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8 **IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON**  
9 **IN AND FOR THE COUNTY OF CLARK**

10 **STATE OF WASHINGTON,**

11 **Plaintiff,**

12  
13 **v.**

14 **DINO J. CONSTANCE**

15 **Defendant.**

**No. 07-1-00843-8**

**SUPPLEMENTAL BRIEF IN RESPONSE  
TO DEFENDANT'S CRR 7.8 MOTION  
FOR RELIEF FROM JUDGMENT**

16  
17 **COMES NOW** the State of Washington, by and through Prosecuting Attorney  
18 **Anthony F. Golik**, and hereby submits the following supplemental brief in opposition to  
19 **the defendant's new CrR 7.8 motion to vacate and/or motion for relief from judgment.**

20 **In his new CrR 7.8 motion**, the defendant raises a number of claimed errors of  
21 **law. Most of these alleged errors were not raised by the defendant at the time of trial.**  
22 **Further, the defendant did not raise any of these alleged errors of law in his direct**  
23 **appeal. In addition, the defendant did not raise these alleged errors in his original CrR**  
24 **7.8 motion. The defendant *did* raise these alleged errors of law in his Petition for**  
25 **Review with the Supreme Court. The Court denied the defendant's Petition. By his own**  
26 **admission, the defendant raises these alleged errors of law now in order to expand the**  
27  
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29

1 record, should he appeal the trial court's decision in his motion for relief from judgment.  
2  
3 Defendant's Motion to Vacate, p. 41.

4 The trial court does not have jurisdiction to review errors of law under CrR 7.8.  
5 *State v. Robinson* 153 Wn.2d 689, 695-96, FN 4, 107 P.3d 90 (2005) (stating "[r]elief  
6 for errors of law must be sought under CrR 7.5 (motion for a new trial) or by appeal or a  
7 PRP"). On July 22, 2011, the State moved the trial court to reconsider its ruling that it  
8 would review the errors of law alleged by the defendant in his new CrR 7.8 motion. On  
9 July 29, 2011, the trial court issued an order denying the State's motion. Pursuant to  
10 the court's order, the State files this supplemental brief with substantive responses to  
11 the defendant's allegations regarding errors of law.  
12  
13

## 14 ARGUMENT

### 15 **1. The trial court did not violate double jeopardy when it sentenced the** 16 **defendant consecutively on Count One and Count Two.** 17

18 The trial court sentenced the defendant consecutively on Counts One and Two.<sup>1</sup>  
19  
20 In his new CrR 7.8 motion, the defendant alleges his conviction for Count One or for  
21 Count Two should be vacated because consecutive sentences violate the double  
22 jeopardy clause of the Fifth Amendment and art. I, § 9 of the Washington Constitution.  
23  
24 The defendant relies on *State v. Varnell* and *State v. Jensen* to support his argument.  
25  
26

27  
28 <sup>1</sup> Count One: Solicitation to Commit Murder in the First Degree, to wit: the defendant did offer to give  
29 money...to Michael Spry; Count Two: Solicitation to Commit Murder in the First Degree, to wit: the  
defendant did offer to give money...to Jordan Spry. (Appendix A).

1 Defendant's Motion to Vacate, p. 74; *State v. Varnell*, 162 Wn.2d 165, 170 P.3d 24  
2  
3 (2007); *State v. Jensen*, 164 Wn.2d 943, 195 P.3d 512 (2008).

4 At the time of sentencing, defense counsel asked the court to run Count One  
5 and Count Two concurrently, alleging both counts constituted the same criminal  
6 conduct (RP 831-33). Defense counsel argued:

7  
8 Defense: [n]ow, with regard to the multiple offense policy, if Mr.  
9 Constance had had the two Sprys and Mr. Brown and Mr.  
10 Castellanos all in the same room and say, Hey, listen, you four, I'll  
11 give you this much money to go kill her, he'd be looking at one  
12 offense, because we have the same victim, we have the same  
13 place and time, we have the same intent."

14 - (RP 831-32).

15 The court rejected the defendant's argument and sentenced the defendant  
16 consecutively for Counts One and Two. (RP 840). In issuing consecutive sentences,  
17 the court made the following statement to the defendant:

18 Court: All right, well, Mr. Constance, as I indicated, I'm not going to  
19 overturn the jury, nor would I. It appeared clear to me from  
20 listening to the evidence that you were serious. Maybe at some  
21 point you weren't, but at the time that you made most of the  
22 statements the jury relied upon, you were deadly serious about  
23 finding someone to kill Ms. Koncos.

