

86427-6

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

Supreme Court No. \_\_\_\_\_ -

COA No. 40062-6-II

STATE OF WASHINGTON,

Respondent,

vs.

AARON HAHN,

Appellant.

FILED

AUG 31 2011

CLERK OF THE SUPREME COURT  
STATE OF WASHINGTON

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

PETITION FOR REVIEW

BRIAN PATRICK WENDT, WSBA #40537  
Deputy Prosecuting Attorney

Clallam County Courthouse  
223 East Fourth Street, Suite 11  
Port Angeles, WA 98362-3015  
(360) 417-2297 or 417-2296

Attorney for Respondent

RECEIVED  
SUPREME COURT  
STATE OF WASHINGTON  
2011 AUG 31 AM 8:15  
DAN HAROLD R. CARPENTER  
CLERK

SERVICE	Ms. Backlund / Mr. Mistry Backlund & Mistry PO Box 6490 Olympia, WA 98501	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: August 29, 2011, at Port Angeles, WA <i>BPW</i>
---------	--	--

**TABLE OF CONTENTS**

	<u>Page(s)</u>
TABLE OF AUTHORITIES .....	ii
I. IDENTITY OF PETITIONER.....	1
II. OPINION BELOW .....	1
III. ISSUE PRESENTED FOR REVIEW.....	2
IV. STATEMENT OF THE CASE.....	2
V. ARGUMENT.....	10
A. THE PUBLISHED OPINION ELIMINATES THE SECOND PRONG OF THE WORKMAN ANALYSIS.....	10
B. THE EVIDENCE DID NOT MERIT A LESSER INCLUDED INSTRUCTION.....	11
VI. CONCLUSION .....	16

**TABLE OF AUTHORITIES**

<b><u>Washington Cases:</u></b>	<b><u>Page(s)</u></b>
<i>State v. Elmi</i> , 166 Wn.2d 209, 207 P.3d 439 (2009).....	13
<i>State v. Fernandez-Medina</i> , 141 Wn.2d 448, 6 P.3d 1150 (2000)..passim	
<i>State v. Hoffman</i> , 116 Wn.2d 51, 804 P.2d (1991).....	15
<i>State v. Porter</i> , 150 Wn.2d 732, 82 P.3d 234 (2004) .....	11, 14-15
<i>State v. Riley</i> , 137 Wn.2d 904, 976 P.2d 624 (1999) .....	15
<i>State v. Workman</i> , 90 Wn.2d 443, 584 P.2d 382 (1978).....	10

<b><u>Other Cases:</u></b>	<b><u>Page(s)</u></b>
<i>People v. Landwer</i> , 166 Ill.2d 475, 655 N.E.2d 848 (1995) .....	14

**I. IDENTITY OF PETITIONER:**

Pursuant to RAP 13.4, the Petitioner, THE STATE OF WASHINGTON, respectfully requests the Washington Supreme Court to accept review of a published decision, *State v. Hahn*, --- P.3d ----, 2011 WL 3444586, filed by the Court of Appeals, Division II.

**II. OPINION BELOW:**

The Court of Appeal reversed Aaron Hahn's conviction for solicitation to commit first degree murder, reasoning the trial court erred when it refused to give a lesser-included instruction on solicitation to commit fourth-degree assault. *See State v. Hahn*, --- P.3d ----, 2011 WL 3444586; Appendix at 15-16.

However, the intermediate court effectively ignored the particularized factual analysis that *State v. Workman* and its progeny prescribes. The intermediate court failed to identify any facts that supported a lesser included except the defendant's self-serving statements removed entirely from their context.

The published opinion essentially eliminates the factual prong under *Workman*. Today, criminal defendants are now entitled to a lesser-included instruction if they place their self-serving statements in a vacuum and then imagine every conceivable crime said statements support.

Because the opinion constitutes a significant departure from established precedent, this Court should accept review.

**III. ISSUES PRESENTED FOR REVIEW:**

1. Did the Court of Appeals eliminate the factual prong under *State v. Workman* when it (1) removed certain statements the defendant made from their context, and (2) speculated that said statements could support a lesser included instruction?

**IV. STATEMENT OF THE CASE:**

On March 21, 2008, law enforcement booked Aaron Hahn into the Clallam County Jail on several charges: Rape of a Child in the Third Degree (4 counts), Sexual Exploitation of a Minor, Possessing Depictions of Minors Engaged in Sexually Explicit Conduct, Stalking, and Extortion in the Second Degree. *See State v. Aaron Hahn*, 08-1-00103-1. *See also* CP 69. These charges derived from Hahn's four-year relationship with the juvenile victim, S.M. *See State v. Aaron Hahn*, 08-1-00103-1. *See also* RP (10/13/2009) at 17, 20-26, 37-40.

While in custody, Hahn sent a series of emails to S.M. with the assistance of his mother.<sup>1</sup> *See* Ex. 1-2, 4. These emails exhibited the defendant's growing desperation with his pending case (08-1-00103-1),

---

<sup>1</sup> The State filed charges against the mother, Linda Hahn, who pleaded guilty to witness tampering. *See State v. Linda Hahn*: 08-1-00239-9. *See also* RP (10/13/2009) at 113-14.

and his efforts to persuade S.M. to drop the charges. *See* Ex. 1-2, 4. One of the emails threatened to reveal information that would allegedly cause problems for S.M. in the future. *See* Ex. 4.

