decisions Were Carefully Considered And Independently Made.

The second factor identified in Lively is "whether the defendant's reluctance to commit a crime was overcome by pleas of sympathy, promises of excessive profits, or persistent solicitation." Lively, 130 Wn.2d at 22. This factor does not condemn an agent's expression of sympathy for the defendant - it condemns an agent's appeal to the defendant by soliciting the sympathy of the defendant for the agent's (or a third party's) predicament.

The Ninth Circuit has held that "the deceptive creation and/or exploitation of an intimate relationship does not exceed the boundary of permissible law enforcement tactics." Simpson; 813 F.2d at 1466. "[I]nformants must be permitted to use deceit by 'assum[ing] identities that will be convincing to the criminal elements they have to deal with.'" Id. (citing United States v. Marcello, 731 F.2d 1354, 1357 (9th Cir. 1984)). "The due process

clause does not protect [a defendant] from voluntarily reposing trust in one who turns out to be unworthy of it." Simpson, 813 F.2d at 1466. "To win a suspect's confidence, an informant must make overtures of friendship and trust and must enjoy a great deal of freedom in deciding how best to establish a rapport with the suspect." Id.

The Ninth Circuit addressed the issue of whether encouraging a person who is directing a plan of murder for hire is a violation of due process in United States v. McClelland, 72 F.3d 717 (1995), cert. denied, 517 U.S. 1148 (1996). McClelland wanted his recently estranged wife killed. Id. at 719. McClelland had hired a man to work for an insurance company, and that employee (and his family) had moved into McClelland's home. Id. McClelland solicited that employee to assist in the killing. Id. The employee contacted the FBI and recorded his subsequent conversations with McClelland. Id. at 719-20. During one of those conversations, McClelland repeatedly expressed reluctance to go through with the killing; at the employee's prompting, McClelland gave the employee permission to "go for it." Id. at 720. McClelland later provided assistance to the employee in carrying out the plan. Id.

On appeal, McClelland claimed outrageous government conduct, based in part on the failure of the FBI to take steps to corroborate the employee's original report or investigate his reliability. The court observed that the recording did allow verification and that, "[i]n any event, allegedly poor police work hardly constitutes outrageous government conduct." Id. at 721.

McClelland also claimed that it was outrageous government conduct that the FBI manufactured the offense by allowing the employee to persuade McClelland to pursue the murder plan despite his reluctance to do so. Id. The court concluded that, although the employee encouraged and prodded McClelland quite frequently, that conduct does not constitute manufacturing the crime. Id. at 721-23. The court noted that it had repeatedly found in cases with more aggressive action by the government than this that the government did not manufacture the crime. Id. at 722. The court rejected the claim of a due process violation even though McClelland was "emotionally debilitated" and vulnerable. Id. at 723.

The expressions of empathy and common feeling by Kultin were permissible efforts to maintain a rapport with Mockovak. They

did not overcome any reluctance on Mockovak's part to go forward with his plans to have King murdered.

c. **Mockovak Was In Complete Control Of The Criminal Activity, Directing It At All Times.**

The third factor identified in Lively is "whether the government controls the criminal activity or simply allows for the criminal activity to occur." Lively, 130 Wn.2d at 22.

The government did not control the criminal activity in this case. Mockovak raised the idea of having Klock killed in the spring of 2009, and no government agent became involved until Mockovak brought up the plan with Kultin again in August. During the August meetings, Mockovak said that he wanted to wait until after the civil depositions to make a decision, and Kultin and the FBI left it at that. After the depositions went well, Mockovak chose to make it a priority to murder King and not Klock, and Kultin made no effort to dissuade him. Mockovak had investigated King's travel plans even before he told Kultin that the priority had switched. Finally, in the conversations of November 6 and November 7, it is clear that Mockovak understood that all of the decisions were his, including how the killing would occur and whether the body would be found.

Mockovak said that he had contemplated the decision and was sure that it was the right thing to do.

Kultin and Mockovak were in an employer/employee relationship and were not even close friends. Kultin did not exert undue influence in Mockovak's decision-making.

- d. The Primary Motive Of The FBI And The Cooperating Witness Was Protection Of Mockovak's Intended Victims.

The fourth factor identified in Lively is "whether the police motive was to prevent crime or protect the public." Lively, 130 Wn.2d at 22. Kultin's motive was to protect the lives of individuals that Mockovak intended to have murdered. 12RP 39.

Mockovak's assertion that Kultin was motivated by money is based on an FBI agent checking a box on a form because no more appropriate box was available. 11RP 59, 85. Kultin denied that his motive was money. 12RP 39. The progress of events is inconsistent with the suggestion that Kultin was motivated by money, as there is no suggestion that when he reported his concern about Mockovak's plans in March 2009, Kultin thought he could get money as a result.

While Carr's motive in signing Kultin as a Confidential Human Source may have been to assist his own career, there is no indication that Carr intended to target Mockovak and set Mockovak up to commit crimes in order to accomplish that goal. 10RP 85-86. Carr had other uses for Kultin, who was a Russian native, and in fact was unable to continue to use Kultin because these crimes occurred and Mockovak was prosecuted, making Kultin a known government agent. 10RP 75.

- e. Kultin Did Not Convey Any Threat To Mockovak Except That Once The Murder Was Completed, The Second Half Of The Payment Must Be Made Promptly.

The fifth factor identified in Lively is "whether the government conduct itself amounted to criminal activity or conduct 'repugnant to a sense of justice.'" Lively, 130 Wn.2d at 22.

Mockovak's argument that Kultin employed a strategy of fear to overcome reluctance by Mockovak is unsupported by the record. The transcripts of the recorded conversations reflect casual conversation of men discussing a plan. There is laughter and profanity, but no intimidation. The actual recordings make it quite clear that Mockovak was in complete control. He never expressed

fear, and was quick to contradict Kultin when he disagreed with him.

Kultin made it clear as late as the November 6th meeting that Mockovak needed to be sure before they went ahead with the plan: "I wanna make sure that you are okay with it." Tr. 11/6 at 61. Mockovak thanked Kultin for asking, and the next day said he was glad they had the discussion, that he had spent 24 hours contemplating it and was sure that was what he wanted to do. Tr. 11/6 at 64; Tr. 11/7 (phone call) at 3-4. The words and the attitude do not reflect a person who has been frightened into participation.

Common sense suggests, and the reported cases reflect, that when a citizen reports that someone has stated that another person should be killed, investigation of the first person's intentions requires use of the person to whom the initial statement was made. See, e.g., United States v. Vasco, 564 F.3d 12 (1st Cir. 2009) (prisoner asked cellmate to arrange for killing of witnesses); United States v. Acierno, 579 F.3d 694 (6th Cir. 2009), cert. denied, 130 S. Ct. 1567 (2010) (man asked friend to kill girlfriend's estranged husband); United States v. Stewart, 420 F.3d 1007 (9th Cir. 2005) (prisoner stated that law enforcement personnel and judge should be killed); United States v. Degan, 229 F.3d 553 (6th Cir. 2000)

(Degan asked acquaintance to kill Degan's ex-wife); United States v. Talley, 164 F.3d 989 (6th Cir.), cert. denied, 526 U.S. 1137 (1999) (Talley asked friend to kill witnesses in pending case); United States v. Cook, 102 F.3d 249 (7th Cir. 1996) (Cook recruited man to join campaign to slaughter patients and staff at medical clinics); State v. Varnell, 162 Wn.2d 165, 170 P.3d 24 (2007) (Varnell asked his employee to kill Varnell's ex-wife); State v. Constance, 154 Wn. App. 861, 226 P.3d 231 (2010) (inmate asked cellmate to arrange for killing of estranged wife). The defendant's statement of an intent to kill will in almost all cases be made to a person trusted by the defendant. That person's empathy and reassurance of trustworthiness do not constitute outrageous government conduct-- they are necessary to establish and maintain rapport and are permissible government action. See Simpson, 813 F.2d at 1466 (deceptive creation and/or exploitation of an intimate relationship does not exceed boundary of permissible law enforcement tactics).

f. No Remand For Fact Finding Is Needed.