24 And I don't find anything shocking about the idea that we treat  
25 someone differently who on one occasion either commits a violent  
26 act or attempts a violent act or solicits a violent act. And we treat  
27 that person differently than someone who over a period of months  
28 repeatedly does that. If you had repeatedly attempted to kill  
29 someone over months and months and months, you would be  
treated differently than if you did it once.

And here you repeatedly over months and months and months  
tried to find someone to kill Ms. Koncos. And the – and fortunately  
for her and everyone else, you didn't find somebody. And that's

1 why you're here today on these charges. But multiple convictions  
2 justify the sentence that you're to receive.

3 - (RP 839-40, L18-25, L 1-19).  
4

5 The defendant did not raise the issue of double jeopardy in his direct appeal.  
6 The defendant *did* raise this issue in his Petition for Review with the Supreme Court;  
7 however, the Court denied the defendant's Petition.

8 A double jeopardy claim is a claim regarding error of law. See *Castillo v.*  
9 *Kincheloe*, 43 Wn. App. 137, 141, 715 P.2d 1358 (1986). Errors of law are not  
10 reviewable by the trial court under CrR 7.8. *Robinson* 153 Wn.2d 689 at 695-96.  
11 Assuming arguendo this court finds it has jurisdiction to review the defendant's double  
12 jeopardy claim, under CrR 7.8, the court should find it properly sentenced the defendant  
13 and his claim is without merit.  
14

15  
16 The double jeopardy clause prevents a defendant from being punished more  
17 than once, under the same statute, for the same "unit of prosecution." *Jensen*, 164  
18 Wn.2d at 949, *citing State v. Westling*, 145 Wn.2d 607, 610, 40 P.3d 669 (2002). The  
19 court looks to the statute at issue in order to determine the "unit of prosecution." *Id*  
20 (*internal citations omitted*). If the statute is ambiguous, the court considers the  
21 legislative history behind the statute. *Id* (*internal citations omitted*).  
22

23 "[T]he solicitation statute punishes the act of engaging another to commit a  
24 crime." *Jensen*, at 950. Solicitation is an inchoate crime that punishes the "preparatory  
25 conduct without regard to whether the contemplated crime actually occurs. *Id*. The  
26 legislative purpose behind criminalizing solicitation is not to deter a person from  
27 committing the contemplated crime; "[r]ather, the solicitation statute aims to deter a  
28  
29

1 person from *enticing another person* to commit a crime.” *Id.*, at 953 (*citing Varnell*, 162  
2 Wn.2d at 169) (*emphasis added*). Therefore, the unit of prosecution for the crime of  
3 solicitation centers on the number of “enticements” rather than on the number of  
4 victims. *Jensen*, at 954-55 (stating this rule was an affirmation of the Court’s holding in  
5 *Varnell*).<sup>2</sup>  
6  
7

8 A person is punished more severely, under the solicitation statute, when he or  
9 she entices more than one person to commit a crime because, with each person  
10 solicited, the risk is increased that the crime will actually be carried out. The court in  
11 *Jensen* stated:

12  
13 [i]n view of the harm the solicitation statute punishes, it is not incongruous to  
14 punish more severely a person who entices four people in four separate  
15 conversations to commit a single murder than one who entices one person to  
16 commit four murders in a single transaction. Four separate enticements produce  
17 more of the harm the solicitation statute aims to prevent. Separate enticements  
18 are more blameworthy because they increase the risk a completed crime will  
19 occur by exposing several people rather than one to the corrupting influence of  
20 the enticement.

21 - (*Jensen*, at 954).

22 To be sure, a person commits only one “enticement” (or one unit of prosecution)  
23 when he or she solicits a group, at the same time, to commit the same crime. *Jensen*,  
24 at 958, *citing see e.g. State v. Schleifer*, 99 Conn. 432, 434, 121 A. 805 (1923) (stating

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25 <sup>2</sup> In *Varnell*, the defendant was convicted of five counts of Solicitation to Commit Murder. These  
26 convictions stemmed from the defendant asking his co-worker to kill his wife (in exchange for money) and  
27 then asking an undercover agent to kill his ex-wife, her two parents, and her one brother (in exchange for  
28 money). *Varnell*, 162 Wn.2d at 167. The Court vacated all but two convictions. *Id.*, at 170-71 (finding one  
29 unit of prosecution applied to the defendant’s solicitation of his co-worker and one unit of prosecution  
applied to the defendant’s solicitation of the undercover agent).

