

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

NO. 40062-6-II

STATE OF WASHINGTON,

Respondent,

vs.

AARON HAHN

Appellant.

FILED
COURT OF APPEALS
DIVISION II
10 OCT 18 AM 9:35
STATE OF WASHINGTON
BY _____
DEPUTY

ON APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR CLALLAM COUNTY
CAUSE NO. 08-1-00195-3

BRIEF OF RESPONDENT

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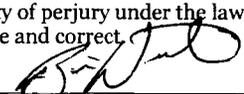
SERVICE	Ms. Jodi Backlund Backlund & Mistry P.O. Box 6490 Olympia, WA 98507	This brief was served via U.S. Mail or the recognized system of interoffice communications as follows: original + one copy to Court of Appeals, 950 Broadway, Suite 300, Tacoma, WA 98402, and one copy to counsel listed at left. I CERTIFY (or declare) under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct. DATED: October 15, 2010, at Port Angeles, WA 
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I. COUNTERSTATEMENT OF THE ISSUES:

1. Did the amended information advise the defendant of the essential elements of solicitation of first-degree murder?
2. Did the trial court err when it found the defendant's recorded statements to police were admissible because (1) they pertained to a new crime that had not yet been formally charged or assigned an attorney, (2) the defendant had asked to speak with the police, (3) the statements were given after the police read the defendant his *Miranda* warnings, and (4) the defendant knowingly, intelligently, and voluntarily waived his right to counsel?
3. Did the trial court err when it refused to instruct the jury on solicitation of assault in the fourth-degree?
4. Did the trial court err when it allowed two witnesses to give testimony that involved ultimate factual issues, but was not a direct comment on the defendant's guilt?
5. Did the defendant receive effective assistance of counsel?
6. Is the criminal solicitation statute unconstitutional under the First Amendment?

II. STATEMENT OF THE CASE:

FACTUAL HISTORY

On March 21, 2008, law enforcement booked Aaron Hahn (the defendant) in the Clallam County Jail on several charges: Rape of a Child in the Third Degree (four counts), Sexual Exploitation of a Minor, Possessing Depictions of Minors Engaged in Sexually Explicit Conduct, Stalking (Domestic Violence), and Extortion in the Second Degree. *See*

State v. Aaron Hahn, 08-1-00103-1. *See also* CP 69. These charges derived from the defendant's four-year relationship with the victim, S.M., who was only 13 when she met the defendant. *See State v. Aaron Hahn*, 08-1-00103-1. *See also* RP (10/13/2009) at 17, 20-26, 37-40. The trial court assigned Mr. Loren Oakley to represent the defendant, who remained in custody throughout the pendency of the case, 08-1-00103-1. *See* CP 69.

While in custody, Mr. Hahn sent a series of emails to S.M. with the assistance of his mother.¹ *See* Exhibits 1-2, 4. These emails exhibited the defendant's growing desperation² with his pending case (08-1-00103-1), and his efforts to persuade S.M. to drop the charges. *See* Exhibits 1-2, 4. The defendant's last email included the following threat:

[R]ecently i found some information that can & will cause problems for your future. what you did to me over the last 4 years is a crime. you broke the law. you have a few options. first you can go to the police & tell them you lied & made a false report. 2nd you can drop the charges. 3rd I can take this to trial & make you look stupid & embarrass you & ruin your future. 4th I can press charges on you that could cause you to lose your boy friend Cody. yes, i have known about him for awhile. you are messing w/mine & zachary's³ lives over what me yelling at you. 6 years in

¹ The State would later file charges, Tampering with a Witness, against the mother, Linda Hahn, who pleaded guilty to the offense. *See State v. Linda Hahn*: 08-1-00239-9. *See also* RP (10/13/2009) at 113-14.

² The defendant often told his mother that he did not believe his assigned counsel was doing enough to prepare a defense in 08-1-00103-1. *See* Exhibit 26-29, 32-33.

³ Zachary is the defendant's minor child involved in dependency proceedings in Oregon.

prison is this something you really want for me. think about it if you still care about me this is a decision that can affect your future. the choice is yours we can end this now & go on our ways or you can make the wrong choice that can affect your future. i am trying to forgive you, but right now I just cannot find it inside me. God will avenge me & cause more problems than i ever could. [sic]

Exhibit 4. S.M. reported the emails to law enforcement. *See* RP (10/13/2009) at 32-34.

After two months in jail, Mr. Hahn began conversing with other inmates about S.M.. The defendant asked Michael Hendricksen⁴ if he “knew anyone who could get to her.” RP (10/26/2009) at 91. The defendant would later confide, “that he wanted her to get hurt” and that he “wish[ed] this bitch was dead[.]” RP (10/26/2009) at 91-92, 97, 104, 106, 109. Hendricksen believed the threat was credible, but caused by the stress Mr. Hahn experienced in custody. RP (10/26/2009) at 107-08. Hendricksen told the defendant he did not know anyone who could help him. RP (10/26/2009) at 91-92.

Mr. Hahn next approached Norman Livengood.⁵ According to Mr. Livengood, the defendant asked him if he had mafia connections. RP (10/26/2009) at 19-20, 50, 53.

⁴ Mr. Hendricksen occupied an adjoining cell next to the defendant. RP (10/26/2009) at 99.

⁵ Mr. Livengood occupied an adjoining cell next to the defendant. RP (10/13/2009) at 58; RP (10/26/2009) at 14, 18-19, 72.

Mr. Livengood: He asked me if I knew of anyone who could – well, he initially asked me if I had any Mafia connections and I said Mexican mafia just kind of joking around. And he said well – and I said why and he said – he claimed that he wanted to have the victim hurt or, you know, killed.

RP (10/26/2009) at 20. While Mr. Livengood first believed the request was in jest or the product of stress, he quickly understood the defendant’s threat was credible:

Mr. Livengood: ... What made me believe he was serious was when he presented me with all [S.M.’s] whereabouts, her work place, her driver’s license number, her parents’ [] address, her father’s address out of town, her social activities.

The State: How did he do that?

Mr. Livengood: Um, verbally and then he wrote it down on paper⁶ and asked me to flush it when finished.

RP (10/26/2009) at 20-21. Mr. Livengood took notes during his conversations with the defendant for two days. RP (10/26/2009) at 24, 27, 70; Exhibit 13. Because Mr. Livengood believed the defendant was intent on killing S.M., he notified the jail of the plan. RP (10/13/2009) at 55, 57; RP (10/26/2009) at 21-22.

On May 20, 2008, Mr. Livengood sent a “kite” to Sergeant Jeff Finley. When Sergeant Finley contacted Mr. Livengood, the inmate

⁶ The State introduced the victim’s personal information that the defendant provided Mr. Livengood as Exhibit 5.

provided the officer with all the information he had received from the defendant. Exhibit 5, 13. Sergeant Finley alerted the Sequim Police Department. RP (10/13/2009) at 60-61, 64, 106-07, 124; RP (10/26/2009) at 25.

Detectives Kori Malone and Cory Hall met with Mr. Livengood. RP (10/13/2009) at 70-71, 94, 108, 125. Mr. Livengood told the officers of the purported murder for hire. RP (10/13/2009) at 109, 125. The officers asked if Mr. Livengood would be willing to wear a “wire” and record his conversations with the defendant in order to corroborate the report. RP (10/13/2009) at 73, 110, 125. Mr. Livengood agreed. RP (10/13/2009) at 73, 110; RP (10/26/2009) at 26.

After the detectives obtained a warrant for a “wire recording”, *see* RP (10/13/2009) at 73, 110, 125-26, the officers delivered a digital recorder, a list of information they wanted elicited from the defendant, and a phone number to an undercover officer who would play the role of a hitman named “Miguel”.⁷ RP (10/13/2009) at 73-76, 81, 88, 94-96, 110-11; RP (10/26/2009) at 30-31, 60-66, 113. Mr. Livengood subsequently recorded two conversations between himself and the defendant. *See* Exhibits 11, 40, 41, 42.

⁷ The detectives arranged Detective Mike Grall to play the “hitman”. RP (10/13/2009) at 76, 87; RP (10/27/2009) at 7-19.

During the first recorded conversation, which occurred on May 21, 2008, Mr. Hahn shared why he wanted S.M. to “disappear” and how he would finance her murder:

AH: I know. This is horseshit though, dude, I’m so f---ing pissed off. I wouldn’t have to take matters into my own hands if my attorney would f---ing do his God damned job, you know what I mean.

NL: I do. What do you mean, take matters in your own hands?

AH: [O]r somebody else’s hands. However, you want to word it, you know.

NL: Yeah.

AH: It’s just I’m so f---ing pissed at my attorney ... not done anything. And I mean there’s nothing I can do about it because I’m stuck behind bars and it’s not like I can knock on the door you know.

NL: Hey, whenever I call him [Miguel].

AH: Yeah.

NL: What if he asks me what you, what, what, what exactly you want done.

AH: I thought you already f---ing, I thought that he already told you that he was going to ... I thought he already told me he knew.

NL: Yeah, but he might want to know exactly what you want done.

AH: I want her to disappear.

NL: I can’t hear you dude.

AH: I want her to disappear.⁸

NL: That's easy enough I guess.

AH: Disappear, make it look like she didn't exist.

NL: Hunh?

AH: Make it look like she never existed.

See Exhibit 41 at 5-6.

AH: Cuz the bill of sale is fine. I don't have a problem getting rid of that car and giving it up to get me out of this situation. I have no problem with that whatsoever. ...

AH: Ok, I have no problem doing a bill of sale, I just don't think the car is going to be there anymore.

NL: Well ...

AH: [S]o that's the problem.

NL: We'll he [Miguel], he said that if he was only going to have the Bill of Sale, that he'll put everything in motion pretty much anyway and the promissory note stating you'll pay the twenty five hundred bucks for the services.

AH: Ok, so, I'll do a bill of sale and a promissory note. What happens if he doesn't get the car[?]

NL: Well, he never really said anything about that. As long as he has it, that's all that really matters I guess.

AH: Ok, well then ...

NL: He's going to want to talk to you whenever he gets the, the phone call set up.

⁸ On cross-examination, Mr. Livengood affirmed that "disappear" meant "murder" to the defendant. *See* RP (10/26/2009) at 67-69.

AH: Because another thing that, that I was thinking about doing, is I'd be willing to do this if he'd be willing to work it out is I could since he's doing this for me, I could return him a favor and do something other than cash if he'd be willing to work out something like that.