After two months in jail, Hahn began conversing with other inmates about his case. Hahn asked Michael Hendricksen<sup>2</sup> if he “knew anyone who could get to [S.M.]” RP (10/26/2009) at 91. Hahn would admit, “that he wanted her to get hurt” and he “wish[ed] [the] bitch was dead[.]” RP (10/26/2009) at 91-92, 97, 104, 106, 109. Hendricksen believed the threat was credible. RP (10/26/2009) at 107-08. Hendricksen told Hahn he could not help him. RP (10/26/2009) at 91-92.

Hahn then approached Norman Livengood.<sup>3</sup> According to Livengood, Hahn asked if he had connections to the mafia:

**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. *See also* RP (10/26/2009) at 50, 53. While Livengood believed it was all a joke, he quickly understood Hahn was serious:

---

<sup>2</sup> Hendricksen occupied an adjoining cell next to the defendant. RP (10/26/2009) at 99.

<sup>3</sup> Livengood occupied an adjoining cell next to the defendant. RP (10/13/2009) at 58; RP (10/26/2009) at 14, 18-19, 72.

**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?

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

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

On May 20, 2008, Livengood sent a "kite" to Sergeant Jeff Finley and provided him with the information he received from the defendant. Ex. 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 Livengood. RP (10/13/2009) at 70-71, 94, 108, 125. The officers asked if Livengood would be willing to wear a "wire" and record his conversations with the defendant. RP (10/13/2009) at 73, 110, 125. 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," they gave Livengood a digital recorder, a list of information they wanted him to

elicit, and the phone number of an undercover officer who would play the role of a hit man named "Miguel".<sup>4</sup> RP (10/13/2009) at 73-76, 81, 88, 94-96, 110-11; RP (10/26/2009) at 30-31, 60-66, 113. Livengood subsequently recorded two conversations with Hahn. *See* Ex. 11, 40, 41, 42.

During the first conversation, Hahn stated he wanted S.M. to "disappear." The context of this conversation revealed he wanted S.M. murdered:

**Livengood:** What if [the hit man] asks me ... what exactly you want done[?]

**Hahn:** I thought you already f---ing, I thought that he already told you that he was going to ... I thought [you] already told me he knew.

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

**Hahn:** I want her to disappear.

**Livengood:** I can't hear you dude.

**Hahn:** I want her to disappear.<sup>5</sup>

**Livengood:** That's easy enough I guess.

---

<sup>4</sup> Law enforcement arranged for Detective Mike Grall of the Sequim Police Department to play the role of "Miguel" the purported hit man. RP (10/13/2009) at 76, 87; RP (10/27/2009) at 7-19.

<sup>5</sup> On cross-examination, Livengood affirmed "disappear" meant "murder" to the defendant. *See* RP (10/26/2009) at 67-69.

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

**Livengood:** Hunh?

**Hahn:** Make it look like she never existed.

*See Ex. 41 at 5-6.*

**Hahn:** ... [A]nother thing ... that I was thinking about doing [for the hit man], ... 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.

**Livengood:** Like what?

**Hahn:** I don't know, it's negotiable.

**Livengood:** Yeah, alright.

**Hahn:** I mean, dude, I'm willing to do almost anything to get, get the f--- out of here, you know what I mean? ... I don't know [if] I want to knock somebody off for him, you know, but I guess I'll do him some favors.

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

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

**Livengood:** Right.

**Hahn:** 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?

**Livengood:** Right.

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

*See Ex. 41 at 9-10.*

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

**Hahn:** Oh no, I agree.

**Livengood:** ... this disturbing of a crime you know?

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

*See* Ex. 41 at 16.

**Hahn:** I'd rather spend the rest of my life in prison for murder than six years for [rape].<sup>6</sup> Hunh?

**Livengood:** Is that right?

**Hahn:** I guess so, I don't know.

**Livengood:** You're a disgusting character.

**Hahn:** Wouldn't you?

**Livengood:** ... I wouldn't rather spend time in prison for rape or murder honestly.

*See* Ex. 41 at 18.

Shortly after this exchange, the defendant used the jail's phone and called the hit man / undercover officer. The officer confirmed he would deliver the "present" that Hahn had requested through Livengood. *See* 52 at 1-3. Hahn never made an effort to cancel the purported murder even

---

<sup>6</sup> The State notes the term "rape" was redacted from the jury's transcripts in order to avoid any undue prejudice.

though he expressed some reservations to Livengood. RP (10/13/2009) at 101. *See also* (10/26/2009) at 56-57; Ex. 42 at 10-15.

After law enforcement revealed they were aware of the plot, Hahn denied he wanted S.M. murdered. Ex. 46 at 3-5. According to Hahn, he only wanted the hit man to “scare” her. Ex. 46 at 6-8, 10. Hahn repeatedly denied he wanted S.M. to “disappear” or that she be hurt or harmed in any manner. Ex. 46 at 7-8, 10.

#### PROCEDURAL HISTORY

The State charged the defendant with Solicitation of First Degree Murder under cause 08-1-00195-3. RP (5/27/2008) at 2-3. At trial, the witnesses testified to the events described above. The defense asked the trial court to provide the jury with a lesser-included instruction for solicitation to commit fourth-degree assault:

**Defense Counsel:** 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. The trial court denied the requested. RP (10/27/2010) at 37. A jury found Hahn guilty of Solicitation of First Degree Murder. RP (10/28/2009) at 6. The trial court sentenced the defendant to 228 months confinement. RP (12/02/2009) at 42-43; CP 12.