Because the undisputed facts in the record do not establish outrageous government conduct, dismissal should be denied. The Washington Supreme Court has concluded that if the defendant

has not established outrageous conduct based on undisputed facts or on findings of fact by the trial court, dismissal on that basis will be denied. State v. Valentine, 132 Wn.2d 1, 24, 935 P.2d 1294 (1997). The court refused to weigh the credibility of the witnesses in that case, who testified to contradictory versions of the events. Id. at 23.

Mockovak has taken the position that remand is unnecessary because he does not dispute the relevant testimony or the content of the recordings. App. Br. at 57-59. There was no contradictory testimony in the State's case about Kultin's interactions with Mockovak, and the defense presented no witnesses.

Mockovak also has argued that if this Court is unwilling to find outrageous conduct on this record, the case should be remanded for "a trial court judge" to make the necessary factual findings. App. Br. at 60. Mockovak has not identified specific facts concerning these events that are disputed and that would be resolved by a remand.

Moreover, the argument that remand for additional findings of fact would be an appropriate remedy was rejected by the

Supreme Court in Valentine.³ In Valentine, the claim of outrageous government conduct was raised for the first time in a petition for review to the Supreme Court, so no relevant findings were made by the trial court. In the case at bar, the State proposed findings upon the trial court's dismissal of the due process claim, but the court chose not to enter written findings. 20RP 42-43. The defense did not propose findings or object when the court indicated that it did not believe that findings were necessary. 20 RP 43. In Valentine, the court rejected the claim of outrageous government conduct because it was unsupported by the record, and that should be the result here as well.

If this Court concludes that a remand for entry of findings is necessary, that remand would have to be for entry of findings by Judge Robinson, the trial judge, who ruled on the motion. It is unclear if that is possible, however, because the judge recused herself after trial on a defense motion. New defense counsel appeared in the trial court after sentencing; that new counsel was James Lobsenz, who is also counsel on appeal. Supp. CP __ (sub.

³ Valentine was decided a year after Lively, and discussed the Lively decision. Thus, Mockovak's inference concerning the need for findings, which is based on a reference in the Lively opinion to a remand in another case, is unwarranted. See App. Br. at 58.

#131, 9-6-11 Motion for Recusal). Lobsenz made a motion for the trial judge to recuse herself because the trial judge had formerly been a law firm partner of Lobsenz for ten years and, according to Lobsenz, was a good friend of his.⁴ Id. Judge Robinson did recuse herself. Supp. CP __ (sub. 139, 9-8-11 Recusal Order).

Nothing in the record establishes outrageous government conduct. Based on the holding in Valentine, no remand for further fact-finding is necessary or appropriate.

2. THERE WAS NO ERROR IN THE TRIAL COURT'S STATEMENT OF THE LAW OF ENTRAPMENT, WHICH WAS REQUESTED BY THE DEFENSE.

Mockovak argues that his attorneys at trial, Jeffery Robinson and Colette Tvedt,⁵ were ineffective for two reasons: they proposed the current WPIC⁶ instruction on the law of entrapment, which was given by the trial court, and they failed to object when the prosecutor relied upon that statement of the law in closing argument. On that basis, he claims, he also should be permitted to

⁴ Mockovak's trial counsel did not file a Notice of Intent to Withdraw as required by CR 71, and new counsel did not file a Notice of Appearance, but the court signed the recusal order two days after the motion was filed, without a hearing.

⁵ A third attorney, Joseph Campagna, also appeared on behalf of Mockovak at some pretrial hearings but apparently did not participate at trial.

⁶ Washington Pattern Jury Instructions, Criminal; 11 Wash. Prac. 18.05.

directly challenge the instruction. These arguments should be rejected because the instruction was a correct statement of the law. Even if it was not, defense counsel did not render ineffective assistance in proposing it, and the prosecutor did not err in arguing the law as given to the jury by the judge.

Mockovak proposed an entrapment instruction. CP 366. It was essentially identical to WPIC 18.05. The entrapment instruction given by the trial court, instruction 29, was identical to the instruction proposed by Mockovak. CP 595, Instruction 29.

While Mockovak may raise the claim of ineffective assistance of counsel, a direct challenge to the entrapment instruction is barred based on the doctrine of invited error. Likewise, analysis of the claim of prosecutorial error must be premised on the lack of an objection below, and Mockovak concedes that it would not be reversible error under that standard.

Mockovak has not established either of the two required predicates of ineffective assistance of counsel. It was not deficient to propose the WPIC instruction on entrapment, when it is supported by existing case law. There can be no prejudice based on any error in that instruction, because there was insufficient evidence to justify a jury finding of entrapment.

a. Any Error Was Invited By Mockovak.

Even if there is error in the entrapment instruction given, Mockovak is precluded from seeking reversal on that basis, because he invited the claimed error. A defendant who invites error may not claim on appeal that he is entitled to reversal based on that error. State v. Studd, 137 Wn.2d 533, 546, 973 P.2d 1049 (1999).

The invited error doctrine bars relief regardless of whether counsel intentionally or inadvertently encouraged the error. Seattle v. Patu, 147 Wn.2d 717, 720, 58 P.3d 273 (2002). The invited error doctrine bars relief even if the instructional error is of constitutional magnitude. State v. Henderson, 114 Wn.2d 867, 870, 792 P.2d 514 (1990).

Invited error is not a bar to review of a separate claim of ineffective assistance of counsel. State v. Doogan, 82 Wn. App. 185, 188, 917 P.2d 155 (II-1996). This claim is analyzed separately, infra.

Mockovak's assertion that there is an exception to the invited error rule if an instructional error is the result of ineffective assistance of counsel is unsupported by the case law. The cases upon which Mockovak relies do review the instructions challenged, but that review is in the context of a claim of ineffective assistance

of counsel, requiring a showing of deficient performance in requesting the instruction as well as a showing of prejudice. See State v. Kylo, 166 Wn.2d 856, 861-71, 215 P.3d 177 (2009); State v. Aho, 137 Wn.2d 736, 744-45, 975 P.2d 512 (1999); State v. Rodriguez, 121 Wn. App. 180, 183-84, 87 P.3d 1201 (2004).

b. The Entrapment Instruction Given, WPIC 18.05, Is A Correct Statement Of Law.

The entrapment instruction given by the trial court is a correct statement of the law of entrapment in Washington. Entrapment was a common law defense in this state,⁷ and eventually it was codified in RCW 9A.16.070. That statute provides:

- (1) In any prosecution for a crime, it is a defense that:
 - (a) The criminal design originated in the mind of law enforcement officials, or any person acting under their direction, and
 - (b) The actor was lured or induced to commit a crime which the actor had not otherwise intended to commit.
- (2) The defense of entrapment is not established by a showing only that law enforcement officials merely afforded the actor an opportunity to commit a crime.

RCW 9A.16.070.

⁷ See City of Seattle v. Gleiser, 29 Wn.2d 869, 873-78, 189 P.2d 967 (1948) (reviewing Washington common law).

The trial court gave the instruction on entrapment that was proposed by Mockovak. See CP 366, 595. It was as follows:

Entrapment is a defense to each of the charges in this case if the criminal design originated in the mind of law enforcement officials, or any person acting under their direction, and Michael Mockovak was lured or induced to commit a crime that he had not otherwise intended to commit.

The defense is not established if the law enforcement officials did no more than afford Michael Mockovak an opportunity to commit a crime. The use of a reasonable amount of persuasion to overcome reluctance does not constitute entrapment.