NL: Like what?

AH: I don't know, it's negotiable.

NL: Yeah, alright.

AH: I mean, dude, I'm willing to do almost anything to get, get the f--- out of here, you know what I mean? So, I mean, what ever he thinks might, he might (inaudible) I don't know what I I want to knock somebody off for him, you know, but I guess I'll do him some favors.

NL: Well that's what he's doing for you, why wouldn't you want to do it for him.

AH: Cuz I don't know if it's something that I could do.

NL: Right.

AH: Um, I honestly just don't know if it's something that I could do and get away with ... it's just really seriously ... You see what I'm saying?

NL: Right.

AH: It's like he's a trained professional. That's what he does.

See Exhibit 41 at 9-10.

NL: Yeah I just want to know what you're going to tell him [Miguel], what you want done before, before you talk to him.

AH: Give me some ideas.

NL: I don't have any ideas what so ever dude, I already told you about what I thought about this.

AH: What[?]

NL: I don't know.

AH: Tell me again.

NL: Shit, it's crazy. It's all crazy to me.

AH: You would do the same thing if you were in my shoes wouldn't you?

NL: Well, I wouldn't be in your shoes I don't think, but I don't know.

AH: Well if you were?

NL: No, I probably wouldn't have somebody else do it.

AH: You'd probably do it yourself?

NL: If I was mad enough and I thought I was going to do something like that, I might do it myself but I doubt I'd even do that, I'd probably just get it over with. Get through this trouble I'm in and get on with my life.

AH: Well it's too late now. I can't do that now. It's already done. He's already agreed to do it.

NL: Yeah.

AH: So it's too late. I can't turn back now, I might as well finish the thing.

See Exhibit 41 at 12.

AH: Yeah, hang on a second. Yeah I think it might be best that I do talk to him [Miguel].

NL: Yeah.

AH: Cause the only thing I'm worried about is that I don't want to have it all come back around on me.

NL: I don't know how it's come back on you but I'm curious to know exactly what you think, you tell him that you want done to the girl.

AH: I can't just say that over the phone though.

NL: I know, that's why I'm curious to know what you want to say so I know whether you can say it or not.

AH: Disappear.

NL: You just want her to disappear?

AH: Just say that, yep.

NL: Unh.

AH: That's discreet enough that the cops won't figure it out but he'll know what I'm talking about.

See Exhibit 41 at 12-13.

AH: Um, what I have to put on a bill of sale. I've never made one before.

NL: Didn't you work at auto dealership?

AH: Yeah, but we didn't have bill of sales, we had a different kind of paperwork.

NL: Oh, just write out you know that...

AH: I've got to put it in the dude's name, right?

NL: Yeah, just write out that you're willing to get rid, that you're selling the car, I guess, just write Miguel and then leave a space where he can put his last name.

AH: What's his first name?

NL: Miguel.

AH: You write out the bill of sale⁹ and I'll, and I'll sign it?

NL: Ok.

AH: And then I'll fill in the rest of the details.

NL: Alright, you got to, you got to write out the, uh, promissory note¹⁰ yourself though.

AH: Yeah, I know. I will.

See Exhibit 41 at 13-14.

NL: Alright, cuz this is kind of a, a small price to pay for something... that's

AH: Oh no, I agree.

NL: ... this disturbing of a crime you know?

AH: I agree with you, he's going to know when I get released, too.

See Exhibit 41 at 16.

AH: I'd rather spend the rest of my life in prison for murder than six years for Hunh?

NL: Is that right?

⁹ The State introduced the Bill of Sale into evidence as Exhibit 8.

¹⁰ The State introduced the promissory note into evidence as Exhibit 8.

AH: I guess so, I don't know.

NL: You're a disgusting character.

AH: Wouldn't you?

NL: I wouldn't rather spend my, I wouldn't rather spend time in prison for rape or murder honestly.

See Exhibit 41 at 18.

AH: I just hope this works.

NL: I can't even hear you dude?

AH: I said I just hope this works.

NL: Yeah, why wouldn't it?

AH: What if I end up getting f---ed and end up getting another charge on me?

NL: Cops are coming.

See Exhibit 41 at 24.

The second recorded conversation occurred shortly before the defendant actually called Detective Grall (a.k.a. the hitman) on May 22, 2008:

AH: What is this?

NL: That's the phone number, dude.

AH: So what did you ask him [Miguel]?

NL: No, he told me he just wanted to talk to you.

AH: Alright, man that's pretty quick.

NL: I know. I didn't talk to him. I talked to his wife. He just wants to talk to you and find out whatever, whatever he can from you before he does it.

AH: He's got all the information?

NL: Yep.

See Exhibit 42 at 2

NL: No, I believe you. Probably gonna ask you if you need, (inaudible) he [Miguel] probably wants to know that you're going to pay.

AH: I'll pay him.

See Exhibit 42 at 6.

AH: See that's the thing on this one, I want, I want some confirmation that he [Miguel] finishes the job.

See Exhibit 42 at 6.

AH: So if I just say disappear, nonexistent, will he [Miguel] understand what I mean?

NL: You know, I really don't know. I can't expect everybody to understand.

AH: Hunh?

NL: I can't expect everybody to understand.

AH: Cuz I don't want to use the words, make her disappear.

See Exhibit 42 at 7-8.

Shortly after this exchange, the defendant left his cell to use the jail's phone to call Detective Grall (a.k.a. Miguel):

AH: Hello.

MG: Hello.

AH: Is this Miguel?

MG: Yes.

AH: Okay, hey and this is Aaron.

MG: Right on, how you doing?

AH: All right.

MG: I got ah, the papers.¹¹

AH: Okay.

MG: I think I have everything I need.

AH: Okay.

MG: Ah, there's just a few ah, few things that I need to know if there's anything specific that you needed or wanted.

AH: Um, not really, no, ah, I kind of just trust however you, you think you want to get it done.

MG: Alright, um what about, you know, I'll, I'll get the, I'm gonna, I'm gonna give her a present that you wanted, I didn't know how you wanted it, whether you wanted your name attached to it or, so she knew who it was from, or did you just want it anonymously?

¹¹ The papers are in reference to the documents (the victim's personal information, bill of sale, promissory note) that Livengood received from Hahn and then passed to law enforcement, who shared this with Detective Grall.

AH: Just ah put it anonymously.

MG: All right. That's ah not a problem. What about ah, I got the notes and everything and just want to make sure that that's going to be followed through on your end once it's ah, once I get the gift delivered.

AH: It will be, yes.

MG: Okay.

AH: Yes, no problem.

MG: The ah, friend that we talked to I trust him, that's why I'm going to ah, you know take the word for it.

AH: Okay.

MG: Cause I, I trust his word so I'm having to assume that he trusts you and that's why I'm here.

AH: Yeah, he, he does, we ah, we've kind of been, been talking for a little while and we kind of trust each and come to an understanding, so.

MG: That's the impression I got.

AH: Okay

See Exhibit 52 at 1-2.

AH: Um, when do you think it'll be taken care of?

MG: Well, how soon um are you interested in me getting it there?

AH: The sooner the better.

MG: Okay.

AH: I mean if we can do, if we can do, do something by the ah, by the end of the month that would be great.¹²

See Exhibit 52 at 3.

AH: Yeah, just so long as it's done by, by about the ah beginning of, of ah next month.

MG: Okay, what's going on, is there something going on with you that the time line is going to be affected?

AH: Um, just, Ju- June 9th I gotta get it, gotta get it taken care of by then.

See Exhibit 52 at 5.

After the call, Mr. Hahn returned to his cell and the recorded conversation continued:

AH: I feel like that was a bad idea on my part.

NL: I can't even hear you.

AH: I said I feel like that was a bad idea on my part.

NL: Giving me the envelope?

AH: No, no, no, no, no, no, the other thing.

NL: What?

AH: Did you forget already?

NL: I guess so.

AH: Talking to Miguel.

¹² At the time of the call, the defendant's trial date in cause 08-1-00103-1 was set for June 9, 2008.

NL: Oh, talking on the phone? Why would that be a bad idea?

AH: So this is how it's going to be. We're going to play it on the down-low and we're not going to talk about it ever again?

See Exhibit 42 at 11.

NL: What did he say to you on the phone?

AH: He basically, he pretty much just asked me um, he talked about it as a gift, really, really discreet about it which is good. And he's like now ok, I, I got the paperwork, um how do you want me to deliver the gift and I was just like, you know what, you're a professional, I just, I kind of, I kind of trust your judgment and then he asked me about the paper work. ... [H]e's kind of like I'm kind of worried about the car cuz it might not be easy to me and I'm like yeah, I kind of thought about that ... he's like I'll cross that bridge, bridge when it happens and I said, look if this won't work, then I'd be willing to return some, some sort of favor to you and he's like ok, I might be interested in that. I mean he's like are you sure you don't want me to mark it any specific way. I'm like no, don't mark it any specific way. I trust your ... I trust your judgment, he's like, you want anybody else to know about this gift. I'm like no, I don't want anybody else to know about this gift. He's like ok. I'm like, I just want some sort of confirmation, he's like, ok, so what do you want. I'm like, I don't know. I probably want some sort of letter or something. He's like ok, I can work on that. That was basically it.

See Exhibit at 42 at 11-12.

AH: Well, what's done is done, dude, there's nothing I can really do about it now.

NL: Other than quit worrying about it, you're making me nervous.

AH: You're not going to say anything are you?

NL: Hunh?

AH: I, I have your trust right?

NL: Yeah

AH: You swear?

NL: Yeah.

See Exhibit 42 at 13. Mr. Hahn never made any effort to cancel the purported "hit".¹³ RP (10/13/2009) at 101.

On May 23, 2008, Sergeant Sean Madison and Detective Hall went to the Clallam County Jail to inform the defendant that they would be filing a new charge against him – Solicitation for Murder. RP (9/21/2009) at 24, 40-41, 50, 63-64; RP (10/26/2009) at 114-16, 137-39. After informing Mr. Hahn of the new charge, the officers left the jail without asking any questions. RP (9/21/2009) at 25, 41-42, 52, 63-64; RP (10/26/2009) at 114-15, 119, 123, 137-139, 152. The officers were aware that Mr. Hahn was represented by an attorney on another cause. RP (9/21/2009) at 49-50, 64, 79.

[Jail] Sergeant Matt Blore informed the officers that the defendant had asked to speak with them. RP (9/21/2009) at 25-26, 33, 42; RP

¹³ Mr. Livengood did testify that the defendant did have some reservations, after the fact, about his actions because he was contemplating having S.M. murdered. *See* (10/26/2009) at 56-57; Exhibit 42 at 10-15.