On appeal, the defendant raised several issues challenging his conviction. The Court of Appeals reversed Hahn's conviction, holding he was entitled to the lesser-included instruction. *Hahn*, 2011 WL 3444586 at 8-9. The intermediate court reasoned:

Turning to the factual prong, we must determine whether the evidence supports an inference that only the lesser crime of solicitation to commit fourth degree assault was committed. Hahn never directly said that he wanted S.M. murdered. He stated only that he wanted her to "disappear," which, depending on the circumstances, could mean a number of things, including fourth degree assault. Hahn also maintained throughout police questioning and at trial that he never intended to have her murdered and that he only thought "Miguel" would only scare S.M. The evidence here, when viewed in the light most favorable to Hahn, supports an inference that the lesser-included offense of fourth degree assault was committed.

Appendix at 15-16. The Court of Appeals remanded for a new trial. The State seeks review.

*State v. Hahn*  
Petition for Review

V. ARGUMENT:

This Court's established precedent is crystal clear. A defendant is entitled to an instruction on a lesser-included offense only if he satisfies the two-pronged test articulated in *State v. Workman*, 90 Wn.2d 443, 447-48, 584 P.2d 382 (1978). Under the legal prong of the test, "each of the elements of the lesser offense must be a necessary element of the offense charged." *State v. Fernandez-Medina*, 141 Wn.2d 448, 454, 6 P.3d 1150 (2000) (quoting *Workman*, 90 Wn.2d at 447-48). Under the factual prong, the evidence must support an inference that only the lesser crime was committed to the exclusion of the charged offense. *Id.* at 455. The evidence must affirmatively establish the defendant's theory of the case; it is not enough that the jury might simply disbelieve the evidence pointing to guilt. *Id.* at 456.

A. THE PUBLISHED OPINION ELIMINATES THE  
SECOND PRONG OF THE WORKMAN ANALYSIS.

The most disturbing aspect of the published opinion is it that it permits criminal defendants to ignore the second prong of *State v. Workman* when requesting a lesser-included instruction. The Court of Appeals reversed Hahn's conviction because "'disappear' ... depending on the circumstances could mean a number of things, including fourth degree assault." *See* Appendix at 15. When the intermediate court ordered

a new trial without examining the contextual evidence introduced at trial in order to determine what Hahn meant when he used the term “disappear,” it gave parties carte blanche to request lesser-included instructions where only the legal prong of the *Workman* analysis is satisfied.<sup>7</sup> Such a departure from this Court’s established precedent is intolerable. This Court should accept review.

B. THE EVIDENCE DID NOT MERIT A LESSER INCLUDED INSTRUCTION.

This Court has stated the analysis prescribed in *Workman* requires a “particularized” factual analysis:

Specifically, we have held that the 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.”

*State v. Porter*, 150 Wn.2d 732, 737, 82 P.3d 234 (2004) (quoting *Fernandez-Medina*, 141 Wn.2d at 456). In the present case, the Court of Appeals failed to conduct this “particularized” analysis.

The Court of Appeals erroneously held Hahn was entitled to a lesser-included instruction, reasoning his use of the words “disappear” and “scare” permitted the inference that he solicited fourth-degree assault. *See*

---

<sup>7</sup> For example, upon retrial nothing prevents the State from requesting lesser-included instructions on solicitation to commit first-degree, second-degree, or third-degree assault.

Appendix at 15-16. However, the intermediate court reached this conclusion only after it removed the identified terms from their context. In doing so, the court failed to evaluate whether the evidence affirmatively established the speculative meaning it gave the two words.

1. The significance of the term “disappear.”

In the present case, the State respectfully disagrees that “‘disappear’ ... could mean a number of things, including fourth degree assault.” *See* Appendix at 15. First, Livengood testified Hahn asked him to arrange a murder. RP (10/26/2009) at 24. Second, Detective Grall (the hit man) testified he spoke to Hahn with the understanding that the defendant was soliciting murder. RP (10/27/2009) at 8, 12, 16-17; Ex. 52 at 1-2. Finally, Hahn told Livengood he wanted the victim killed:

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

...

**Hahn:** I’d rather spend the rest of my life in prison for *murder* than 6 years for [rape].

Ex. 41 at 5-6, 18 (emphasis added). Hahn even acknowledged he did not have the constitution to “knock somebody off” himself; thus, he was relying on the hit man to commit the crime because he was a “trained professional.” Ex. 41 at 9-10. This evidence provides necessary context,

and it does not permit the inference that Hahn's use of the word "disappear" meant an assault.

Additionally, when the police informed Hahn they had uncovered the plot to murder S.M., he emphatically denied that he wanted S.M. to "disappear." *See* Ex. 46 at 7-8. Hahn's after-the-fact denial implies "disappear" carried a meaning far more sinister than a simple assault.

In light of the evidence introduced at trial, the Court of Appeals erroneously concluded "disappear" supported an inference that Hahn only solicited fourth-degree assault. This Court should accept review.

2. The significance of the term "scare."

In the present case, the State respectfully disagrees that Hahn's self-serving claims of wanting to "scare" S.M. support an inference he solicited an assault. *See* Appendix 15-16. Hahn's use of the word "scare" does not correspond with the three common law 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 (fear of bodily injury). *See State v. Elmi*, 166 Wn.2d 209, 215, 207 P.3d 439 (2009).

Hahn's claim that he did not want his victim to be hurt in a "physical sense" demonstrated that he did not solicit an actual battery. *See* Ex. 46 at 7. Hahn's further clarifications that he did not want S.M. to be "physically hurt, mentally hurt, nothing" proves he did not solicit an assault that merely threatened bodily injury. *See* Ex. 46 at 10. The context surrounding the word "scare" reveals a lesser-included instruction on fourth-degree assault has no supporting factual basis.