Michael Mockovak has the burden of proving this defense by a preponderance of the evidence. Preponderance of the evidence means that you must be persuaded, considering all the evidence in this case, that it is more probably true than not true. If you find that Michael Mockovak has established this defense, it will be your duty to return a verdict of not guilty.

CP 595, Instruction 29.

The entrapment instruction proposed by Mockovak and given by the court was identical to WPIC 18.05, with two exceptions unrelated to the statement of law: Mockovak's name was substituted for "the defendant" throughout, and the reference to "a charge of ____" in the WPIC instruction was replaced with "each of the charges in this case." Compare CP 595 with WPIC 18.05.

On appeal, Mockovak claims that the second sentence in the second paragraph of WPIC 18.05 is not a component of the

defense of entrapment. That sentence is: "The use of a reasonable amount of persuasion to overcome reluctance does not constitute entrapment." WPIC 18.05. Mockovak's claim that the amount of persuasion used is not relevant to a claim of entrapment is unfounded.

The Washington Supreme Court has held that the use of a normal amount of persuasion to overcome reluctance to enter into a criminal transaction does not constitute entrapment. State v. Waggoner, 80 Wn.2d 7, 10-11, 490 P.2d 1308 (1971). The court reaffirmed that principle in State v. Smith, 101 Wn.2d 36, 42-43, 677 P.2d 100 (1984). This Court explained the distinction as the difference between solicitation or normal persuasion to commit a crime, which is not entrapment, and undue solicitation, which would be entrapment. State v. Swain, 10 Wn. App. 885, 889, 520 P.2d 950 (1974); accord State v. Keller, 30 Wn. App. 644, 647-48, 637 P.2d 985 (1981).

In his dissent in Smith, Justice Utter explained that Washington courts have required that the inducement go beyond a normal amount of persuasion, and constitute undue solicitation; he noted that a defendant need not allege outrageous conduct to establish an entrapment defense. Smith, 101 Wn.2d at 47 (Utter,

J., dissenting). That is, the amount of persuasion that would constitute entrapment is more than the normal persuasion required, but less than outrageous conduct. The Court of Appeals in Keller also noted that the statutory defense does not require proof of outrageous conduct, but does require proof of undue persuasion. Keller, 30 Wn. App. at 647-48.

The defendant who claims entrapment must prove both that the criminal design originated in the minds of law enforcement and that he "was lured or induced to commit a crime which the actor had not otherwise intended to commit." RCW 9A.16.070(1). The entrapment statute also provides that the defense "is not established by a showing only that law enforcement officials merely afforded the actor an opportunity to commit a crime." RCW 9A.16.070(2). That limitation appears in WPIC 18.05 and is not challenged by Mockovak.

The case law establishes another limitation: that the defendant must prove that he was induced by undue persuasion. Waggoner, 80 Wn.2d at 10-11; Smith, 101 Wn.2d at 42-43. Thus, the statement that "a reasonable amount of persuasion to overcome reluctance does not constitute entrapment" sets out a definition of the inducement that the defendant must prove.

Mockovak's claim that there is a logical fallacy in the challenged sentence is without merit.⁸ The negative statement in this instance is part of the legal standard that Mockovak must satisfy. It is not a logical premise of a categorical syllogism, the type of logical fallacy that is described at the Wikipedia page that he cites as authority. App. Br. at 67. It is rather a simple definition phrased in the negative. Thus, it is not an illogical or false conclusion that the defendant must show that more than a reasonable amount of persuasion was used to overcome reluctance--that is the defendant's burden.

Mockovak relies on State v. O'Neill,⁹ but that case does not support his argument. O'Neill was charged with bribery and the government agent involved with that crime was a corrupt officer who was soliciting a bribe, not an undercover officer investigating crime. 91 Wn. App. at 982-83. This Court concluded that under these circumstances, the statement that "a reasonable amount of persuasion to overcome reluctance does not constitute entrapment" was error. Id. at 982. That is because the statement erroneously suggested that a corrupt officer could have illegally threatened

⁸ App. Br. at 67.

⁹ 91 Wn. App. 978, 967 P.2d 985 (1998).

incarceration to extort bribes by using reasonable persuasion. Id. at 989. The Court concluded that because the officer "did not legitimately negotiate the bribe in an attempt to enforce the law," no amount of persuasion would be reasonable or sanctioned by law. Id.

The holding of O'Neill by its own terms does not extend to this case. The court stated:

The "reasonable amount of persuasion to overcome reluctance language" is clearly designed for the typical undercover or sting operation. While perfectly appropriate in the normal entrapment case, it does not apply here.

Id. at 990 (emphasis added).

The WPIC commentary addresses O'Neill, and it indicates that the WPIC Committee also understood that the holding of O'Neill is limited to bribery cases. 11 Wash. Prac. 18.05, Comment.

This case is the normal entrapment case. It involves a citizen who reported a statement indicating that someone intended to commit a crime (murder), and the citizen then agreed to assist the FBI in investigation of that criminal activity. It does not involve an officer extorting the defendant to persuade him to commit a crime. In this case, the language of the WPIC instruction regarding

the use of a reasonable amount of persuasion was an accurate statement of the law.

c. The Prosecutor Did Not Err In Closing Argument When She Relied Upon The Court's Statement Of The Law Of Entrapment.

Mockovak claims that the prosecutor misled the jury in closing argument by referring to the law as it was set out in the entrapment instruction and describing it as three elements that must be proven to establish entrapment. Mockovak concedes that the alleged misstatement of the law that is the predicate of this argument could have been neutralized by a curative instruction and that he cannot raise a claim of prosecutorial misconduct in this appeal.¹⁰ App. Br. at 85. He has not identified any other basis for reversal in the prosecutor's argument. Mockovak does assert that the prosecutor's argument was error, and that is one premise of his claim of ineffective assistance of counsel. However, the

¹⁰ No objection was made at trial to the remarks now challenged. 16RP 94-98. A defendant who does not make a timely objection at trial waives any claim of prosecutorial misconduct unless the misconduct in question is "so flagrant and ill-intentioned that it evinces an enduring and resulting prejudice" that could not have been neutralized by a curative instruction to the jury. State v. Fisher, 165 Wn.2d 727, 747, 202 P.3d 937 (2009) (quoting State v. Gregory, 158 Wn.2d 759, 841, 147 P.3d 1201 (2006)).

prosecutor's argument was proper based on the instruction given by the court.

The asserted error in the argument is that the prosecutor told the jury that Mockovak had to prove that Kultin used an unreasonable amount of persuasion, and described that burden as a third element of the defense. App. Br. at 79. That argument, however, is a correct statement of the law given in the instruction. CP 595. The attorneys' statements about the law must be confined to the law set out in the instructions given by the court. State v. Davenport, 100 Wn.2d 757, 760, 675 P.2d 1213 (1984).

The trial judge made it quite clear before closing argument that she believed that the issue of whether reasonable persuasion was used was a question for the jury. Mockovak moved to dismiss at the close of the State's case, arguing that entrapment had been established as a matter of law because there were threats of violence implied by the informant, and that could never be reasonable persuasion. 15RP 39-53. The court denied the motion, ruling that what is reasonable persuasion is a question for the jury. 15RP 53-54. The prosecutor's argument was an accurate reflection of the letter and spirit of the entrapment instruction.

The reference to the burden of establishing more than reasonable persuasion as an additional "element" does not render it misleading to the jury. "Element" has the common meaning of "one of the constituent parts, principles, materials, or traits of anything." Webster's Third New Int'l Dictionary 734 (1993). While the entrapment statute lists two elements, the "reasonable persuasion" provision is another component required to establish the defense, as the trial judge recognized, and referring to it as another "element" was not misleading.