(10/26/2009) at 82-85, 140. The officers stated that they would not speak with the defendant without his attorney present. RP (9/21/2009) at 26, 28, 35, 42, 52-53, 64; RP (10/26/2009) at 83-84. The officers then left the jail.

Approximately, 20 minutes later, Sergeant Blore phoned Officer Hall and said that the defendant had reiterated his request, did not care if his attorney was present, and that S.M. was still in danger. RP (9/21/2009) at 27-30, 35, 42, 53, 65; RP (10/26/2009) at 83-85, 126-27, 141. The officers returned to the jail.

At the jail, the officers contacted Mr. Hahn a second time in the interrogation room. RP (9/21/2009) at 31, 66. The officers read the defendant his *Miranda* rights and informed him that the interview would be recorded. RP (9/21/2009) at 44, 54; RP (10/26/2009) at 142.

SM: Hang on a second. The date is 5/23/08 and the time is about 18:32 hours. This is Detective Sgt Madison and Detective hall with the Sequim Police Department and we're in the room with Aaron Hahn. Aaron, do you understand that this is being recorded?

AH: Yes.

SM: Is that ok with you?

AH: Not right now. Um, I actually want to ask you guys a few questions off the record first and then, and then I'm okay with it being recorded.

SM: Well, Aaron, uh, before we do that, before we go any further, um, I'm going to put on, put on put something on

the recording. You do not, the recorder still running and you don't have to answer, you don't have to say anything[.]

AH: Ok.

SM: Just know that if you say something, it's being recorded.

AH: Yes.

SM: You have the right to remain silent, do you understand that?

AH: Yes.

SM: Any statement that you can make, that, any statement that you make can be used against you in a court of law. Do you understand that?

AH: Yes.

SM: You have the right at this time to talk to a lawyer and to have him or her present with you while you're being questioned. Do you understand that?

AH: Yes.

SM: And, if you cannot afford to hire a lawyer one will be appointed to represent you before any questioning if you wish. Do you understand that?

AH: Yes.

SM: You can decide at any time to exercise these rights and not answer any questions or make any statements. Do you understand that?

AH: Yes.

SM: Aaron, understanding that this is still being recorded, a couple of hours ago I came here to the jail and I told you

that you were being, uh, rearrested for the crime of criminal solicitation, uh, and I told you that that charge would be added to your, uh, uh to your list of charges that you're being held here at the jail on.

AH: Yes.

SM: Uh, I did not ask you any questions or ask anything of you at that time. Would you agree with that?

AH: Correct, correct.

SM: Now the reason that we're here is because you have asked us to come back here. Is that correct?

AH: That is correct.

SM: And you, you have not ask for an attorney to be here. Is that right?

AH: That is correct.

SM: Having all of those things in mind, that I've just read to you, having all those rights in mind, do you wish to talk to us?

AH: Yes.

SM: Ok. Well, I'm satisfied that, uh, that you've sufficiently waived your, your right to counsel and we are only here because you have asked us to come here and talk to you?

AH: Yes.

SM: So, if you want, I'll turn off the recorder and then you can talk to us or we can just keep talking like this.

AH: Just go ahead and return and turn off the recorder I want to ask you guys some questions first, and then, and then you guys can ask me your questions.

See Exhibit 46 at 1-2.

When the officers turned off the digital recorder, Mr. Hahn asked to know what evidence the officers had on him. RP (9/21/2009) at 45, 57-58, 70-71; RP (10/26/2009) at 128, 143. The officers said they would not discuss the evidence, and that the interview would only continue if it was recorded. RP (9/21/2009) at 45, 71-72, 128. Mr. Hahn agreed to the recording. RP (10/26/2009) at 127-28, 130.

When the interview resumed, Mr. Hahn made the following statements:

SM: ... The tape has been off for less than two minutes. Uh, Aaron, I've turned the recorder back on, is that ok with you? It's a yes or no man, and I don't care.

AH: Yes, yes, yes.

SM: Yes it's ok and having those rights in mind that I read to you earlier, is it ok if we can ah, if you talk to us?

AH: Yes.

SM: Ok. Aaron, you have our attention. What did you want to talk about?

AH: Uh, I don't want her dead. I don't know where that idea came from. It's, it's, it's news to me, I actually just recently found out about it today when you guys, when you guys came. I don't know, I don't know what that is about. I did talk to a Miguel, I talked to, I did talk to Norman[.] ... I ended up talking to this guy, Miguel, and Miguel kept talking about a gift, a gift, a gift. I didn't really know what he was talking about. ... The topic of murder was never

mentioned on the phone. The topic of murder was never mentioned to Norman.

See Exhibit 46 at 3.

SM: You told the guards that [S.M.'s] life is in danger.

AH: [S.M.] is in danger[.]

SM: How?

AH: And it's not, and it's not from me.

SM: How? ...

AH: He [Michael Hendrickson] called a guy, I think that's, that's going to go after to [S.M.].

SM: Why do you think that he did that?

AH: Uh, he kept talking about Zodiac. He kept talking about how when he gets out of here he's, uh, he wants to kill people and about how when he get's out of here, he just, he has Mafia connections and he can just go in and start killing some people.

SM: And why do you think that he would choose to hurt [S.M.]?

AH: I do not know. We, we, we uh we mentioned about what [S.M.] did and, uh, again he felt bad. This is not my idea I wanted, I wanted nothing to do with her being dead, absolutely nothing at all. Nothing to do with her being dead. I do not want her dead; I do not want her dead.

See Exhibit 46 at 4-5.

SM: What kind of help was [Miguel] offering?

AH: He didn't say.

SM: What kind of help did you think it was?

AH: I don't know. I thought originally maybe just scare her. ...

SM: And is that why you, you talked to Miguel because you wanted her to be scared?

AH: I didn't want, I didn't want her to be scared.

SM: Then how come you didn't tell that to Miguel?

AH: I don't know. I wanted to call Miguel back later in the day and tell him, Dude I don't know what that phone call was about.

See Exhibit 46 at 6.

SM: Okay, so you wanted Miguel to hurt her but not kill her. Is that right?

AH: I didn't even really want, not hurt her as in the physical sense. Hurt her as in more like be scared.

SM: You wanted Miguel to scare her.

AH: Yeah.

SM: Is that what you thought the gift was?

AH: That's what I thought it was.

See Exhibit 46 at 7.

SM: What would you say if I told you that we have recordings of you talking to, uh, both of these guys, both of your cell mates about just that making her disappear? What would you say about that?

AH: I'd say, I'd say you're not right.

SM: It's your voice on the recording[.]

AH: Ok.

SM: Ok. You would just, you'd say that didn't happen?

AH: Yeah.

SM: You never said that you wanted her to disappear?

AH: No. I don't want her to disappear; I don't want her to disappear.

See Exhibit 46 at 7-8.

AH: Yeah. I was behind talking to Miguel. I was behind scaring Miguel. It was not murder. There was no intention of murder in there, none what so ever, none. It wasn't even supposed to be hurt, it was supposed to be scared.

SM: Ok, now what about disappear?

AH: I don't know anything about that. I didn't mention anything about ...

SM: I know that, but is it that you wanted her scared or disappeared or hurt or whatever, you wanted all that to happen before June 9. Is that because that's when your trial date is?

AH: Yeah.

See Exhibit 46 at 8.

AH: I wanted to scare her, yeah, yeah. Bottom line, yeah, I gonna admit I wanted her scared. Yeah, I'm not going [to] deny that. I'll tell my attorney that, I wanted her scared. I did not ever want her killed. I did not ever want her physically hurt, mentally hurt, nothing. Never hurt, never dead, ever. I never mentioned that to Norman. I never

mentioned that to Mike [Hendricksen]. Mike brought up the whole murder thing[.]

See Exhibit 46 at 10.

At no point did Mr. Hahn invoke his right to counsel. RP (9/21/2009) at 48, 55-56, 68, 77, 80; Exhibit 46 1-13. Throughout the interview, Mr. Hahn was alert, orientated, understood that he was speaking with law enforcement about his new charge, and voluntarily discussed the circumstances surrounding the charge. RP (9/21/2009) at 48, 56, 76-77, 80.

PROCEDURAL HISTORY

On May 27, 2008, the State charged the defendant with Solicitation of First Degree Murder under cause 08-1-00195-3. RP (5/27/2008) at 2-3.

The amended information read:

On or about the period of time between May 15 and May 22, 2008, in the County of Clallam, State of Washington, the above-named Defendant, with intent to promote or facilitate the commission of First Degree Murder, to-wit: with a premeditated intent to cause the death of another person, to wit: S.M[.], offered to give or gave money or other thing of value to another to engage in specific conduct which would constitute such crime and/or would establish complicity of such person in its commission or attempted commission had such crime been attempted or committed; contrary to Revised Code of Washington 9A.28.030 and RCW 9A.32.030(1)(a), a class A felony.

CP 21. Mr. Hahn affirmed that he understood the charge against him. RP (9/21/2009) at 4. *See also* RP (5/27/2008) at 7; RP (6/8/2008) at 3.

From the outset, the State intended to prosecute the defendant's two cases separately, even though the criminal solicitation case derived from Mr. Hahn's frustrated relationship with S.M., the victim in 08-1-00103-1. *See* RP (6/2/2008) at 3-4; RP (8/1/2008) at 2.

When a new deputy prosecutor assumed control of the case, he moved the trial court to join the two proceedings, arguing that certain evidence was "cross admissible" in both cases. RP (3/13/2009) at 4-5; RP (3/20/2009) at 10. The deputy prosecutor filed his motion pursuant to the permissive joinder rule, CrR 4.3(a). CP 69-75.

The defense vehemently opposed joining the two separate causes. RP (03/13/2009) at 7; RP (03/20/2009) at 3-4; RP (5/1/2009) at 9-10; RP (6/5/2009) at 4-5. The trial court agreed with the defense and denied the deputy prosecutor's motion, reasoning that the criminal rules did not compel joinder in the present case. RP (3/20/2009) at 11; RP (6/5/2009) at 10; CP 68.