Hendrickson did testify that Hahn shared his desire to "hurt" S.M. RP (10/26/2009) at 91-92, 97, 104, 106, 109. However, Hahn never gave anything of value to Hendricksen in exchange for planning an assault.<sup>8</sup> The exchange of valuable consideration is a necessary element of criminal solicitation. *See* RCW 9A.28.030. As such, there is still no evidence to support the requested instruction. The evidence supporting the requested instruction may only come from Hahn's interactions with Livengood and the purported hit man. *See State v. Porter*, 150 Wn.2d 732, 738, 82 P.3d 234 (2004) ("the lesser offense must arise from the same act or transaction supporting the greater charged offense"). *See also People v. Landwer*, 166 Ill.2d 475, 490-93, 655 N.E.2d 848 (1995) (a criminal defendant is not permitted to raise as a defense to a charged transaction that he committed

---

<sup>8</sup> In contrast, Hahn exchanged valuable consideration via Livengood in order to finance the murder of S.M. *See* Ex. 41 at 9-10; 13-14.

some uncharged transaction that occurred on different days and involving different participants).

Hahn's statements that he wanted to "scare" S.M. is vague *only* when removed from their context and placed in a vacuum. The appellate courts may not speculate what significance the defendant attached to a particular statement. Instead, they must determine that significance from the evidence introduced at trial. *Porter*, 150 Wn.2d at 737; *Fernandez-Medina*, 141 Wn.2d at 455-56.

At most, the term "scare" may have supported Hahn's willingness to commit witness tampering.<sup>9</sup> However, the defense never requested such an instruction.<sup>10</sup> Thus, the trial court was not obligated to give the lesser-included instruction. *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 an instruction is not reversible error).

---

<sup>9</sup> With the assistance of his mother, Hahn sent S.M. a series of emails threatening to reveal embarrassing information that would affect her future if she did not drop the charges. *See* Ex. 1-2, 4. If a jury believed Hahn wanted the hit man to make similar third-party contact, it could have found such communication would have scared S.M. without threatening physical/mental harm. However, such third-party communication would constitute witness tampering, not fourth-degree assault. *See State v. Linda Hahn*: 08-1-00239-9. *See also* RP (10/13/2009) at 113-14.

<sup>10</sup> The State recognizes witness tampering is not a lesser-included of murder. However, each side is entitled to have a jury instructed on its theory of the case if there is substantial evidence to support the theory. *State v. Riley*, 137 Wn.2d 904, 909 n.1, 976 P.2d 624 (1999).

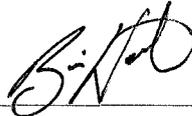
In sum, the evidence admitted at trial did not support a reasonable inference that Hahn only solicited fourth-degree assault. Because the Court of Appeals failed to apply the factual prong of *State v. Workman* and its progeny, this Court should accept review.

**VI. CONCLUSION:**

Based on the arguments above, the State respectfully requests that the Washington Supreme Court accept review in the present case.

DATED this 29<sup>th</sup> day of August, 2011.

DEBORAH S. KELLY, Prosecuting Attorney



---

Brian Patrick Wendt, WSBA # 40537  
Deputy Prosecuting Attorney

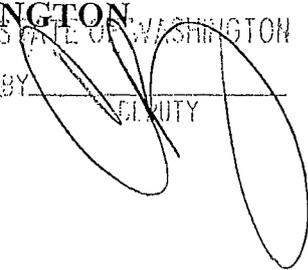
# APPENDIX

11 AUG -3 AM 9:32

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

STATE OF WASHINGTON  
BY \_\_\_\_\_  
CLERK



STATE OF WASHINGTON,

No. 40062-6-II

Respondent,

v.

AARON MICHAEL HAHN,

PUBLISHED OPINION

Appellant.

WORSWICK, A.C. J. — Aaron Hahn appeals his conviction for solicitation to commit first degree murder. He argues that (1) the information failed to charge a crime and violated his right to notice, (2) statements he made to police were obtained in violation of his right to counsel, (3) the trial court erred in refusing to instruct the jury on the lesser included offense of solicitation of fourth degree assault, (4) the State offered improper opinion testimony, (5) he received ineffective assistance of counsel, and (6) the criminal solicitation statute is unconstitutionally overbroad. Holding the trial court erred by failing to give a lesser included offense instruction, we reverse and remand.

FACTS

Hahn had a multiyear sexual relationship with S.M., an underage girl. On March 24, 2008, Hahn was charged with four counts of third degree child rape, sexual exploitation of a minor, possessing depictions of minors engaged in sexually explicit conduct, and stalking. At his arraignment, the trial court appointed an attorney to represent him.

While in custody, Hahn had his mother send several emails to S.M., encouraging her to drop the charges against him. After that proved unsuccessful, Hahn began talking with other

inmates about his situation and eventually asked Michael Hendricksen if he knew anyone who could “get to” S.M. Report of Proceedings (RP) (Oct. 28, 2009) at 92. Hendricksen told Hahn that he did not know anyone who could hurt S.M., so Hahn asked another inmate, Norman Livengood, if he had any mafia connections. After talking about it for a few days, Livengood became concerned that Hahn was serious and contacted Sergeant Jeff Finley at the jail. Sergeant Finley contacted the Sequim Police Department to report what he had heard from Livengood.