The Supreme Court recognizes the reality that the absence of an objection by defense counsel "strongly suggests to a court that the argument or event in question did not appear critically prejudicial to an appellant in the context of trial." State v. McKenzie, 157 Wn.2d 44, 53 n.2, 134 P.3d 221 (2006) (emphasis in original) (quoting State v. Swan, 114 Wn.2d 613, 661, 790 P.2d 610 (1990), cert. denied, 498 U.S. 1046 (1991)). That court has stated, "Counsel may not remain silent, speculating upon a favorable verdict, and then, when it is adverse, use the misconduct as a life preserver ... on appeal." State v. Russell, 125 Wn.2d 24, 93, 882 P.2d 747 (1994), cert. denied, 514 U.S. 1129 (1995) (citing Jones v. Hogan, 56 Wn.2d 23, 27, 351 P.2d 153 (1960)).

In this appeal, Mockovak attempts to add weight to his argument of prosecutorial error by citing to the defense attorney's closing argument, and its statement of the requirements of the entrapment defense in the same manner as the prosecutor's statement. App. Br. at 83. To the contrary, this echo of the prosecutor's explanation of the law, by the defense attorney, indicates that the prosecutor's statement was an accurate reflection of the court's instruction.

d. Mockovak Has Not Established Ineffective Assistance Of Counsel.

Mockovak argues that his trial counsel, Jeffery Robinson and Colette Tvedt, were ineffective for two reasons: they proposed the current WPIC instruction on the law of entrapment, which was given by the trial court, and they failed to object when the prosecutor relied upon that statement of the law in closing argument. Because that instruction is an accurate reflection of the current state of the law, Mockovak has not sustained his burden of establishing deficient performance and resulting prejudice.

To establish ineffective assistance of counsel, Mockovak must show both that defense counsel's representation was

deficient, i.e., that it "fell below an objective standard of reasonableness based on consideration of all the circumstances," and that defense counsel's deficient representation prejudiced the defendant. In re Pers. Restraint of Hutchinson, 147 Wn.2d 197, 206, 53 P.3d 17 (2002) (applying the test of Strickland v. Washington, 466 U.S. 668, 687, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984)). The benchmark for judging a claim of ineffective assistance of counsel is whether counsel's conduct "so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result." Strickland, 466 U.S. at 686.

In judging the performance of trial counsel, courts begin with a strong presumption that the representation was effective. Strickland, 466 U.S. at 689; Hutchinson, 147 Wn.2d at 206. This presumption of competence includes a presumption that challenged actions were the result of reasonable trial strategy. Strickland, 466 U.S. at 689-90.

The Strickland standard must be applied with "scrupulous care, lest 'intrusive post-trial inquiry' threaten the integrity" of the adversary process. Harrington v. Richter, 562 U.S. ___, 131 S. Ct. 770, 788, 178 L. Ed. 2d 624 (2011) (quoting Strickland, 466 U.S. at

689-90). Counsel's representation is not required to conform to the best practices or even the most common custom, as long as it is competent representation. Richter, 131 S. Ct. at 788.

In addition to overcoming the strong presumption of competence and showing deficient performance, the petitioner must affirmatively show prejudice. Strickland, 466 U.S. at 693. Prejudice is not established by a showing that an error by counsel had some conceivable effect on the outcome of the proceeding. Id. at 693. Mockovak must establish a reasonable probability that, but for counsel's errors, the result of the proceeding would have been different. Id. at 694.

- i. Proposing the current WPIC 18.05 to define entrapment was not deficient performance.

As discussed supra, section (C)(2)(b), WPIC 18.05 is an accurate statement of the law of entrapment. Thus, proposing that instruction to the trial court was reasonable. The court in O'Neill specifically stated that the instruction is "perfectly appropriate in the normal entrapment case." 91 Wn. App. at 990.

Even if this Court concludes that the entrapment instruction generally should not include a reference to reasonable persuasion,

Mockovak has not established that his counsel's performance was deficient at the time of trial, when it was proposed. It is not deficient performance for a defense attorney to fail to anticipate changes in the law. State v. Skuza, 156 Wn. App. 886, 898, 235 P.3d 842 (2010), rev. denied, 170 Wn.2d 1021 (2011).

Washington's pattern jury instructions are drafted and approved by a committee that includes judges, law professors, and practicing attorneys. State v. Bennett, 161 Wn.2d 303, 307, 165 P.3d 1241 (2007). They generally have the advantage of thoughtful adoption. Id. at 308. The instructions do not carry the implied approval of the Washington Supreme Court, however. Id. at 307.

There was no case law at the time of this trial indicating that WPIC 18.05 was an incorrect statement of the law of entrapment in the normal entrapment case. Thus, counsel could not be faulted for proposing the instruction. Studd, 137 Wn.2d at 551. The O'Neill court's limitation of the instruction was explicitly limited to bribery cases, and this case did not involve bribery. The WPIC Committee considered the O'Neill holding in its comment to WPIC 18.05 and did not modify the instruction. Proposing the standard WPIC instruction was not deficient performance in this case.

- ii. Failure to object to the prosecutor's accurate description of the law provided in Instruction 29 was not deficient performance.

Mockovak claims that defense counsel was deficient in not objecting to the prosecutor's description of the law of entrapment. That claim also is without merit, because the prosecutor's description of the law was the law as set out in Instruction 29.

Because the prosecutor's argument accurately reflected the law in the entrapment instruction, an objection would have been fruitless. Counsel "has no duty to pursue strategies that reasonably appear unlikely to succeed." State v. Brown, 159 Wn. App. 366, 371, 245 P.3d 776, rev. denied, 171 Wn.2d 1025 (2011) (citing State v. McFarland, 127 Wn.2d 339, 334 n.2, 898 P.2d 831 (1995)).

Defense counsel also understood Instruction 29 to require proof by the defendant that the agents' actions were unreasonable. 17RP 9-11. That clearly was included in the instruction as a component of the defense. CP 595.

Mockovak appears to suggest that there is special significance to the prosecutor's reference to "three elements" of the entrapment instruction, arguing that this was error because the case law describes only two. However, the instruction included

more than two things that must be proved by the defendant, it included four: that the crime originated with law enforcement, that Mockovak was lured or induced to commit a crime he had not otherwise intended to commit, that law enforcement officials did more than simply afford Mockovak an opportunity to commit a crime, and that the persuasion used to overcome Mockovak's reluctance was more than a reasonable amount. CP 595.

An objection to the use of the term "three elements" would not have been to Mockovak's benefit. It would simply have emphasized the number of things that Mockovak was required to establish, regardless of whether they were termed "elements" or not. There was no tactical reason to object to the term. Legitimate trial strategy or tactics cannot be the basis of a claim of ineffective assistance of counsel. State v. Garrett, 124 Wn.2d 504, 520, 881 P.2d 185 (1994). The defendant "must show in the record the absence of legitimate strategic or tactical reasons supporting the challenged conduct by counsel." Hutchinson, 147 Wn.2d at 206. In any given case, effective assistance of counsel could be provided in countless ways, with many different tactics and strategic choices. Strickland, 466 U.S. at 689.

Under these circumstances, an objection would have been fruitless and potentially damaging. Failure to object was not deficient performance.

- iii. Mockovak has not established prejudice as a result of trial counsel's actions.

Mockovak also has not established the prejudice prong of his ineffective assistance claims. The defendant must show "that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable." Strickland, 466 U.S. at 687. This showing is made when there is a reasonable probability that, but for counsel's errors, the result of the trial would have been different. State v. Thomas, 109 Wn.2d 222, 226, 743 P.2d 816 (1987); Strickland, 466 U.S. at 694. "The likelihood of a different result must be substantial, not just conceivable." Richter, 131 S. Ct. at 792. Speculation that a different result might have occurred is not sufficient. State v. Crawford, 159 Wn.2d 86, 99-102, 147 P.3d 1288 (2006). Without a showing of prejudice, Mockovak's ineffectiveness claim fails, even if the representation was deficient. See In re Rice, 118 Wn.2d 876, 889, 828 P.2d 1086, cert. denied, 506 U.S. 958 (1992).