At a 3.5 hearing, the defense conceded that Mr. Hahn knowingly, intelligently, and voluntarily made the statements to law enforcement. RP (9/21/2009) at 82-84. Nevertheless, the defense argued the statements should be suppressed:

Mr. Anderson: ... [E]verybody here knew [Mr. Hahn] was represented. And I think it's improper to talk to a defendant who is represented without at least contacting the attorney

and advising that attorney, who is currently appointed to represent him or retained to represent him, to talk to the police under any circumstances without the attorney at least being advised and given a chance to appear or to decide not to appear. ...

RP (9/21/2009) at 82-84. *See also* RP (9/21/2009) at 108.¹⁴ In response, the State argued that (1) no Sixth Amendment right to counsel had attached at the time the defendant made statements to law enforcement, and (2) Mr. Hahn affirmatively waived his constitutional right to counsel. RP (9/21/2009) at 84-86.

The trial court agreed with the State and ruled that Mr. Hahn's statements were admissible:

The Court: ... [A] couple of issues that Ms. Kell[y] had raised. One of them was this was a new proceeding and therefore the police or law enforcement had a right to contact him in the investigation of this new proceeding – new charge, for which he was not yet appointed an attorney. I think it's a valid argument, however, I don't want to base my ruling on that because I think they are related significantly. I would not want to make a ruling based upon that alone. ...

He [Mr. Hahn] initiated contact essentially and requested them to be there ... It was clearly his desire to speak with

¹⁴ The defense argued that it was the trial attorney's right to be present at the interview:

I believe that if you have a client in jail currently represented and is charged with a related crime in this county, I believe, and I would argue, that the counsel for the existing case has a right or should have a right to be informed and to be present because of all the various reasons – depression or mental illness or recovering from substance abuse – that the police might not be able to judge just from the contact. My position is, if a person is represented and he later subsequently has a related matter in the same county, then I believe the police should have an obligation to contact. RP (9/21/2009) at 108.

law enforcement at that time and tell them whatever he told them. ... But they were very careful and gave him his rights, and they went over the rights form with him, and they mentioned his rights again after they went on the record. And he was willing to talk to them, wanted to talk to them very clearly.

So I think under those circumstances, especially since it was his initiation, I don't think there was any violation of any Sixth or Fifth Amendment rights here[.]

RP (9/21/2009) at 104-08. *See also* RP (10/27/2009) at 29. In its ruling, the trial court relied heavily on *Montejo v. Louisiana*.¹⁵ RP (9/21/2009) at 104-08.

At trial, the witnesses testified to the events described above. Mr. Livengood and Mr. Hendricksen both testified that the defendant had asked them if they knew anyone who could hurt/kill S.M.. *See e.g.*, RP (10/26/2009) at 20-21, 24, 52, 69, 91-92, 106. Only once, did the defense object to Mr. Livengood's testimony that the defendant wanted to have S.M. murdered. RP (10/26/2009) at 69. However, similar testimony was previously introduced without objection and pursuant to defense questioning. *See, e.g.*, RP (10/26/2009) at 20-21, 24, 52. The trial court overruled the objection. RP (10/26/2009) at 69.

¹⁵ *Montejo v. Louisiana*, ___ U.S. ___, 129 S.Ct. 2079, 173 L.Ed.2d 955 (2009) (the appointment of an attorney at first appearance or arraignment does not bar an officer from contacting a defendant for an interview, however, the officer must immediately tender *Miranda* warnings and must obtain a voluntary waiver of the defendant's rights to remain silent and to have an attorney present for the interview).

The defense requested the trial court provide the jury with a lesser-included instruction:

Mr. Anderson: There is dispute – substantial dispute about what exactly Mr. Hahn wanted. In fact, it may not be clear what Mr. Hahn himself wanted. But there is – particularly based just on Mr. Hendricksen’s testimony, that there is a substantial factual basis that my client simply wanted her scared, which could be an assault 4, or physically harmed in a way that was certainly short of murder.

So, to that extent, there is substantial evidence in the record that supports giving of this instruction and it would be improper not to under the circumstances. Because like I say, just taking Mr. Hendricksen’s testimony, not to mention Mr. Hahn’s repeated assertions that he did not intend to kill her in the evidence produced by the State, I think it would be reversible error not to give a lesser in this case.

RP (10/27/2009) at 29-30. *See also* RP (10/27/2009) at 30-31, 33-35; CP 49,53-55, 57, 63-65.¹⁶ The trial court took the matter under advisement, expressly doubting that solicitation to commit assault was even a lesser included for solicitation of first-degree murder.¹⁷ RP (10/27/2009) at 30-31.

The trial court denied the requested instruction:

The Court: ... I spent a fair amount of time on this issue which is interesting, but I think our focus has to be on what the charge is, and the charge is criminal solicitation. And

¹⁶ The defense did provide a “to convict” instruction for Assault in the Fourth Degree. CP 54, 64.

¹⁷ The trial court said it was “hung-up” on the legal prong under *State v. Workman*, 90 Wn.2d 443, 584 P.2d 382 (1978). RP (10/27/2009) at 33.

the elements of criminal solicitation are the offering of something of value or the giving of something of value to another person to engage in specific conduct that constitutes a crime. It really doesn't matter what the crime is, except as it affects ultimately the sentencing range if the person's found guilty. But the crime itself isn't the basic element of the charge. The basic element is you offer to give something of value or you give something of value to a person to commit specific conduct which constitutes a crime. So I don't believe there is a lesser included to criminal solicitation. The focus isn't on the type of crime that's been solicited, the focus is on the offering or giving of value to a person to engage in the crime. So in this instance – well, in any instance of criminal solicitation, either the person did it or he didn't, and it's a matter of proof beyond a reasonable doubt to – for the State to show that the solicitation was for the crime of murder in the first degree and if they can't do that then obviously it's a not guilty. But it's not a lesser included in that sense. I don't believe there is a lesser included to criminal solicitation.

RP (10/27/2010) at 37. The defense opposed the trial court's ruling. RP (10/27/2010) at 40.

In its closing remarks, the State repeatedly asked the jury to examine carefully the exhibits admitted into evidence. *See e.g.* RP (10/27/2009) at 49-50, 52-53, 56, 70. The defense savagely attacked the credibility of Mr. Livengood. *See e.g.*, RP (10/27/2009) at 73-75, 77, 79-80, 85, 95. On rebuttal, the State responded, in part, with the following statements:

The State: ... Defense counsel at one point asked Officer Malone I believe it was and this was Norman Livengood and you didn't believe him. I submit to you ladies and gentlemen that it was not because the police didn't believe

Norman Livengood but because they did and they knew that no jury would believe Norman Livengood unless they had a recording of the Defendant's own words saying what he wanted. ... You've heard those recordings, and you saw the Defendant's own words.

RP (10/27/2009) at 99. The defense did not object to this argument. *See* RP (10/27/2009) at 99.

The jury found the jury guilty of Solicitation of First Degree Murder. RP (10/28/2009) at 6. The trial court sentenced the defendant to 228 months confinement and 36 months community custody. RP (12/02/2009) at 42-43; CP 12. The defendant appeals.

III. ARGUMENT:

A. THE AMENDED INFORMATION APPRISED THE DEFENDANT OF THE ESSENTIAL ELEMENTS OF SOLICITATION OF FIRST DEGREE MURDER.

“A charging document must include all essential elements of a crime.” *State v. Borrero*, 147 Wn.2d 353, 359, 58 P.3d 245 (2002) (quoting *State v. Taylor*, 140 Wn.2d 229, 236, 996 P.2d 571 (2000)). The “essential elements rule” is grounded in the federal and state constitutional requirements that criminal defendants be informed of the accusations against them. *Id.*

The United States Constitution provides that “[i]n all criminal prosecutions, the accused shall ... be informed of the nature and cause of

the accusation.” U.S. Const. amend. VI. The Washington Constitution contains a similar provision: “In criminal prosecutions the accused shall have the right ... to demand the nature and cause of the accusation against him [and] to have a copy thereof.” Wash. Const. art. I, § 22. Also, as established by court rule, the initial pleading by the State in all criminal proceedings is to be “a plain, concise and definite written statement of the essential facts constituting the offense charged.” CrR 2.1(a)(1).

“All essential elements of a crime ... must be included in the charging document so as to appraise the defendant of the charges against him and to allow him to prepare his defense.” *Borrero*, 147 Wn.2d at 359 (quoting *State v. Hopper*, 118 Wn.2d 151, 155, 822 P.2d 775 (1992)). “When a conviction is reversed due to an insufficient charging document, the result is a dismissal of charges without prejudice to the right of the State to recharge and retry the offense for which the defendant was convicted or for any lesser included offense.” *Id.* at 359-60 (quoting *State v. Vangerpen*, 125 Wn.2d 782, 791, 888 P.2d 1177 (1995)).

“The standard of review for evaluating the sufficiency of a charging document is determined by the time at which the motion challenging its sufficiency is made.” *Borrero*, 147 Wn.2d at 360 (quoting *Taylor*, 140 Wn.2d at 237). When, as is the case here, a charging document is challenged for the first time *after* the verdict, it is to be

“liberally construed in favor of validity.” *Id.* (quoting *State v. Kjorsvick*, 117 Wn.2d 93, 102, 812 P.2d 86 (1991)). This encourages defendants to make timely challenges to defective charging documents and discourages sandbagging. *Id.* (citing *Taylor*, 140 Wn.2d at 237 n. 32).

The charging statute for first-degree murder provides that a person is guilty of the crime when “[w]ith a premeditated intent to cause the death of another person, he or she causes the death of such person or of a third person[.]” RCW 9A.32.030(1)(a). A person is guilty of criminal solicitation when:

... with intent to promote or facilitate the commission of a crime, he [or she] offers to give or gives money or other thing of value to another to engage in specific conduct which would constitute such crime or which would establish complicity of such other person in its commission or attempted commission had such crime been attempted or committed.

RCW 9A.28.030(1). The information need not use the exact words of a statute so long as the words used adequately convey the same meaning.

State v. Ralph, 85 Wn. App. 82, 85, 930 P.2d 1235 (1997).

Here, the State filed an amended information that read:

On or about the period of time between May 15 and May 22, 2008, in the County of Clallam, State of Washington, the above-named Defendant, with intent to promote or facilitate the commission of First Degree Murder, to-wit: with a premeditated intent to cause the death of another person, to-wit: S.M[.], offered to give or gave money or other thing of value to another to engage in specific

conduct which would constitute such crime and/or would establish complicity of such person in its commission or attempted commission had such crime been attempted or committed; contrary to Revised Code of Washington 9A.28.030 and RCW 9A.32.030(1)(a), a class A felony.