Soon thereafter, Sequim Police Department Detectives Kori Malone and Cory Hall met with Livengood. Livengood told the detectives about Hahn’s interest in hiring someone to murder S.M. Livengood agreed to wear a wire to record future conversations with Hahn. After the detectives obtained a warrant for the recording, they provided a wire and a phone number to Livengood to give to Hahn so he could call Detective Mike Grall, who would act as a hit man named “Miguel.” RP (Oct. 13, 2009) at 73-87. On May 21, 2008, Hahn and Livengood then engaged in the following exchange regarding additional details:

.....  
[Livengood]: Hey, whenever I call him.

[Hahn]: Yeah.

[Livengood]: What if he asks me what you, what, what, what exactly you want done.

[Hahn]: I thought you already f—ing, I thought that he already told you that he was going to . . . I thought you already told me he knew.

[Livengood]: Yeah, but he might want to know exactly what you want done.

[Hahn]: I want her to disappear.

[Livengood]: I can’t hear you, dude.

[Hahn]: I want her to disappear.

[Livengood]: That’s easy enough I guess.

[Hahn]: Disappear, make it look like she didn’t exist.

.....  
[Hahn]: Make it look like she never existed.

.....  
[Livengood]: You just want her to disappear?

40062-6-II

[Hahn]: Just say that, yep.

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

....  
Exhibit (Ex.) 41 at 6, 13.

The next day, on May 22, Livengood provided Hahn with a phone number for "Miguel" and told him to call to discuss the details. Later that day, Hahn called "Miguel":

[Hahn]: Hello.

[Miguel]: Hello.

[Hahn]: Is this Miguel?

[Miguel]: Yes.

[Hahn]: Okay, hey, and this is Aaron.

....  
[Miguel]: I think I have everything I need[.]

[Hahn]: Okay.

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

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

[Miguel]: 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?

[Hahn]: Just, ah, put it anonymously.

[Miguel]: 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.

[Hahn]: It will be, yes.

....  
[Miguel]: All right, um, what about confirmation, how do you want confirmation once, ah, the gift has been delivered?

[Hahn]: Um, can you do like some sort of discreet letter?

[Miguel]: From me or from her?

[Hahn]: Um, from you.

[Miguel]: Okay, yeah, I can get that, you'll know who it's from when you get it.

....  
[Hahn]: Um, when do you think it'll be taken care of?

[Miguel]: Well, how soon, um, are you interested in me getting it there?

[Hahn]: The sooner the better.

[Miguel]: Okay.

[Hahn]: 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.

....

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

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

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

....

Ex. 52.

Then on May 23, 2008, Sergeant Sean Madison and Detective Hall went to the Clallam County Jail where Hahn was located to let him know that, based on the new evidence, they would be charging him with solicitation of first degree murder. The officers did not ask Hahn any questions at that time and left the jail. After the officers left, Hahn told Sergeant Matt Blore at the jail that he wanted to speak to the officers. But when Sergeant Blore contacted them to pass this message along, the officers refused, stating that they would not speak with Hahn without his attorney.

Apparently Hahn did not take no for an answer and again reiterated his desire to talk to the officers, even without his attorney. Sergeant Blore again contacted the officers and passed this message along. As a result, the officers returned to the jail to speak with Hahn. The officers read Hahn his *Miranda*<sup>1</sup> rights, which he explicitly waived. Hahn also agreed to have the interview recorded. Throughout the interview, Hahn acknowledged talking with "Miguel" and other inmates, but he adamantly denied any interest in having S.M. killed. Instead, Hahn insisted

---

<sup>1</sup> *Miranda v. Arizona*, 384 U.S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966).

that he “did not want her dead,” that the call to Miguel “was not about murder,” and that all he originally thought was that Miguel would “maybe just scare her.” Ex. 46.

On May 27, 2008, the State charged Hahn with solicitation of first degree murder. The first amended information in this case, filed on September 21, 2009, provided in relevant part:

On or about the period of time between May 15 and May 22, 2008, in the County of Clallam, State of Washington, [Hahn], 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.

Maximum Penalty—Life imprisonment and/or a \$50,000 fine pursuant to RCW 9A.32.030(2) and RCW 9A.20.021(1)(a), plus restitution and assessments.

Minimum Penalty—Pursuant to RCW 9.94A.540(1)(a), this crime is punishable by no less than twenty (20) years mandatory total confinement imprisonment without availability of furlough, work release, earned release time, or other leave of absence from confinement during such minimum twenty (20) year term except for emergency medical treatment or an extraordinary medical placement under RCW 9.94A.728(4).

.....

Clerk’s Papers (CP) at 21-22.

The trial court held a pretrial CrR 3.5 hearing on whether to suppress Hahn’s statements made to police officers and to Livengood in the jail. The trial court denied Hahn’s request to suppress the statements, largely due to his waiver of his right to counsel.

Several witnesses testified at trial, including Livengood and Hendricksen. The State asked Livengood whether he had any doubt what Hahn wanted to have happen to S.M.:

[STATE]: 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.] ?

[DEFENSE COUNSEL]: Objection—

40062-6-II

[LIVENGOOD]: None whatsoever.

[COURT]: Overruled.

RP (Oct. 26, 2009) at 69. And the State also asked Livengood his opinion on whether Hahn was serious about having S.M. killed:

[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 his victim hurt, or, you know, killed.

[STATE]: Have you ever heard that type of talk before when you've been in jail?

[LIVENGOOD]: Yes, I have.

[STATE]: Is it uncommon?

[LIVENGOOD]: Not at all.

[STATE]: Did you ever do anything about it before?

[LIVENGOOD]: No, ma'am.

[STATE]: Did you this time?