Because the challenged sentence was in the WPIC instruction and reflected the current state of the law, Mockovak cannot establish that if a different instruction were offered, it would have been given by the court. There is no reason to believe the court would have given an instruction that did not accurately reflect the law of entrapment.

As to the use of the term "three elements" by the prosecutor in closing argument, the absence of an objection by defense counsel "strongly suggests to a court that the argument or event in question did not appear critically prejudicial to an appellant in the context of trial." McKenzie, 157 Wn.2d at 53 n.2 (emphasis in original). The challenged sentence is a part of the defense burden of proving entrapment. Labeling that part of the burden another element, if error, was not misleading, and conferred no greater weight to that component of the defense than the instruction provided.

Further, the evidence at trial was not sufficient for a rational juror to find entrapment by a preponderance of the evidence, so any error in the entrapment instruction given was not prejudicial. Mockovak did not testify at trial. The most direct evidence of his state of mind was the recordings of his conversations with Kultin.

In those recordings, it is clear that Mockovak was directing the activity and Kultin was simply providing the opportunity for Mockovak to proceed if he chose to do so.

There is no evidence that Mockovak lacked the predisposition to commit the crime, and without that element, no entrapment defense can prevail.

Mockovak conceded at trial that he was the first to articulate a plan to kill Klock, who was suing the business. There is no evidence that he was not serious, although the defense attorneys made that argument. His attitude throughout his conversations with Kultin did not evidence surprise or reluctance. Kultin took Mockovak's intention to kill people seriously; Kultin asked the FBI agents, "What if he decides to kill me?" and told them that he thought the situation was very risky. Tr. 10/22 at 2-3.

As soon as Mockovak understood that he might be able to hire hit men, he began to secure cash, weekly, in \$1000 increments, in order to be able to pay for the hit without drawing suspicion. Mockovak said at the October 22 meeting that he had set aside \$11,000 so far, and said at the November 6 meeting that he had been taking out \$1000 per week; at that rate, he had begun setting aside cash on about August 6. Tr. 10/22 at 145; Tr. 11/6 at

12. This refutes any suggestion that Mockovak was induced to commit a crime that he was not predisposed to commit.

3. THE CONVICTIONS OF SOLICITATION TO COMMIT MURDER AND ATTEMPTED MURDER, AND THE CONVICTIONS OF CONSPIRACY TO COMMIT THEFT AND ATTEMPTED THEFT, DO NOT VIOLATE DOUBLE JEOPARDY.

Mockovak argues that his convictions of solicitation to commit murder and attempted murder and his convictions of conspiracy to commit theft and attempted theft were a violation of double jeopardy under the merger doctrine and because they constitute multiple punishments for the same offense.¹¹ Under the circumstances in this case, where the convictions were based on different acts on different dates, these convictions do not violate double jeopardy.

The solicitation to commit murder charge alleged that from October 14 through November 6, 2009, Mockovak offered to give money or other things of value to another in order to accomplish the murder of Dr. Joseph King. CP 413, 580. The attempted murder

¹¹ Mockovak analyzes these two arguments separately, but both are double jeopardy claims and the merger doctrine is a component of analysis of the multiple punishment claim. The State has accordingly consolidated its response to both double jeopardy claims.

charge alleged that on November 7, 2009, Mockovak attempted to cause the death of King. CP 413, 583. The conspiracy to commit theft charge alleged that from August 5 through November 6, 2009, Mockovak agreed with one or more other persons to engage in or cause the performance of conduct constituting theft in the first degree, and one of the persons involved in the agreement took a substantial step in pursuance of that agreement. CP 413, 593. The attempted theft charge alleged that on November 7, 2009, attempted to commit theft by deception of the proceeds of a four-million-dollar insurance policy on the life of King. CP 414, 594.

The trial court concluded that these convictions did not violate double jeopardy and did not violate the merger doctrine. 20RP 64. Review of these double jeopardy claims is de novo. State v. Freeman, 153 Wn.2d 765, 770, 108 P.3d 753 (2005).

If the legislature intends to impose multiple punishments, such punishment does not violate the double jeopardy clause. Freeman, 153 Wn.2d at 771. In repeating this basic principle, the Washington Supreme Court noted the United States Supreme Court's holding that the legislature has the power to criminalize every step leading to a greater crime, and the crime itself. Id.

(citing Garrett v. United States, 471 U.S. 773, 779, 105 S. Ct. 2407, 85 L. Ed. 2d 764 (1985)).

Nevertheless, a court may not impose multiple punishments for the same offense without offending double jeopardy. Freeman, 153 Wn.2d at 770. Where a defendant's acts support charges under two criminal statutes, a court must determine "whether, in light of legislative intent, the charged crimes constitute the same offense." Id. (quoting In re Pers. Restraint of Orange, 152 Wn.2d 795, 815, 100 P.3d 291 (2004)).

When there is no express legislative intent, Washington courts apply the Blockburger¹² test: in order to be the same offense for purposes of double jeopardy, the crimes must be the same in law and in fact. State v. Calle, 125 Wn.2d 769, 777, 888 P.2d 155 (1995). If each offense includes elements not included in the other, the offenses are different and each may be punished. Id.

This Court has observed that if the factual grounds for two crimes are distinct, no multiple punishment (double jeopardy) question arises. State v. Schneider, 36 Wn. App. 237, 243 n.3, 673 P.2d 200 (1983). Because the crimes at issue here were based on

¹² Blockburger v. United States, 284 U.S. 299, 52 S. Ct. 180, 76 L. Ed. 306 (1932).

acts occurring on different dates, the factual separation between the crimes is a sufficient basis to reject Mockovak's double jeopardy claims.

When one of the crimes in the analysis is criminal attempt, the court examines the substantial step element based on the facts of the case and determines whether the attempt requires proof of a fact not required in proving the other crime. In re Pers. Restraint of Borrero, 161 Wn.2d 532, 537, 167 P.3d 1106 (2007), cert. denied, 552 U.S. 1154 (2008). If the charging document did not specify the facts constituting the substantial step, double jeopardy is not violated if different facts could have supported the different convictions. Id. at 538-39. Cf. Orange, 152 Wn.2d at 818-21 (convictions of assault in the first degree and attempted murder were both based on the same, single shot, fired at one person, and this violated double jeopardy).

The merger doctrine is another aid to determine legislative intent. Freeman, 153 Wn.2d at 777. The merger doctrine is a rule of statutory construction that applies only where the legislature has clearly provided that a higher degree of crime (like first degree rape) is distinguished from a lower degree (like second degree rape) by an act that is a separate crime (as to rape, kidnapping

elevates the crime). Id. at 777-78; State v. Vladovic, 99 Wn.2d 413, 420-21, 662 P.2d 853 (1983). In that situation, convictions for those two crimes (in the example, rape and kidnapping) based on the same act would merge unless the court found contrary legislative intent or another exception to the merger rule. Freeman, 153 Wn.2d at 778. In this case, with respect to each of these pairs of crimes, neither crime requires proof of the other crime, so by its terms, the merger doctrine does not apply.

Mockovak argues that the crimes merge because they were part of a continuing course of conduct, but under double jeopardy principles, even the same act may be punished twice if that is the legislature's intent. The trial court did find that these crimes constituted a continuing course of criminal conduct for purposes of sentencing, but that is a separate issue from double jeopardy. If this Court concludes that conviction of both crimes related to murder or both crimes related to theft violates double jeopardy, the case should be remanded to strike one of the convictions from the judgment, including the term of months imposed on that count. Because the trial court found that the crimes encompassed the same course of criminal conduct, CP 873, only one of each pair was counted in the offender score and concurrent terms were

imposed pursuant to RCW 9.94A.589(1). The standard range sentences and the term of sentences of the remaining counts would be unaffected.

a. The Convictions Of Solicitation To Commit Murder And Attempted Murder.