CP 21. This language followed the language of RCW 9A.28.030 (criminal solicitation) and RCW 9A.32.030(1)(a) (first degree, premeditated murder). More importantly this language appraised the defendant of the essential elements of the crime charged: (1) that Mr. Hahn offered or gave valuable consideration, (2) to a third party, (3) to promote/facilitate that third party's first-degree, premeditated murder of S.M., (4) the third party's specific conduct would constitute first degree murder, or would establish complicity in the crime if attempted or committed, and (5) the criminal act occurred in the State of Washington. *See* CP 21. Mr. Hahn's argument that the information is legally deficient is without merit.

It is important to note that when the officers first informed Mr. Hahn of the new charge, he immediately understood from where the allegation derived: "I did talk to a Miguel, I talked to, I did talk to Norman[.] *See* Exhibit 46 at 3. *See also* RP (9/21/2009) at 30-35; RP (10/26/2009) at 118-19, 139, 152. Furthermore, from the outset of the case, Mr. Hahn knew that first-degree murder, if completed, required the State to prove "premeditated intent to cause the death of another person, to

wit: [S.M.], caused the death of said person.”¹⁸ RP (5/27/2008) at 7. Finally, defense counsel, who had represented Mr. Hahn for more than a year agreed with the “legal decision” to file the amended information in this case. RP (9/21/2009) at 4. The defense never challenged the sufficiency of the information, precisely because Mr. Hahn understood the elements of the crime charged and what conduct of his constituted the offense.

The fact the amended information did not specify the amount of remuneration promised, the method of killing, the alleged third party, and omitted the language “cause[d] the death of [another] person”, does not render the information constitutionally inadequate. *See Schwenk v. State*, 733 S.W.2d 142, 148-49 (1981). While Mr. Hahn already knew who was the “hitman”, who was involved in the purported murder for hire, and what was the remuneration, *see argument above*, these facts are not necessary allegations for the offense of solicitation to commit murder. While first-degree murder requires proof that the defendant “cause[d] the death of [another] person”, such was not necessary because the police fortunately intervened before Mr. Hahn could complete a successful “hit” on the victim. Mr. Hahn neither argues, nor proves that the failure to include these specific facts within the amended information affected his

¹⁸ This language is from in the original information. *See* RP (5/27/2008) at 7.

ability to prepare an adequate defense to the crime charged, as such, the argument is without merit.

Furthermore, if Mr. Hahn sincerely required additional information he should have requested a bill of particulars. *See State v. Holt*, 104 Wn.2d 315, 320, 704 P.2d 1189 (1985). A bill of particulars functions “to amplify or clarify particular matters essential to the defense.” *Holt*, 104 Wn.2d at 321. Where a charging document alleges facts sufficient to establish elements of the charged offense:

but is vague as to some other matter significant to the defense, a bill of particulars is capable of correcting that defect ... [and] a defendant is not entitled to challenge the information on appeal if he failed to request the bill of particulars at an earlier time.

Id. at 320. Mr. Hahn never requested a bill of particulars. In addition, prior to trial, the State and defense worked closely to edit the numerous recordings that the prosecution would use to support a conviction.

Accordingly, the amended information sufficiently apprised Mr. Hahn of the charged offense so as to allow him to prepare a defense. This Court should so hold.

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B. THE TRIAL COURT PROPERLY ADMITTED THE STATEMENTS TO LAW ENFORCEMENT.¹⁹

The present case does not require a *Gunwall* analysis. Washington's appellate courts have already held the federal and state constitutional provisions with respect to the right to counsel are coextensive. The record clearly establishes that Mr. Hahn affirmatively waived his right to counsel. Furthermore, the right to counsel had not attached at the time he requested to speak to law enforcement.

1. There was no violation of the Fifth Amendment or Article I, § 9.

The Fifth Amendment provides no person "shall be compelled in any criminal case to be a witness against himself." U.S. Const. amend. V. The Washington Constitution reads that "[n]o person shall be compelled in any criminal case to give evidence against himself, or be twice put in jeopardy for the same offense." Wash. Const. art. I, § 9. The State

¹⁹ The State confines its arguments to the statements Mr. Hahn made to Sergeant Madison and Detective Hall. *See* Exhibit 46.

Mr. Hahn's recorded conversations with Norman Livengood, *see* Exhibits 41, 42, were obtained pursuant to a warrant / wire order. *See* RP (10/13/2009) at 110, 125-26. The statements were lawfully obtained under RCW 9.73.040. Mr. Hahn does not contest the validity of this warrant or the admissibility of the statements. *See* Brief of Appellant at 16-27.

Furthermore, Mr. Hahn understood that any telephone call from the jail would be recorded. *See* Exhibit 52 at 1. Mr. Hahn's statements to Detective Grall (a.k.a. Miguel) were lawfully obtained pursuant to RCW 9.73.095 and *State v. Modica*, 164 Wn.2d 83, 186 P.3d 1062 (2008). Mr. Hahn does not contest challenge the admission of the phone call. *See* Brief of Appellant at 16-27.

constitutional provision is co-extensive with its federal counterpart. *See State v. Russell*, 125 Wn.2d 24, 59-62, 882 P.2d 747 (1994) (refusing to extend greater protection through Const. Art. 1, § 9 than that provided by the federal constitution to the use of un-*Mirandized* statements); *State v. Earls*, 116 Wn.2d 364, 374-75, 805 P.2d 211 (1991). ("[R]esort to the *Gunwall* analysis is unnecessary because this court has already held that the protection of article 1, section 9 is coextensive with, not broader than, the protection of the Fifth Amendment."); *State v. Moore*, 79 Wn.2d 51, 57, 483 P.2d 630 (1971) ("The Washington constitutional provision against self-incrimination envisions the same guarantee as that provided in the federal constitution. There is no compelling justification for its expansion.").

Statements are only admissible at trial in the prosecution's case in chief if the prosecution can prove a voluntary waiver of the suspect's *Miranda* rights. *See, e.g. State v. Ellison*, 36 Wn. App. 564 (1984). Any waiver of a suspect's *Miranda* rights must be knowingly, voluntarily, and intelligently made. The test for the waiver is the "totality of the circumstances." *See, e.g., Dutil v. State*, 93 Wn.2d 84, 606 P.2d 269 (1980). This Court must look to the totality of the circumstances, including the setting in which the statements were obtained, the details of the interrogation, and the background, experience, and conduct of the

accused. *United States v. Carroll*, 710 F.2d 164 (4th Cir.), *cert. denied*, 464 U.S. 1008 (1983) (citing *Schenckloth v. Bustamante*, 412 U.S. 218, 226, 93 S.Ct. 2041, 36 L.Ed.2d 854 (1973)). A waiver may be in writing or oral. *State v. Rupe*, 101 Wn.2d 664, 678, 683 P.2d 571 (1984).

Here, Mr. Hahn knowingly, intelligently, and voluntarily waived his *Miranda* rights. When the officers first contacted the defendant at the jail, they advised him of the new charge and immediately left without any subsequent questioning. RP (9/21/2009) at 25, 41-42, 52, 63-64; RP (10/26/2009) at 114-15, 119, 123, 137-39, 152. When jail staff reported that Mr. Hahn had asked to speak with the officers, they refused to speak to him without his attorney present. RP (9/21/2009) at 26, 28, 35, 42, 52-53, 64; RP (10/26/2009) at 83-84. The jail later phoned the officers and said Mr. Hahn was willing to waive his right to counsel. RP (9/21/2009) at 26, 28, 35, 42, 52-53, 64; RP (10/26/2009) at 83-84. When the officers contacted Mr. Hahn a second time, pursuant to his request, they specifically advised him of his constitutional rights. *See* Exhibit 46 at 1-2. Mr. Hahn also provided a written waiver of his constitutional rights. *See* Exhibit 46 at 11.

Despite law enforcement's numerous reminders that Mr. Hahn was under no obligation to speak with them, the defendant still wanted to talk with the two detectives. There is no evidence that the police coerced Mr.

Hahn. This Court should hold the defendant knowingly, intelligently, and voluntarily waived his right to counsel under the Fifth Amendment and Art. I, § 9.²⁰

2. There was no violation of the Sixth Amendment or Article I, § 22.

The Sixth Amendment provides that “in all criminal prosecutions, the accused shall enjoy the right ... to have the Assistance of Counsel for his defense.” U.S. Const. amend VI. The Washington Constitution reads, in part, that “the accused shall have the right to appear and defend in person, or by counsel, to demand the nature and cause of the accusation against him[.]” Wash. Const. art. I, § 22. These two constitutional provisions are co-extensive with one another. *See State v. Medlock*, 86 Wn. App. 89, 97-99, 935 P.2d 693, *review denied*, 133 Wn.2d 1012 (1997) (conducting a *Gunwall* analysis and holding there is no basis to conclude the Art. I, § 22 should be interpreted as providing more protection than Sixth Amendment.) *See also State v. Corn*, 95 Wn. App. 41, 62, 975 P.2d 520 (1999); *State v. Clark*, 48 Wn. App. 850, 861, 743 P.2d 822 (1987) (citing *Heinemann v. Whitman County*, 105 Wn.2d 796, 800, 718 P.2d 789 (1986)).

²⁰ At trial, the defense conceded Mr. Hahn’s statements to law enforcement were made knowingly, intelligently, and voluntarily. RP (9/21/2009) at 82, 84.

The Sixth Amendment right to counsel does not attach until a prosecution is commenced, that is, at or after the initiation of adversary judicial criminal proceedings, whether by way of formal charge, preliminary hearing, indictment, information, or arraignment. *McNeil v. Wisconsin*, 501 U.S. 171, 175, 111 S.Ct. 2204, 115 L.Ed.2d 158 (1991). Once the Sixth Amendment right to counsel attaches, police may not interrogate the suspect regarding the pending charges without a waiver of *Miranda*. *Patterson v. Illinois*, 487 U.S. 285, 108 S.Ct. 2389, 101 L.Ed.2d 261 (1988). However, the Sixth Amendment right to counsel is offense specific. It cannot be invoked for all future prosecutions. *McNeil*, 501 U.S. at 175; *See also State v. Stewart*, 113 Wn.2d 462, 478, 780 P.2d 844 (1989), *cert. denied*, 494 U.S. 1020 (1990) (an individual charged with robbery, may be contacted by police and interrogated about unrelated burglaries).