[LIVENGOOD]: Yes, ma'am.

[STATE]: Why, what was different?

[LIVENGOOD]: The difference is that I believe that he was serious with what he was talking about.

RP (Oct. 26, 2009) at 20-21. Further, the State asked Hendrickson if it sounded like Hahn wanted S.M. dead:

[STATE]: And Mr. Hendricksen, didn't you tell the officers that it really sounded like [Hahn] wanted [S.M.] dead?

[HENDRICKSON]: Yeah, yeah I did.

RP (Oct. 26, 2009) at 106.

Before closing argument, Hahn requested that the trial court provide the jury with a lesser included instruction on solicitation of fourth degree assault. The trial court denied Hahn's request. And the jury found Hahn guilty as charged. He now appeals.

ANALYSIS

Hahn raises several issues on appeal, including that (1) the amended information in the case failed to properly charge a crime and violated his right to notice, (2) statements he made to police were obtained in violation of his right to counsel, (3) the trial court erred in refusing to instruct the jury on the lesser included offense of solicitation of fourth degree assault, (4) the State offered improper opinion testimony, (5) he received ineffective assistance of counsel and (6) the criminal solicitation statute is unconstitutionally overbroad. We agree that the trial court should have given a lesser included jury instruction.<sup>2</sup>

FAULTY FIRST AMENDED INFORMATION

At the outset, Hahn contends that the first amended information in this case failed to charge a crime and violated his right to notice under various provisions of the United States and Washington constitutions. In order to be sufficient, a charging document must include all essential elements, statutory or otherwise, of the crime charged. *State v. Tinker*, 155 Wn.2d 219, 221, 118 P.3d 885 (2005). This affords the accused notice of the nature and cause of the accusation against him and allows him to properly prepare a defense. *Tinker*, 155 Wn.2d at 221; *State v. Goodman*, 150 Wn.2d 774, 784, 83 P.3d 410 (2004). “An essential element is one whose specification is necessary to establish the very illegality of the behavior,’ . . . but the charging document need not repeat the exact language of the statute.” *Tinker*, 155 Wn.2d at 221(internal citation omitted).

---

<sup>2</sup> Because we reverse and remand on the lesser included instruction issue, we consider only those issues that are sure to remain following remand. Thus, we do not reach Hahn’s improper opinion testimony or ineffective assistance of counsel arguments.

If the defendant challenges the information before the verdict, the trial court must strictly construe the document to determine whether all of the crime's elements are included. *Tinker*, 155 Wn.2d at 221. But where, as here, the defendant challenges the charging document for the first time on appeal, we liberally construe it in favor of validity. *Goodman*, 150 Wn.2d at 787. Our Supreme Court has adopted a two-prong test to determine whether an unchallenged charging document is insufficient: “(1) do the necessary facts appear in any form, or by fair construction can they be found, in the charging document; 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?” *Goodman*, 150 Wn.2d at 788 (quoting *Kjorsvik*, 117 Wn.2d 93, 105-06, 812 P.2d 86 (1991)).

Hahn first argues that the first amended information was legally deficient because it omitted the essential elements of the underlying offense, first degree murder. Specifically, Hahn states that the charging document did not make clear that the completed crime requires proof that the accused person “cause[d] the death of [another] person . . . .” Br. of Appellant at 14 (some alterations in original). Under RCW 9A.28.030(1),

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

And under RCW 9A.32.030(1), “A person is guilty of murder in the first degree 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.”

This argument appears to be entirely without merit, as the relevant language in the amended information provided:

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 [RCW] 9A.28.030 and RCW 9A.32.030(1)(a), a class A felony.

CP at 21. The amended information adequately reflects the essential elements of both criminal solicitation and first degree murder. Thus, Hahn's argument fails.

Hahn also argues that the first amended information was factually deficient because it failed to allege specific conduct constituting solicitation of first degree murder. Specifically, Hahn argues the information's facts were deficient because (1) it did not specify whether Hahn "offered to give" or "gave" something to solicit the crime and did not identify what was offered or given, (2) it did not identify the individual Hahn was alleged to have solicited, and (3) it did not set forth the "specific conduct" Hahn was alleged to have solicited from this other person.

Br. of Appellant at 15.

As Hahn suggests, the information must not only describe the elements of the crime charged but also must describe the specific conduct of the defendant that allegedly constituted that crime. *City of Auburn v. Brooke*, 119 Wn.2d 623, 630, 836 P.2d 212 (1992). But in this case, the necessary facts appear in the charging document, including that Hahn offered something of value in exchange for S.M.'s murder. And Hahn has not demonstrated that he was

actually prejudiced by the language in the information that he argues resulted in a lack of notice. Thus, Hahn's argument fails.

#### RIGHT TO COUNSEL

Hahn next contends that his statements to the police and their agents were obtained in violation of his right to counsel because Hahn was already represented in a prosecution closely related to the crime charged. A denial of Sixth Amendment rights is reviewed de novo. *State v. Iniguez*, 167 Wn.2d 273, 280, 217 P.3d 768 (2009). The Sixth Amendment guarantees a defendant assistance of counsel. U.S. CONSTITUTION, amendment VI. Article I, section 22 of the Washington Constitution also guarantees such assistance.

Hahn asks us to conduct a *Gunwall* analysis<sup>3</sup> and find that article I, section 22 of the Washington Constitution provides greater protections than the Sixth Amendment of the United States Constitution. Specifically, Hahn urges us to adopt a now-abrogated standard established in *United States v. Arnold*, 106 F.3d 37 (3rd Cir. 1997), *abrogated by Texas v. Cobb*, 532 U.S. 162, 121 S. Ct. 1335, 149 L. Ed. 2d 321 (2001).