The trial court correctly concluded that these convictions do not violate double jeopardy. 20RP 64. The statutes at issue in this case do not explicitly authorize separate punishments for the crimes of solicitation to commit murder and attempted murder. However, legislative intent may be found in legislative history, the structure of the statutes, the fact that the statutes are directed at different evils, or any other source. Freeman, 153 Wn.2d at 773. Because these crimes address different evils and the elements are not concurrent, punishment for both is permissible.

The elements of solicitation to commit murder include offering money (or something else of value) to another person to engage in specific conduct. CP 580; RCW 9A.28.030. The elements of attempted murder do not include offering money to another, but do include doing an act that is a substantial step toward commission of murder. CP 583; RCW 9A.28.020(1).

Solicitation requires only an offer, an enticement; it does not require commission of any act that is a step toward commission of the crime. As making an offer of money is not an element of attempted murder in the first degree, and doing an act that is a substantial step toward committing murder is not an element of solicitation to commit murder, the crimes are not the same.

Mockovak asserts that the Court of Appeals has held that solicitation is "an attempt to attempt," and thus solicitation to commit murder is a lesser included crime of attempted murder. App. Br. at 91-92. Neither case cited, however, reaches that conclusion. State v. Gay¹³ did not hold that solicitation is a crime composed of a subset of the elements of attempt, it simply addressed whether the facts sustained a conviction for attempted murder or reflected mere preparation. Id. at 841-42.

State v. Jensen, 164 Wn.2d 943, 953, 195 P.3d 512 (2008), upon which Mockovak also relies, addressed the unit of prosecution for solicitation. The court in Jensen did note that solicitation is an attempt to conspire, with the actus reus of an attempt to persuade another to commit a specific crime. 164 Wn.2d at 951. The

¹³ 4 Wn. App. 834, 486 P.2d 341, rev. denied, 79 Wn.2d 1006 (1971).

relevance of that observation was to the conclusion that solicitation should not be punished more severely than conspiracy. Id. Neither case suggests that solicitation is a legal lesser included offense of attempt to commit murder.

This Court has reached the opposite conclusion. Schneider, 36 Wn. App. 237 at 243. The Court held "solicitation is not a lesser included offense of the crime of attempted murder." Id.

In this case, the solicitation was alleged to have occurred between October 14 and November 6, and Mockovak's offer during that time to pay to have King killed supported that conviction. CP 412-13, 580. The attempted murder was alleged to have occurred on November 7, when Mockovak gave Kultin the photograph of King and his family, the flight information, and \$10,000 in cash. CP 413, 583. In Gay, the court concluded that handing over money (and a photograph of the intended victim) to a feigned assassin constituted attempted murder. Id. at 841-42. Mockovak has not identified acts during the weeks before November 7 that could support a conviction of attempted murder and, in any event, the jury did not rely on Mockovak's actions on November 7 to convict him of solicitation, because those acts were outside the time period of the solicitation. CP 580.

The presumption that crimes are not the same offense when their elements differ may be overcome with clear evidence of contrary legislative intent. Calle, 125 Wn.2d at 780. The different purposes served by the statutes, however, is evidence that the legislature intended to punish them as separate offenses. Calle, 125 Wn.2d at 780. Mockovak has not offered any evidence to the contrary.

The focus of the solicitation statute is on enticement; the statute aims to deter a person from enticing others to commit crimes. Jensen, 164 Wn.2d at 953. The focus of the attempt statute is the evil of the crime attempted; here, the killing of a human being. It is logical to conclude that if a defendant has solicited another to commit a murder and then actually attempts the murder, that defendant is more culpable than one who attempts a murder without soliciting others to participate in that criminal activity.

Mockovak's convictions of solicitation to commit murder in the first degree and attempted murder in the first degree do not violate double jeopardy.

b. The Convictions Of Conspiracy To Commit Theft And Attempted Theft.

The trial court correctly concluded that these convictions do not violate double jeopardy. 20RP 64. The statutes at issue in this case do not explicitly authorize separate punishments for the crimes of conspiracy to commit theft and attempted theft in the first degree. However, because these crimes address different evils and the elements are not concurrent, punishment for both is permissible.

Traditionally the law has considered conspiracy and the completed substantive offense to be separate crimes. Jannelli v. United States, 420 U.S. 770, 777, 95 S. Ct. 1284, 43 L. Ed. 2d 616 (1975). The United States Supreme Court observed that agreement is the essential element of the crime of conspiracy. Id. at n.10. "Unlike some crimes that arise in a single transaction, the conspiracy to commit an offense and the subsequent commission of that crime normally do not merge into a single punishable act." Id. (citations omitted). Even if there is a substantial overlap in proof, there is no double jeopardy violation if each crime requires proof of a fact that the other does not. Id. at 786 n.17. That the conspiracy charge is paired with an attempt charge does not

change that analysis: the agreement is the core of the conspiracy charge but a substantial step toward actual commission of the theft is the gravamen of the attempt.

The elements of conspiracy to commit theft include agreeing with another person to engage in or cause the crime of theft.

CP 593; RCW 9A.28.040. The elements of attempted theft do not include agreement with another, but do include doing an act that is a substantial step toward commission of a crime. CP 583; RCW 9A.28.020(1). Conspiracy does not require commission of any act that is a step toward commission of the crime, although it does require that one of the conspirators act in pursuance of the agreement. RCW 9A.28.040. As making an agreement with another is not an element of attempted theft, and doing an act that is a substantial step toward committing theft is not an element of conspiracy to commit theft, the crimes are not the same.

The definition of "substantial step in pursuance of the agreement" for purposes of conspiracy is broader than the definition applicable to an attempt, and includes preparation to carry out the agreement. State v. Dent, 123 Wn.2d 467, 477, 869 P.2d 392 (1994). The definition of "substantial step" for purposes of attempt requires more than mere preparation. Id.

at 475. This difference in the two crimes was set out in the trial court's jury instructions. CP 582, 585 (Instructions 16, 19).

Because one of the crimes in this analysis is criminal attempt, the court examines the substantial step element based on the facts of the case. Borrero, 161 Wn.2d at 537. Because the charging document did not specify the facts constituting the substantial step, double jeopardy is not violated if different facts could have supported the different convictions. Id. at 538-39.

This conspiracy to commit theft was alleged to have occurred between August 5 and November 6, and Mockovak's agreement with Kultin during that time, to kill a person in order to obtain insurance proceeds supported that conviction. CP 413, 593. The attempted theft was alleged to have occurred on November 7, when Mockovak gave Kultin the photograph of King and his family, the flight information, and \$10,000 in cash. CP 414, 594. Mockovak has not identified acts during the weeks before November 7 that could support a conviction of attempted theft and, in any event, the jury did not rely on Mockovak's actions on November 7 to convict him of conspiracy, because those acts were outside the time period of the conspiracy. CP 593.

Mockovak has not overcome the presumption that because they have different elements, these crimes are not the same offense. The different purposes served by the statutes is evidence that the legislature intended to punish them as separate offenses. Calle, 125 Wn.2d at 780. The focus of the conspiracy statute is on agreement and the statute aims to deter a person from joining with others in a criminal enterprise. The focus of the attempt statute is the evil of the crime attempted; here, the theft of insurance proceeds.

Mockovak's convictions of conspiracy to commit theft in the first degree and attempted theft in the first degree do not violate double jeopardy.