The Sixth Amendment right to counsel is no greater than the Fifth Amendment right to counsel that existed before charges are formally filed. *State v. Visitacion*, 55 Wn. App. 166, 170, 776 P.2d 986 (1989) (citing *Patterson*, 108 S.Ct. at 2397). The Sixth Amendment right to counsel can be waived by a defendant if he so chooses, and the waiver will be upheld if the State can show that the defendant knowingly, voluntarily, and intelligently waived his right to counsel. *Visitacion*, 55 Wn. App. at 170

(citing *Brewer v. Williams*, 430 U.S. 387, 404, 51 L.Ed.2d 424, 97 S.Ct. 1232 (1977); *Johnson v. Zerbst*, 304 U.S. 458, 464, 58 S.Ct. 1019, 82 L.Ed. 1461 (1938)). *Miranda* warnings are adequate to advise an individual of his or her post-indictment Sixth Amendment right to counsel. *Patterson*, 108 S.Ct. at 2398; *Visitacion*, 55 Wn. app. at 170-71.

Here, Mr. Hahn's Sixth Amendment right to counsel on the murder charge did not attach until the date of his first appearance, which occurred four days after the interview with law enforcement. *See* RP (5/27/2008) at 2. While the defendant was represented on cause number 08-1-00103, the Sixth Amendment right to counsel is "offense specific". Thus, it did not prevent law enforcement from speaking with him regarding the new crime – solicitation of murder. This Court should hold that there was no Sixth Amendment violation in the present case. *See Stewart*, 113 Wn.2d at 478.

Even if the Sixth Amendment right to counsel had attached, there was no violation because Mr. Hahn affirmatively waived the right to an attorney. As argued above, law enforcement went to great lengths to advise the defendant of his constitutional rights and avoid any impermissible questioning. *See, e.g.*, RP (9/21/2009) at 25, 26, 28, 35, 41-42, 52, 53 63-64; RP (10/26/2009) at 83-84, 114-15, 119, 123, 137-39, 152. The police even read Mr. Hahn's *Miranda* warnings before he could make any incriminating statements. Exhibit 46 1-2. With these rights fresh

in his mind, Mr. Hahn made a conscious decision to speak with police without his attorney present. *See* Exhibit 46 at 2. Finally, law enforcement confined its questioning to murder charge, and not the charges under 08-1-00103-1. *See* Exhibit 46 at 1-13. This Court should hold Mr. Hahn affirmatively waived his Sixth Amendment right to counsel. *See Visitacion*, 55 Wn. App. at 170. *See also Commonwealth v. Torres*, 442 Mass. 554, 813 N.E.2d 1261, 1277-78 (2004).

3. There was no violation of CrR 3.1(c)(1).

An arrested person must be notified as soon as practicable after arrest of his/her court rule right to an attorney. *See* CrR 3.1(c)(1). The rule further provides: “[a]t the earliest opportunity a person in custody who desires a lawyer shall be provided access to a telephone ... and any other means necessary to place the person in communication with a lawyer.” CrR 3.1(c)(2). Moreover, the protections of CrR 3.1(c)(2) are activated only after the accused requests an attorney. *State v. Corn*, 95 Wn. App. 41, 62, 975 P.2d 520 (1999). It follows that the court rules do not grant additional rights, but rather reinforce the *Miranda* right to counsel. *Id.* at 63. Because the admission of evidence obtained in violation of the court rule is not a constitutional error, the appellate courts review the admission under the harmless error standard. *State v. Templeton*, 148 Wn.2d 193,

220, 59 P.3d 632 (2002). Evidence obtained in violation of the court rule right will only be suppressed if the defendant can demonstrate prejudice arising from the violation.

Here, there is no violation of the court rule. As argued above, the State repeatedly reminded the defendant of his right to counsel. *See* Exhibit 46 at 1-2. Sergeant Madison even confirmed that Mr. Hahn wanted to proceed without an attorney. Exhibit 46 at 2. There is no evidence to suggest that the police failed to provide Mr. Hahn with counsel pursuant to the court rules.

4. The right to counsel may only be asserted by the defendant.

The Fifth and Sixth Amendment right to counsel belongs exclusively to the defendant. It may not be asserted on the defendant's behalf by another. *See Moran v. Burbine*, 475 U.S. 412, 106 S.Ct. 1135, 89 L.Ed.2d 410 (1986); *State v. Earls*, 116 Wn.2d 364, 382, 805 P.2d 211 (1991); *State v. Petitclerc*, 53 Wn. App. 419, 425, 768 P.2d 516 (1989).

At the 3.5 hearing, the defense tried to suppress the statements that the defense made to law enforcement with the following argument:

I believe that if you have a client in jail currently represented and is charged with a related crime in this county, I believe, and I would argue, that the counsel for the existing case [08-1-00103-1] has a right or should have a right to be informed and to be present[.] ... My position is, if a person is represented and he later subsequently has a

related matter in the same county, then I believe the police should have an obligation to contact.

RP (9/21/2009) at 108. The defendant's entire appellate argument is derived from this flawed premise. The right to counsel is not the trial attorney's right. It belongs exclusively to the defendant. *See Earls*, 116 Wn.2d at 382, *Petticlerc*, 53 Wn. App. at 425. While it may not be advisable for a defendant to speak with law enforcement outside the presence of his/her attorney, it is a decision for the defendant to make. *See State v. McDonald*, 89 Wn.2d 256, 264, 571 P.2d 930 (1977), *overruled on other grounds by, State v. Sommerville*, 111 Wn.2d 524, 760 P.2d 932 (1988). Here, Mr. Hahn knowingly, intelligently, and voluntarily waived his right to counsel and freely elected to speak with law enforcement. His arguments, at trial and on appeal, that his statements should have been suppressed are without merit.

5. This Court should reject Mr. Hahn's efforts to characterize the present case as inextricably intertwined with cause 08-1-00103-1.

The defendant goes to great lengths to argue that the present case is "closely related". *See* Brief of Appellant at 26. However, the truth remains that the murder case could not be joined pursuant to CrR 4.3.1 (mandatory joinder rule).

CrR 4.3.1(b) makes joinder of “related offenses” mandatory. *State v. Downing*, 122 Wn. App. 185, 190, 93 P.3d 900 (2004). Under the rule, offenses are “related” only if they are “within the jurisdiction and venue of the same court and are based on the same criminal conduct.” CrR 4.3.1(b)(1); *see also State v. Lee*, 132 Wn.2d 498, 503, 939 P.2d 1223 (1997) (the purpose of the rule is to protect defendants from multiple prosecutions based upon “essentially the same conduct.”). The “same conduct” for purposes of applying the rule is conduct involving a single criminal episode or incident. *Lee*, 132 Wn.2d at 503. Offenses involving distinct incidents are not the “same conduct”. *Id.* at 504.

The solicitation of first-degree murder involved a separate and distinct incident then the sex crimes alleged under 08-1-00103-1. Mr. Hahn was arrested for the unrelated sex crimes, spanning a four-year period, on March 21, 2008. *See State v. Aaron Hahn*, 08-1-00103-1. These alleged crimes ceased after that date. Approximately two months later, Mr. Hahn committed solicitation of first-degree murder on or about May 15-22, 2008. While S.M. is a prominent figure in both causes, 08-1-00103-1 (the sex case) and 08-1-00195-3 (the murder case), this Court should hold the two proceedings are unrelated. Mr. Hahn’s argument fails.

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C. THE TRIAL COURT PROPERLY REFUSED TO INSTRUCT THE JURY ON SOLICITATION OF ASSAULT.

The test for analyzing lesser-included offenses is traditionally stated as follows: “First, each of the elements of the lesser offense must be a necessary element of the offense charged. Second, the evidence in the case must support an inference that the lesser crime was committed.” *State v. Workman*, 90 Wn.2d 443, 447–48, 584 P.2d 382 (1978) (citations omitted). Additionally, “the lesser offense must arise from the same act or transaction supporting the greater charged offense” *State v. Porter*, 150 Wn.2d 732, 738, 82 P.3d 234 (2004).

The *Workman* test requires a factual showing that is “more particularized” than the sufficient evidence standard that otherwise applies to jury instructions. *Porter*, 150 Wn.2d at 737,

[T]he evidence must raise an inference that *only* the lesser included ... offense was committed to the exclusion of the charged offense.” In other words, “the evidence must affirmatively establish the defendant’s theory of the case—it is not enough that the jury might disbelieve the evidence pointing to guilt.

Porter, 150 Wn.2d at 737, (quoting *State v. Fernandez-Medina*, 141 Wn.2d 448, 456, 6 P.3d 1150 (2000)). If the instruction is requested by the defendant in an appropriate case, it is reversible error to refuse to give the instruction. *State v. Parker*, 102 Wn.2d 161, 683 P.2d 189 (1984).

Here, the “factual prong” is not satisfied.²¹ The evidence at trial does not raise the inference that the lesser crime – solicitation of assault – was committed to the exclusion of the charged offense – solicitation of murder. The State did present evidence that the defendant discussed with Michael Hendricksen a desire to “hurt” S.M.. RP (10/26/2009) at 91-92, 97, 104, 106, 109. However, there was no evidence to show Mr. Hahn actually requested, encouraged, or gave anything of value to Mr. Hendricksen to assist him in arranging an assault. Even if the jury believed that such a request took place, Mr. Hahn fails to explain how soliciting Mr. Hendricksen to commit an assault against S.M. is a lesser included offense of his soliciting Mr. Livengood and “Miguel” to murder the same victim.

A fair comment on the evidence is that Mr. Hahn may have discussed an intention to have the victims assaulted and murdered, but only solicited S.M.’s death. To the extent that trial counsel relied on Mr. Hendricksen’s testimony to support the requested instruction, *see* RP (10/27/2009) at 29-31, 33-35, then that procurement is for a separate crime – one that the State did not charge. *See People v. Landwer*, 166 Ill.2d 475, 490-93, 655 N.E.2d 848 (1995).

²¹ The State notes that the trial court was only concerned with the legal prong of the analysis. *See* RP (10/27/2009) at 33. However, this Court may affirm the trial court’s ruling on any ground that the record supports. *State v. Costich*, 152 Wn.2d 463, 477, 98 P.3d 795 (2004).

Mr. Hahn may have been entitled to a lesser-included offense instruction under the amended information if there was evidence he entered into an agreement with Mr. Livengood and “Miguel” only with the intent that S.M. be assaulted. However, the evidence does not “affirmatively establish” such a theory. Mr. Livengood testified that the defendant asked him to arrange a murder. RP (10/26/2009) at 24. Detective Grall (a.k.a. Miguel) testified that he spoke to Mr. Hahn understanding that he was soliciting the crime of murder, even though such terms were not expressly used. RP (10/27/2009) at 8, 12, 16-17; Exhibit 52 at 1-2. Most importantly, Mr. Hahn, himself, told Mr. Livengood that he wanted the victim killed:

AH: I want her to disappear ... Make it look like she never existed.