*Arnold* involved a defendant working as an armored car courier for Federal Armored Express who stole \$65,000. *Arnold*, 106 F.3d at 38. Arnold subsequently told his fiancée about the theft. *Arnold*, 106 F.3d at 38-39. Arnold continued to steal additional money and told his fiancée about it. *Arnold*, 106 F.3d at 38-39. Eventually, Arnold feared that his fiancée would tell the FBI about the crimes, so Arnold told a few individuals that he would pay someone up to \$20,000 to kill her. *Arnold*, 106 F.3d at 39. One of those individuals reported Arnold's offer to

---

<sup>3</sup> *State v. Gunwall*, 106 Wn.2d 54, 64-65, 720 P.2d 808 (1986).

40062-6-II

the FBI . *Arnold*, 106 F.3d at 39. The FBI used this individual as part of a “sting” operation and recorded a meeting between the individual and Arnold. *Arnold*, 106 F.3d at 39.

The next day, the government obtained a sealed indictment against Arnold, charging him with bank theft, money laundering, and witness intimidation based on his threat to kill his fiancée if she provided information to law enforcement about the thefts. *Arnold*, 106 F.3d at 39. Later that day, Arnold met with the same individual and an undercover officer posing as a hit man. *Arnold*, 106 F.3d at 39. After Arnold again agreed to pay \$20,000 to have his fiancée killed, the FBI arrested him and seized the money. *Arnold*, 106 F.3d at 39. Then the government obtained a superseding indictment charging Arnold with the additional count of attempted murder of a witness. *Arnold*, 106 F.3d at 39. The government played the tape recording at trial. *Arnold*, 106 F.3d at 39. Ultimately, the court held that Arnold’s Sixth Amendment right to counsel carried over to the closely related but uncharged attempted murder charge once it attached with respect to the charged offense and that the tape recording of the incriminating statements was inadmissible with respect to the murder charge. *Arnold*, 106 F.3d at 39.

More recently in *Cobb*, the U.S. Supreme Court moved away from this “closely related” standard applied in *Arnold*, opting for a narrower approach. 532 U.S. at 164. Now the Sixth Amendment right to counsel attaches to charged offenses, and there is no exception for uncharged crimes that are “factually related” to a charged offense. *Cobb*, 532 U.S. at 164. The

Sixth Amendment right to counsel also attaches to offenses that, even if not formally charged, would be considered the same offense under the *Blockburger*<sup>4</sup> test. *Cobb*, 532 U.S. at 164.

Post-*Cobb*, our Supreme Court declined to consider whether, under *Gunwall*, article I, section 22 of the Washington Constitution requires a different test than the one articulated in *Cobb*. *State v. Gregory*, 158 Wn.2d 759, 820, 147 P.3d 1201 (2006). On November 2, 1998, Gregory was in police custody after arraignment on charges that he raped R.S. *Gregory*, 158 Wn.2d at 818. Suspecting Gregory's involvement in another crime years earlier, Tacoma police detectives transported Gregory from the Pierce County jail to an interview room in a Tacoma police department. *Gregory*, 158 Wn.2d at 818. The detectives read Gregory his *Miranda* rights, questioned him about an unrelated and still uncharged shooting, and then questioned him about the rape and murder of G.H. *Gregory*, 158 Wn.2d at 818. At the time, Gregory was represented by counsel on the R.S. rape charges, but police did not contact counsel nor invite counsel to the interview. *Gregory*, 158 Wn.2d at 818-19.

The State ultimately charged Gregory with G.H.'s murder. *Gregory*, 158 Wn.2d at 812. At trial, one of the detectives testified that during the interview, Gregory refused to be

---

<sup>4</sup> *Blockburger v. U.S.*, 284 U.S. 299, 52 S. Ct. 180, 76 L.3d 306 (1932). Under the *Blockburger* test, when the relevant statutes do not expressly disclose legislative intent to treat the charged crimes as the same offense, we determine whether the charged crimes are the same in law and fact. See *In re Pers. Restraint of Orange*, 152 Wn.2d 795, 816-17, 100 P.3d 291 (2004). The *Blockburger* test is a rule of statutory construction used to discern legislative purpose. *State v. Calle*, 125 Wn.2d 769, 778, 888 P.2d 155 (1995). We must answer two questions as part of its analysis—whether the two charged crimes arose from the same act and, if so, whether the evidence supporting conviction of one crime was sufficient to support conviction of the other crime. *Orange*, 152 Wn.2d at 820. “The applicable rule is that, where the same act or transaction constitutes a violation of two distinct statutory provisions, the test to be applied to determine whether there are two offenses or only one is whether each provision requires proof of an additional fact which the other does not.” *Blockburger*, 284 U.S. at 304.

audiotaped, but he stated that he thought DNA evidence was good evidence and he became sullen after he was accused of raping and murdering G.H. *Gregory*, 158 Wn.2d at 819. A jury convicted Gregory of the murder of G.H. *Gregory*, 158 Wn.2d at 812. On appeal, Gregory argued that the interrogation without his counsel present violated his constitutional rights. *Gregory*, 158 Wn.2d at 819. Gregory implored our Supreme Court to conduct a *Gunwall* analysis, adopt the pre-*Cobb* “closely related” test, and hold that, because Gregory was in custody and already represented by counsel, he should not have been questioned regarding the other case without his attorney present. *Gregory*, 158 Wn.2d at 818-19. Our Supreme Court declined to do so, reasoning that even if it were to adopt the “closely related” test, the rape of R.S. and the rape and murder of G.H. were not closely related.<sup>5</sup> *Gregory*, 158 Wn.2d at 820.