4. THE FAILURE TO USE THE TERM "SUBSTANTIAL STEP" IN THE CHARGE OF CONSPIRACY TO COMMIT THEFT IS NOT REVERSIBLE ERROR.

For the first time on appeal, Mockovak asserts that the charging language on the charge of conspiracy to commit theft in the first degree is defective. He contends that the omission of an element--taking a substantial step in pursuance of the agreement--requires reversal of this conviction. While the information did not

include the specific statutory language of RCW 9A.28.040, it was not constitutionally deficient.

A charging document must include all essential elements of a crime, to apprise the accused of the charges and allow preparation of a defense. State v. Pineda-Pineda, 154 Wn. App. 653, 670, 226 P.3d 164 (2010). When the sufficiency of a charging document is first raised on appeal, it is more liberally construed in favor of validity. State v. Kjorsvik, 117 Wn.2d 93, 104-05, 812 P.2d 86 (1991). The test is: (1) do the necessary facts appear in any form in the charging document, or can they be found in that document by fair construction; and, if so, (2) can the defendant show that he or she was nonetheless actually prejudiced by the inartful language, which caused a lack of notice. Id. at 105-06.

Count 4 of the charging document in this case provides:

And I, Daniel T. Satterberg, Prosecuting Attorney aforesaid further do accuse MICHAEL EMERIC MOCKOVAK of the crime of **Conspiracy to Commit Theft in the First Degree**, based on a series of acts connected together with another crime charged herein, committed as follows:

That the defendant MICHAEL EMERIC MOCKOVAK in King County, Washington, during a period of time intervening between August 5, 2009, through November 6, 2009, with intent that conduct constituting the crime of Theft in the First Degree, did feloniously agree with one or more persons to engage in and cause the performance of such conduct and

one of the parties so agreeing did perform an overt act pursuant to the agreement;

Contrary to RCW 9A.28.040, 9A.56.030(1)(a) and 9A.56.020(1)(a) and (b), and against the peace and dignity of the State of Washington.

CP 413 (emphasis in original).

Applying the liberal review standard of Kjorsvik, this Court has held that the word "attempt" in a charging document encompasses the statutory definition of attempt, including the substantial step element of attempt. State v. Rhode, 63 Wn. App. 630, 636, 821 P.2d 492, rev. denied, 118 Wn.2d 1022 (1992). It concluded that by fair construction the "substantial step" element of attempt can be found by use of that word. Id. That holding was cited with approval by the Supreme Court in State v. Borrero, 147 Wn.2d 353, 363, 58 P.3d 245 (2002).

This Court has described the first prong of the Kjorsvik test as follows: "there must be some language in the document giving at least some indication of the missing element." Pineda-Pineda, 154 Wn. App. at 670. The Supreme Court has concluded that the word "conspiracy" alone does not convey the element of a substantial step. State v. Moavenzadeh, 135 Wn.2d 359, 364, 956 P.2d 1097 (1998).

In this case, however, there is additional language in the charging document that provides notice of the substantial step element: the provision that "one of the parties so agreeing did perform an overt act pursuant to the agreement." CP 413. While the technical meaning of "an overt act" is not the exact equivalent of "an act which is a substantial step," it does fairly convey the same meaning.

In Borrero, the Court observed that synonyms of the word "attempt" include "try," "endeavor," and "strive," and drew the conclusion that the word "attempt," even strictly construed, conveys the element of the substantial step element. Borrero, 147 Wn.2d at 363. Under the more liberal Kjorsvik standard, the phrase "one of the parties so agreeing did perform an overt act pursuant to the agreement," conveys the element of taking a substantial step. Notably the "substantial step" definition for purposes of conspiracy is broader than the definition applicable to an attempt, and includes preparation to carry out the agreement. Dent, 123 Wn.2d at 477.

Mockovak argues that the State is required to elect a specific set of facts and incorporate those in the charging document. App. Br. at 112-13. The case law does not support this claim. The State is not required to specify the alternative means of a crime charged.

State v. Noltie, 116 Wn.2d 831, 842, 809 P.2d 190 (1991); State v. Hartz, 65 Wn. App. 351, 354-55, 828 P.2d 618 (1992). The Supreme Court has rejected the argument that an information must include the "when, where or how" of the charged crime. Noltie, 116 Wn.2d at 843. If an information is vague as to some matter other than the elements of a crime, the defendant must request a bill of particulars to cure that alleged defect. Id. at 843-44.

5. THERE IS NO REQUIREMENT THAT A CO-CONSPIRATOR BE NAMED IN AN INFORMATION CHARGING A CRIMINAL CONSPIRACY.

Mockovak claims that the information in this case is defective in charging conspiracy to commit theft without naming the co-conspirator. This claim is entirely without merit. The co-conspirator in a conspiracy charge need not be identified in the charging document.

Mockovak relies first on State v. Miller, 131 Wn.2d 78, 929 P.3d 372 (1997). He quotes this sentence from the opinion: "A charge that does not connect a defendant with a specific co-conspirator is not maintainable." Id. at 87; App. Br. at 114. Miller addressed the issue of whether the elements of a conspiracy

to deliver drugs include an agreement by two conspirators to deliver drugs to a third person. Miller, 131 Wn.2d at 86-90. The case includes no consideration of the issue of whether co-conspirators must be identified by name in the charging document.

The quoted sentence from Miller cites State v. Valladares, 99 Wn.2d 663, 664 P.2d 508 (1983). The charging document was not challenged in Valladares either, but the court's analysis makes it clear that the charging document need not identify co-conspirators by name. The court in Valladares reversed a conspiracy conviction because the only conspirator referred to in the information was identified by name, and that person was acquitted of the conspiracy in a joint trial with Valladares. Id. at 670-71. The court rejected the State's argument that the jury could have found that Valladares conspired with another person, because the State "did not charge Valladares with having conspired with [a third named individual] or with having conspired with some unnamed coconspirator." Id. at 671. The court clearly contemplated a charging document that referred to an unnamed co-conspirator.

The possibility of conspiracy charging language with an unnamed co-conspirator also was approved in State v. Stark,

158 Wn. App. 952, 962-63, 244 P.3d 433 (2010), rev. denied, 171 Wn.2d 1017 (2011). That court held that, "when a defendant is specifically charged with conspiring with a named codefendant," he or she cannot be convicted of conspiring with another person. Id. The court also cited State v. Brown,¹⁴ for the proposition that if the State specifically names co-conspirators in the information, the jury must be instructed to convict only if it finds that the defendant conspired with one or more persons named in the information. Stark, 158 Wn. App. at 962-63 (citing Brown, 45 Wn. App. at 577).

Thus, the cases cited by Mockovak do endorse charging based on unnamed co-conspirators, merely requiring that if a co-conspirator is named in the information, the defendant may be convicted only upon proof of conspiring with the named persons.

6. MOCKOVAK HAS NOT IDENTIFIED ANY CONSTITUTIONAL INFIRMITY IN THE 1997 AMENDMENT TO THE CONSPIRACY STATUTE.

In section 11 of his brief, Mockovak asserts that the current conspiracy statute violates due process and constitutes cruel and

¹⁴ 45 Wn. App. 571, 726 P.2d 60 (1986).

unusual punishment. However, he has cited no authority for either of these claims and this Court should decline to review them.

The Supreme Court has endorsed the principle articulated by the Eight Circuit: "naked castings into the constitutional sea are not sufficient to command judicial consideration or discussion." In re Rosier, 105 Wn.2d 606, 616, 717 P.2d 1353 (1986) (quoting United States v. Phillips, 433 F.2d 1364, 1366 (8th Cir. 1970), cert. denied, 401 U.S. 917 (1971)).

The authority upon which Mockovak relies throughout this section of the brief is the analysis of the Supreme Court in State v. Pacheco, 125 Wn.2d 150, 882 P.2d 183 (1994). That analysis, however, was not a constitutional analysis, it was an interpretation of the term "agreement" as used in the prior version of the conspiracy statute. Id. at 153-56. That interpretation was not premised on the need to preserve the constitutionality of the statute, and the court's discussion of criminal justice policy does not substitute for constitutional analysis.