...

AH: I’d rather spend the rest of my life in prison for murder than 6 years for ...

Exhibit 41 at 6, 18. The evidence does not permit the inference that the Mr. Hahn only intended to solicit an assault. As such, Mr. Hahn was not entitled to the requested instruction. *See Porter*, 150 Wn.2d at 737.

On appeal, Mr. Hahn relies on the recorded statements that he gave to law enforcement to support his argument the evidence was sufficient to prove he committed only the lesser offense. *See* Brief of Appellant at 30. Mr. Hahn did tell Sergeant Madison that he only intended to scare S.M.:

AH: Yeah. I was behind talking to Miguel. I was behind scaring Miguel (sic). It was not murder. There was no intention of murder in there, none what so ever, none. It wasn't even supposed to be hurt, it was supposed to be scared.

Exhibit 46 at 8. *See also* Exhibit 46 at 7, 10. However, this statement does not accord with the three recognized definitions of assault: (1) an unlawful touching (actual battery); (2) an attempt with unlawful force to inflict bodily injury upon another, tending but failing to accomplish it (attempted battery); and (3) putting another in apprehension of harm. *State v. Elmi*, 166 Wn.2d 209, 215, 207 P.3d 439 (2009). Because Mr. Hahn expressly told the officers that he did not intend to hurt/harm S.M., *see* Exhibit 46 at 7-8, 10, the request for an assault instruction is untenable.

At most, the defendant's statement to "scare" S.M. expresses an intent to intimidate the witness. It could even be argued, the defendant intended to solicit a kidnapping in order to make S.M. "disappear". However, Mr. Hahn never requested such instructions, and the trial court was under no obligation to provide them. *See State v. Hoffman*, 116 Wn.2d 51, 111-12, 804 P.2d 577 (1991) (if not requested by either party, the failure to give a lesser offense instruction is not reversible error).

Finally, the State suggests that this issue is not properly preserved for appellate review. While Mr. Hahn did request an instruction on solicitation of fourth degree assault, the defendant never prepared, nor

provided the court with the requisite “to convict” instruction. *See* CP 48-65. This Court may hold that the issues is not preserved. *See State v. Jacobson*, 74 Wn. App. 715, 724, 876 P.2d 916 (1994) (“If a party does not propose an appropriate instruction, it cannot complain about the court’s failure to give it.”).

D. THE LAY WITNESSES TESTIMONY WAS ADMISSIBLE.

The decision to admit or exclude opinion testimony generally involves the routine exercise of discretion by the trial court under, among other rules, ER 401, 403, 701, 702 and 704. *City of Seattle v. Heatley*, 70 Wn. App. 573, 585, 854 P.2d 658 (1993). These rules govern evidentiary questions that do not necessarily implicate constitutional rights. *Id.*

In order to preserve an evidentiary challenge on appeal, a party must make a specific objection to the admission of the evidence before the trial court. ER 103. Failure to do so precludes appellate review. *State v. Guloy*, 104 Wn.2d 412, 422, 705 P.2d 1182 (1985). However, if the error is a manifest error affecting a constitutional right, this Court may consider the issue for the first time on appeal.²² RAP 2.5(a)(3).

²² The Washington Supreme Court has rejected the argument that all trial errors which implicate a constitutional right are reviewable under RAP 2.5(a)(3), noting that “[t]he exception actually is a narrow one, affording review only of ‘certain constitutional questions.’” *City of Seattle v. Heatley*, 70 Wn. App. 573, 584, 854 P.2d 658 (1993) (citing *State v. Scott*, 110 Wn.2d 682, 687, 757 P.2d 492 (1988)).

Lay witness may give opinions based upon rational perceptions that help the jury understand the witness's testimony and that are not based upon scientific or specialized knowledge. ER 701; *State v. Montgomery*, 163 Wn.2d 577, 591, 183 P.3d 267 (2008). However, witness should not tell the jury what result to reach and that opinion testimony should be avoided if the information can be presented in such a way that the jury can draw its own conclusions. *Montgomery*, 163 Wn.2d at 591.

Before a party offers opinion testimony, the trial court must determine its admissibility. In determining whether such statements are impermissible opinion testimony, the court will consider the circumstances of the case, including the following factors: (1) the type of witness involved, (2) the specific nature of the testimony, (3) the nature of the charges, (4) the type of defense, and (5) the other evidence before the trier of fact. *Montgomery*, 163 Wn.2d at 591.

It is inappropriate for witnesses to provide "particular expressions of personal belief, as to the guilt of the defendant, the intent of the accused, or the veracity of the witnesses." *Montgomery*, 163 Wn.2d at

Furthermore, the appellate courts have expressed their reluctance to recognize the general type of error presented in this appeal as manifest constitutional error. *Heatley*, 70 Wn. App. at 584-85 (citing *State v. Madison*, 53 Wn. App. 754, 770 P.2d 662, review denied, 113 Wn.2d 102, 77 P.2d 1050 (1989)); *Accord State v. Stevens*, 58 Wn. App. 478, 486, 794 P.2d 38, review denied, 115 Wn.2d 1025, 802 P.2d 128 (1990) (alleged error in admission of opinion testimony was not "truly of constitutional magnitude").

591. This is true for both direct statements or inferences. *Heatley*, 70 Wn. App. at 577.

However, “testimony that is not a direct comment on the defendant’s guilt or on the veracity of a witness, is otherwise helpful to the jury, and is based on inferences from the evidence is not improper opinion testimony.” *Heatley*, 70 Wn. App. at 577. Under modern evidence rules, an opinion is not improper merely because it involves ultimate factual issues. ER 704; *Heatley*, 70 Wn. App. at 578. “The fact that an opinion encompassing ultimate factual issues *supports* the conclusion that the defendant is guilty does not make the testimony an improper opinion on guilt.” *Id.* at 579 (emphasis in original). “[I]t is the very fact that such opinions imply that the defendant is guilty which makes the evidence relevant and material.” *Id.*

Here, the defendant challenges three statements: two made by Norman Livengood, and one made by Michael Hendricksen.

1. Mr. Livengood’s testimony was proper.

At trial, the defense only objected to one statement made by Mr. Livengood:

Ms. Kelly: This is going to be the last one – was there ever any doubt in your mind, Mr. Livengood, specifically what the Defendant wanted to [have] happen to S.M.?

Mr. Anderson: Objection –

Mr. Livengood: None whatsoever.

The Court: Overruled.

RP (10/26/2009) at 69. Mr. Livengood’s response “[n]one whatsoever” is not an expression of personal belief as to the guilt of the defendant, the intent of the accused, or the veracity of a witnesses. *See Montgomery*, 163 Wn.2d at 591. It did not tell the jury what result to reach.

Instead, the testimony was helpful to the jury because it was relevant as to what specific crime the defendant actually solicited. This is evident from Mr. Livengood’s next two answers: “[the defendant] wanted her to disappear ... he wanted her to be murdered.” RP (10/26/2009) at 69. This Court should hold that Mr. Livengood’s response does not constitute impermissible opinion testimony. *See Heatley*, 70 Wn. App. at 577.

On appeal, the defendant also challenges Mr. Livengood’s testimony that “[the defendant] was serious[.]” *See* Brief of Appellant at 39 citing RP (10/26/2009) at 69. The defense never objected to this testimony, which precludes appellate review. *See Guloy*, 104 Wn.2d at 422.

However, again, the testimony does not constitute impermissible opinion testimony. Again, it is not an expression of personal belief as to the guilt of the defendant, the intent of the accused, or the veracity of a

witnesses. *See Montgomery*, 163 Wn.2d at 591. The testimony was helpful to the jury because it explained why Mr. Livengood reported the potential threat to jail staff. *See RP (10/26/2009)* at 20-23. This Court should hold that the testimony does not constitute impermissible opinion testimony. *See Heatley*, 70 Wn. App. at 577.

2. Mr. Hendricksen's testimony was proper.

On appeal, the defendant challenges Michael Hendricksen's affirmative response to the question "didn't you tell the officers that it really sounded like [the defendant] wanted [S.M.] dead?" *See* Brief of Appellant citing *RP (10/26/2009)* at 106. Again, the defense did not object to this testimony at trial, thus, review is precluded on appeal. *See Guloy*, 104 Wn.2d at 422.

However, this testimony also does not constitute impermissible opinion testimony. The testimony corroborated Mr. Livengood's testimony and helped the jury understand that the defendant was soliciting murder, a fact at issue. *See also RP (10/26/2009)* at 91-92. The testimony was also helpful to refute counsel's assertions that the intent in the present case came from Mr. Livengood, not the defendant. *See RP (10/27/2009)* at 75, 79, 85, 87, 95. Furthermore, the defense extensively "recrossed" the defendant on this same testimony to show Mr. Hendricksen did not take

the threat seriously. *See* RP (10/26/2009) at 107-09. Thus, the inquiry potentially aided the defense. This Court should hold the challenged testimony is not an impermissible opinion. *See Heatley*, 70 Wn. App. at 577.

3. If the testimony was improper, the error was harmless.

Assuming the testimony was improper and impinged on Mr. Hahn's constitutional right, the error was harmless. It is well established that constitutional errors may be so insignificant as to be harmless. *Guloy*, 104 Wn.2d at 425. (citing *Harrington v. California*, 395 U.S. 250, 251-52, 89 S.Ct. 176, 23 L.Ed.2d 284 (1969); *Chapman v California*, 386 U.S. 18, 21, 87 S.Ct. 824, 17 L.Ed.2d 705, *rehearing denied*, 386 U.S. 987, 87 S.Ct. 1283, 18 L.Ed.2d 241 (1967)). A constitutional error is harmless if the appellate court is convinced beyond a reasonable doubt that any reasonable jury would have reached the same result in the absence of the error. *Id.* Constitutional error is presumed to be prejudicial and the State bears the burden of proving that the error was harmless. *Id.*

Here, there was "overwhelming untainted evidence" that pointed to Mr. Hahn's guilt, aside from the three contested statements above. The jury heard two recorded conversations between Mr. Hahn and Mr.