Even if we were to adopt the pre-*Cobb* “closely related” test, the two charges in this case, as in *Gregory*, are not closely related. Crimes that have been deemed ‘closely related’ generally “involved the same course of conduct, the same cast of characters, were closely related in time, and/or occurred at the same location.” *Gregory*, 158 Wn.2d at 820. In Hahn’s case, the only unifying fact is that both crimes involved the same victim. The crimes here are clearly separate under the *Blockburger* test, were not closely related in time, and did not occur at the same location. Thus, Hahn’s argument fails.

---

<sup>5</sup> Specifically, our Supreme Court acknowledged that the crimes (1) involved different victims, (2) occurred more than two years apart, and (3) occurred in different locations. *Gregory*, 158 Wn.2d at 820.

CRIMINAL SOLICITATION STATUTE

Hahn also contends that the criminal solicitation statute is overbroad because it punishes constitutionally protected speech in violation of the First and Fourteenth Amendments of the U.S. Constitution. Under RCW 9A.28.030(1),

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

A statute is overbroad if it chills or sweeps within its prohibition constitutionally protected free speech activities. *City of Bellevue v. Lorang*, 140 Wn.2d 19, 26, 992 P.2d 496 (2000); *State v. Halstien*, 122 Wn.2d 109, 122, 857 P.2d 270 (1993). “A statute which regulates behavior, and not pure speech, ‘will not be overturned as overbroad unless the overbreadth is both real and substantial in relation to the ordinance’s plainly legitimate sweep.’” *City of Seattle v. Webster*, 115 Wn.2d 635, 641, 802 P.2d 1333 (1990) (quoting *Seattle v. Eze*, 111 Wn.2d 22, 31, 759 P.2d 366 (1988) (internal quotation marks omitted)). “Criminal statutes require particular scrutiny and may be facially invalid if they ‘make unlawful a substantial amount of constitutionally protected conduct.’” *Lorang*, 140 Wn.2d at 27 (quoting *City of Seattle v. Huff*, 111 Wn.2d 923, 925, 767 P.2d 572 (1989)). This standard is very high and speech will be protected unless shown likely to produce a clear and present danger of a serious substantive evil that rises far and above public inconvenience, annoyance, or unrest. *Lorang*, 140 Wn.2d at 27.

The threshold inquiry in the overbreadth analysis is whether the statute prohibits a substantial amount of constitutionally protected speech. *Huff*, 111 Wn.2d at 925. On its face,

RCW 9A.28.030 clearly does not prohibit a substantial amount of speech; rather, it only prohibits remuneration in exchange for the commission or attempted commission of a crime. Thus, Hahn's argument fails.

LESSER INCLUDED INSTRUCTION

Hahn contends that his conviction must be reversed because the trial court refused to instruct the jury on the lesser included offense of solicitation of assault in the fourth degree. The right to present a lesser included offense instruction to the jury is statutory. RCW 10.61.006; RCW 10.61.010; *State v. Bowerman*, 115 Wn.2d 794, 805, 802 P.2d 116 (1990). A defendant is entitled to a lesser included offense instruction if (1) each of the elements of the lesser offense is a necessary element of the offense charged (legal prong) and (2) the evidence in the case supports an inference that the lesser crime was committed (factual prong). *State v. Workman*, 90 Wn.2d 443, 447-48, 584 P.2d 382 (1978). The State conceded at oral argument that solicitation of assault in the fourth degree meets the legal prong of the *Workman* test and that the focus of our analysis in this case rests on the factual prong. We accept the State's concession and deem the legal prong to be met in this case.

Turning to the factual prong, we must determine whether the evidence supports an inference that only the lesser crime of solicitation to commit fourth degree assault was committed. Hahn never directly said that he wanted S.M. murdered. He stated only that he wanted her to "disappear," which, depending on the circumstances, could mean a number of things, including fourth degree assault.<sup>6</sup> Hahn also maintained throughout police questioning

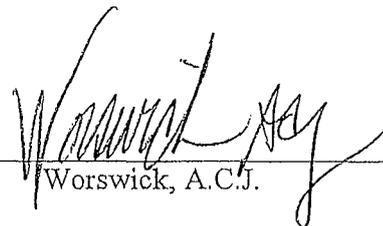
---

<sup>6</sup> A person is guilty of fourth degree assault if he commits an assault under circumstances not amounting to first, second, or third degree assault. RCW 9A.36.041(1).

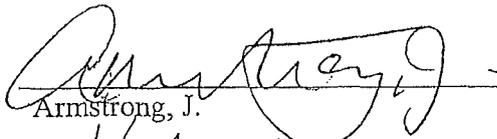
40062-6-II

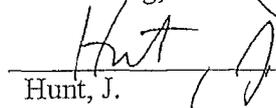
and at trial that he never intended to have her murdered and that he only thought "Miguel" would only scare S.M. The evidence here, when viewed in the light most favorable to Hahn, supports an inference that the lesser included offense of fourth degree assault was committed. *State v. Grier*, 171 Wn.2d 17, 42, 246 P.3d 1260 (2011). Thus, we reverse Hahn's conviction because the trial court denied Hahn's request for the lesser included offense jury instruction under the facts of this case.

Reversed and remanded.

  
Worswick, A.C.J.

We concur:

  
Armstrong, J.

  
Hunt, J.