The Pacheco court noted that the Model Penal Code adopted the unilateral approach to conspiracy: that "an actual agreement is not required as long as the defendant believes another is agreeing to commit the criminal act." Id. at 153-54.

Because the legislature did not define the term "agreement" in RCW 9A.28.040, the court concluded that the legislature intended to retain the common law requirement of two criminal participants. Pacheco, 125 Wn.2d at 154-56. The court stated: "We will not presume the Legislature intended to overturn this long-established legal principle unless that intention is made very clear." Id. at 156.

The 1997 amendment to the statute, which Mockovak challenges, specifically addresses the question of legislative intent. Laws of 1997, ch. 17, §1. The legislature expanded the list of circumstances when a unilateral approach applies, that is, when the co-conspirator's lack of criminal responsibility is irrelevant, by adding the following: when the co-conspirator is "a law enforcement officer or other government agent who did not intend that a crime be committed." The legislature now has explicitly adopted the unilateral approach when the co-conspirator is a government agent, abrogating Pacheco.

RCW 9A.28.040 is presumed constitutional, and Mockovak bears the burden of proving its unconstitutionality beyond a reasonable doubt. State v. Heckel, 143 Wn.2d 824, 832, 24 P.3d 404, cert. denied, 534 U.S. 997 (2001). Although a court may hold views inconsistent with the wisdom of a law, the law may not be

annulled unless it is palpably in excess of legislative power.

Armunrud v. Board of Appeals, 158 Wn.2d 208, 215, 143 P.3d 571 (2006), cert. denied, 549 U.S. 1282 (2007). Mockovak has not met his burden.

In this section of his brief, Mockovak also asserts that there is a question presented as to the circumstances that would justify conviction under the current version of the statute. App. Br. at 116. He includes no explanation of the question presented and includes no statutory construction analysis supporting any limiting interpretation of the statute.

RAP 10.3(a)(6) requires that the appellant's brief contain argument supporting the issues presented for review, citations to legal authority, and references to relevant parts of the record. "Assignments of error unsupported by citation authority will not be considered on appeal unless well taken on their face." State v. Kroll, 87 Wn.2d 829, 838, 558 P.2d 173 (1976).

The basis of the claims has not been identified and this, along with lack of authority and analysis, has prevented the State from responding to the substance of the claims. The State submits that these bare constitutional and statutory arguments should not be considered.

7. THE EVIDENCE SUPPORTING MOCKOVAK'S
CONVICTION OF CONSPIRACY TO COMMIT
THEFT IN THE FIRST DEGREE WAS
SUBSTANTIAL.

Mockovak challenges the sufficiency of the evidence supporting his conviction of conspiracy to commit theft in the first degree, alleging that there was insufficient evidence to prove an agreement to commit theft. His argument is based on the theory that the State was required to prove that a co-conspirator (Kultin) agreed to take part in the submission of a fraudulent claim to the insurance company. This argument is without merit. There was uncontroverted evidence that Mockovak conspired with Kultin to accomplish the theft of insurance proceeds upon the murder of Joe King.

There are two elements of conspiracy to commit theft in the first degree that relate to the agreement required: (1) that the defendant agreed with one or more persons to engage in or cause the performance of conduct constituting the crime of theft in the first degree; and (2) that the defendant made the agreement with the intent that such conduct be performed. RCW 9A.28.040; CP 593.

When there is a claim that evidence is insufficient to support a conviction, the evidence is reviewed in a light most favorable to

the State, and all reasonable inferences that can be drawn from the evidence must be drawn in favor of the State and interpreted most strongly against the defendant. State v. Salinas, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992). A trier of fact may infer a mental state where it is a logical probability. State v. Delmarter, 94 Wn.2d 634, 638, 618 P.2d 99 (1980).

A conviction will be affirmed if any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. Salinas, 119 Wn.2d at 201. The trier of fact is the sole arbiter of credibility determinations and those credibility decisions cannot be reviewed on appeal. State v. Camarillo, 115 Wn.2d 60, 71, 794 P.2d 850 (1990).

It is not necessary to show a formal agreement in order to prove a conspiracy to commit a crime. State v. Barnes, 85 Wn. App. 638, 664, 932 P.2d 669, rev. denied, 133 Wn.2d 1021 (1997). The agreement may be proven by showing a "concert of action, all the parties working together understandingly, with a single design for the accomplishment of a common purpose." Id.

(quoting State v. Casarez-Gastelum, 48 Wn. App. 112, 116, 738 P.2d 303 (1987)). The proof may be in the declarations, the acts, and the conduct of the co-conspirators. Barnes, 85 Wn. App. at 638.

An essential component of the planned theft in this case was the death of Joe King. There was uncontroverted evidence that from the beginning of the discussions about killing King, Kultin and Mockovak contemplated that Mockovak would collect the insurance proceeds. Tr. 8/11 at 81. Mockovak planned to use the proceeds to buy back King's interest in the business from King's soon-to-be widow (which is the accepted purpose of a key man insurance policy), and planned to use the rest of the money to get the business on a solid footing, and to pay Kultin \$100,000 in consideration of his part in this killing. Tr. 11/6 at 92-93.

Mockovak and Kultin were (at least as far as Mockovak knew) working together with two common purposes, to eliminate King for the benefit of Mockovak personally as well as for the benefit of the Clearly Lasik business, where Kultin was employed.

Kultin clearly anticipated the benefit to all employees of the business. Tr. 10/20 at 66-67, 10/22 at 68-69. Mockovak also told Kultin that Kultin would be given a new position as marketing director, after a six-month period of inaction in order to divert any suspicion. Tr. 11/6 at 91. In addition, Kultin specifically agreed to arrange to have King's body found in order to avoid any problem collecting the insurance proceeds. Tr. 11/6 at 54.

The death of King was necessary to the theft and the theft of the insurance proceeds was one of the motives for the killing. The State was not required to prove that Kultin agreed to personally take part in filing the fraudulent insurance claim in order to establish an agreement to accomplish that theft.

There was sufficient evidence for the jury to find an agreement to commit theft in the first degree beyond a reasonable doubt. Mockovak has not challenged the sufficiency of the remainder of the elements of conspiracy to commit theft. That conviction should be affirmed.

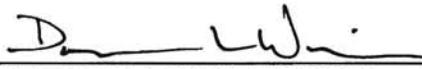
D. CONCLUSION

For the foregoing reasons, the State respectfully asks this Court to affirm Mockovak's convictions and sentence.

DATED this 6TH day of April, 2012.

Respectfully submitted,

DANIEL T. SATTERBERG
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Pretrials:

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- 2 December 6, 2010
- 3 December 13, 2010
- 4 December 16, 2010

Trial:

- 5 January 12, 2011 (voir dire)
- 6 January 13, 2011 (voir dire)
- 7 January 18, 2011 (excerpt of morning session)
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Post-trial motions and sentencing:

- 20 Volume including February 23, 2011; March 16, 2011; March 17, 2011 (sentencing).

APPENDIX 1

Certificate of Service by Mail

Today I deposited in the mail of the United States of America, postage prepaid, a properly stamped and addressed envelope directed to James E. Lobsenz, the attorney for the appellant, at Carney Badley Spellman, P.S., 701 Fifth Avenue, Suite 3600, Seattle, WA 98104-7010, containing a copy of the Brief of Respondent, Cause No. 66924-9-1, in the Court of Appeals, Division I, for the State of Washington.

I certify under penalty of perjury of the laws of the State of Washington that the foregoing is true and correct.

U Brame
Name
Done in Seattle, Washington

4/6/12
Date