Livengood.²³ See Exhibits 11, 40, 41, 42. During these conversations, the two inmates discussed the purported murder of S.M., and the jury heard the defendant's own words:

AH: I want her to disappear ... Make it look like she never existed.

...

AH: I'd rather spend the rest of my life in prison for murder than six years for ...

Exhibit 41 at 6, 18. The jury listened to the phone call between the Mr. Hahn and Detective Grall (a.k.a. Miguel), where the defendant confirmed the order.²⁴ See Exhibits 49, 52. The jury listened to Mr. Hahn's interview with law enforcement. See Exhibit 44, 45. Finally, the jury was able to review the bill of sale and the promissory note that Mr. Hahn signed to pay for the purported murder. See Exhibit 8. Given the overwhelming amount and credibility of the properly admitted evidence, this Court should find that the exclusion of three statements over the course of a two-week trial would not have resulted in a different verdict.

Furthermore, there is no evidence that the jury was unfairly influenced by the allegedly improper testimony. The trial court properly

²³ The State notes that the jury asked to review the transcripts from the recorded conversation between Mr. Hahn and Mr. Livengood during its deliberation. RP (10/28/2009) at 3.

²⁴ The State notes that the jury asked to review the transcripts from the recorded phone call between Mr. Hahn and Detective Grall during its deliberations. RP (10/28/2009) at 3.

instructed the jurors that “[y]ou are the sole judges of the credibility of each witnesses”, “[y]ou are also the sole judge of the value or weight to be given to the testimony of each witness”, and “you may consider ... the reasonableness of the witness’s statements in the context of all of the other evidence[.]”²⁵ CP 30. The appellate courts presume that the jury follows the court’s instructions. *Montgomery*, 163 Wn.2d at 596. When the trial court instructs a jury similar to the present case, the record does not establish actual prejudice to the defendant due to the alleged erroneous testimony. *See id.*

E. MR. HAHN RECEIVED EFFECTIVE ASSISTANCE OF COUNSEL.

To prevail on a claim of ineffective assistance of counsel, the defendant must show (1) defense counsel’s representation was deficient in that it fell below an objective standard of reasonableness, and (2) the

²⁵ The trial court’s complete charge to the jury regarding witness testimony reads:

You are the sole judges of the credibility of each witness. You are also the sole judges of the value or weight to be given to the testimony of each witness. In considering a witness’s testimony, you may consider these things: the opportunity of the witness to observe or know the things he or she testifies about; the ability of the witness to observe accurately; the quality of a witness’s memory while testifying; the manner of the witness while testifying; any personal interest that the witness might have in the outcome or the issues; any bias or prejudice that the witness may have shown; the reasonableness of the witness’s statements in the context of all of the other evidence; and any other factors that affect your evaluation or belief of a witness or your evaluation of his or her testimony.

CP 30.

deficient performance prejudiced the defendant. *State v. Sutherby*, 165 Wn.2d 870, 883, 204 P.3d 916 (2009) (applying two-prong test of *Strickland v. Washington*, 466 U.S. 668, 687, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984)). If one of the two prongs of the test is absent, this Court need not inquire any further. *Strickland*, 466 U.S. at 697. This Court presumes that counsel is effective. *Id.* A claim of ineffective assistance of counsel is reviewed de novo. *Id.*

First. Mr. Hahn alleges that he received ineffective counsel because his attorney did not object to improper opinion testimony. *See* Brief of Appellant at 43. As argued above, the challenged testimony did not constitute impermissible testimony; and even if it did, the three challenged statements did not alter the outcome at trial because (1) the jury was properly instructed on witness testimony, and (2) the evidence of guilt was overwhelming. This Court should hold that Mr. Hahn's argument fails to satisfy either prong of the analysis.

Second. Mr. Hahn alleges that he received ineffective assistance of counsel because he did not object during the State's rebuttal when the prosecutor (1) mischaracterized the evidence, and (2) vouched for Mr. Livengood's testimony by telling the jury that the police believed the inmate's report. *See* Brief of Appellant at 44.

To establish prosecutorial error, a defendant must prove that the prosecutor's conduct was improper and that this error prejudiced his right to a fair trial. *State v. Johnson*, 113 Wn. App. 482, 492, 54 P.3d 155 (2002), *review denied*, 149 Wn.2d 1010 (2003). To establish prejudice, the defendant must prove that there is a substantial likelihood that the error affected the jury's verdict. *State v. Brown*, 132 Wn.2d 529, 561, 940 P.2d 546 (1997), *cert. denied*, 523 U.S. 1007 (1998).

This Court reviews the prosecutor's comments during closing argument "in the context of the total argument, the issues in the case, the evidence addressed in the argument, and the instructions given to the jury." *Brown*, 132 Wn.2d at 561. Here, because defense counsel did not object below, Mr. Hahn must also establish that the prosecutor's comments were so flagrant or ill intentioned that they caused an enduring prejudice that could not be cured by instruction. *Id.*

Mr. Hahn does not specify what evidence the prosecutor mischaracterized. *See* Brief of Appellant at 44. Thus, this Court may ignore the argument. *In re Estate of Lint*, 135 Wn.2d 518, 532, 957 P.2d 755 (1998) (courts need not assume an obligation to comb the record with a view toward constructing arguments for counsel) *Cowiche Canyon Conservancy v. Bosley*, 118 Wn.2d 801, 809, 828 P.2d 549 (1992)

(appellate courts do not review an argument absent any reference to the record or citation to authority);

Assuming, without conceding, that the prosecutor misspoke with respect to certain facts elicited during a two-week trial, the prosecutor repeatedly asked the jury to examine carefully the exhibits admitted into evidence. *See, e.g.*, RP (10/27/2009) at 49-50, 52-53, 56, 70. Essentially, the prosecutor asked the jury to rely on its own memory and understanding of the evidence. This was proper and does not constitute misconduct. Furthermore, the trial court clearly instructed the jury that it was not to consider the prosecutor's argument as evidence and that "[t]he evidence is the testimony and the exhibits. *See* CP 30. Mr. Hahn's argument fails.

Furthermore, the prosecutor did not improperly comment on Mr. Livengood's credibility. Although it is improper for a prosecutor to vouch for a witness's credibility, a prosecutor has wide latitude in closing argument to draw reasonable inferences from the evidence and may freely comment on witness credibility based on the evidence. *State v. Gregory*, 158 Wn.2d 759, 860, 147 P.3d 1201 (2006). This is especially so where, as here, the prosecutor is rebutting an issue the defendant raised in his closing argument. *State v. Jones*, 71 Wn. App. 798, 809, 863 P.2d 85 (1993). Thus, closing argument does not constitute improper vouching unless it is clear that the prosecutor is not arguing an inference from the

evidence, but instead is expressing a personal opinion about credibility. *State v. Warren*, 165 Wn.2d 17, 30, 195 P.3d 940 (2008), *cert. denied*, --- U.S. ---, 129 S.Ct. 2007, 173 L.Ed.2d 1102 (2009).

Here, the defense savagely attacked Mr. Livengood's credibility in his closing argument. *See e.g.*, RP (10/27/2009) at 73-75, 77, 79-80, 85, 95. At trial, Detectives Malone and Hall testified that they asked Mr. Livengood to wear a "wire" to corroborate his report of the purported murder for hire. *See* RP (10/13/2009) at 73, 110, 125. A reasonable inference from this testimony is that the officers "believed" the threat to be credible. *See* RP (10/27/2009) at 99. Furthermore, the jury was properly instructed that it was the "sole judge[] of credibility". *See* 30. Mr. Hahn's argument fails.

Finally, Mr. Hahn alleges that he received ineffective assistance of counsel because his attorney never provided a "to convict" instruction on Solicitation of Assault in the Fourth Degree. *See* Brief of Appellant at 45. A trial attorney has an obligation to provide the trial court with appropriate instructions. *See State v. Jacobson*, 74 Wn. App. 715, 724, 876 P.2d 916 (1994). However, as argued above, Mr. Hahn was not entitled to a lesser-included instruction because there was no evidence to show that he committed the lesser offense – solicitation of assault – to the exclusion of

the greater – solicitation of murder. Thus, Mr. Hahn was not prejudiced because the outcome at trial would have been the same.

F. THE CRIMINAL SOLICITATION STATUTE IS CONSTITUTIONAL.

Mr. Hahn suggests that the criminal solicitation statute, RCW 9A.28.030, inhibits the exercise of free speech.

Free speech is one of our most jealously guarded rights. *State v. Williams*, 144 Wn.2d 197, 206, 26 P.3d 890 (2001). However, speech directed toward the persuasion of another to enter into an illegal arrangement does not enjoy constitutional protection. *State v. Carter*, 89 Wn.2d 236, 570 P.2d 1218 (1977) (the statute prohibiting pimping was not unconstitutionally vague or overbroad). That is the only kind of speech punished under this statute – soliciting another person to commit a crime.

Furthermore, “true threats” are not protected speech. *State v. J.M.*, 144 Wn.2d 472, 477, 28 P.3d 720 (2001). A true threat is a statement made “in a context or under such circumstances wherein a reasonable person would foresee that the statement would be interpreted ... as a serious expression of intention to inflict bodily harm upon or to take the life of {another individual}.” *Williams*, 144 Wn.2d at 207-08 (quoting *State v. Knowles*, 91 Wn. App. 367, 373, 957 P.2d 797 (1998)). A true threat “is a serious one, not uttered in jest, idle talk, or political argument.”

State v. Hansen, 122 Wn.2d 712, 717 n. 2, 862 P.2d 117 (1993) (quoting *United States v. Howell*, 719 F.2d 1258, 1260 (5th Cir.1983), *cert. denied*, 467 U.S. 1228 (1984)).

Here, taking the evidence in the light most favorable to the State, Mr. Hahn expressed an intent to arrange the murder of S.M.. He specifically said. Exhibit 41 at 6-7, 17. He actively sought individuals who he believed could help him make S.M. “disappear”. *See* Exhibits 41, 42, 52. He prepared documents to (1) provide the “hitman” with the necessary information to locate the target, and (2) pay the “professional”, who he believed was going to complete the purported murder. *See* Exhibits 5, 8. A reasonable person would foresee that the defendant’s statements/acts were a serious expression of an intent to inflict harm. This type of expression cannot enjoy the First Amendment’s protection of free speech. The argument fails.

IV. CONCLUSION:

Based upon the foregoing arguments, the State respectfully requests that this court affirm Mr. Hahn’s conviction for Solicitation of First Degree Murder.

DATED this October 14, 2010.



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