1 a paradigmatic case of solicitation occurs when "a person on a platform incites a crowd  
2 to engage in criminal conduct"). However, what begins as one "enticement" to a group,  
3 may evolve into multiple "enticements" to individuals, if the defendant goes on to  
4 individually solicit members of the group. *Id.*, at 958 (stating an individual meeting with a  
5 "crime partner" can constitute a "fresh enticement").  
6

7  
8 In *Jensen*, the defendant asked a fellow inmate to kill four members of his family.  
9 The inmate told an officer about the defendant's proposal. Posing as the inmate's  
10 "crime partner," the officer and the inmate met with the defendant, together, to discuss  
11 the defendant's proposal. Later, the defendant met with the officer, alone, to discuss  
12 the officer carrying out the proposal, alone. *Id.* at 946. The State charged the  
13 defendant with four counts of solicitation, based on the number of intended victims.  
14

15 Reaffirming its holding in *Varnell*, the Court said the proper inquiry was not the  
16 number of victims, but the number of enticements. *Id.*, at 946. The court found the  
17 defendant engaged in one enticement when he solicited his fellow inmate. *Id.*, at 958.  
18 The defendant's meeting with both the inmate and the officer was a continuation of the  
19 first enticement because the officer was acting as the inmate's "crime partner." *Id.* The  
20 defendant engaged in a "fresh enticement," however, when he met with the officer,  
21 alone. *Id.*  
22

23  
24 In the present case, there was no evidence that Jordan Spry and Michael ("Kit")  
25 Spry were at any time "crime partners." Similarly, there was no evidence that the  
26 defendant solicited Jordan and Kit as a "team" to kill his wife. Rather, the testimony at  
27 trial proved the defendant "enticed" both Jordan and Kit *separately* as he continued to  
28  
29

1 seek-out someone to kill his wife. The following excerpts from trial demonstrate the fact  
2 that the defendant solicited Jordan Spry and Kit Spry, individually, to murder his wife.  
3

4 Jordan: ...eventually, you know, [the defendant] was like, you know, Well, if  
5 you got there and something bad is to happen to her, you know, I'll  
6 give you \$5,000...if she happens to not survive, I'll give you  
7 another 5,000...I was like, So you're telling me, you know, you'll  
8 give me like \$10,000 to kill her? And he's like, "Yeah"...

...I believed he would have actually given me the money.

9 State: Did you contact Jean at that point?

10 Jordan: Immediately.

11 ...

12 Jordan: ...if he's offering me money to do this and I'd only known him for a  
13 couple weeks, I don't know who else he was offering money to do  
14 it.

15 ...

16 State: [Y]ou said there was a – a point – a point in time where the  
17 defendant stopped talking to you about hurting his wife and/or  
18 having you kill his wife for him. How did that occur?...

19 Jordan: I had told him just to stop, that, you know, it's – I didn't want to deal  
20 with it, I'm done with it, I'm steppin' out, this is, you know, it's way  
21 too much.

22 State: Did you make it clear to him that you weren't gonna do those things  
23 for him?

24 Jordan: Yes, I made it perfectly clear...

25 State: That was when he stopped.

26 Jordan: Yes. He stopped talking to me at that point about that type of stuff.

27 - (RP 370-71, 374, 402-03, *emphasis added*).  
28  
29

1 Kit: ...Even in *our* very first conversation [the defendant] made  
2 statements that it was bad enough that if something could be done  
3 about her, he'd be glad to do it, which I initially took as just being  
4 guys talking.

5 ...

6 Kit: ...[A]s the conversations became more familiar, *we'd* spend more  
7 time or he'd had more to drink or whatever, he would add  
8 eventually it was...he said, It'd be just another 5,000, he says, I'd  
9 just get him to flat F-in' kill her...

10 I discounted it initially and thought it was just talk. But it didn't stop.  
11 I didn't act on it, so I didn't take it too seriously. But it didn't stop...

12 ...

13 State: Did he make an indication to *you* specifically about doing  
14 something in payment?

15 Kit: Yes.

16 State: How'd he do that?

17 Kit: ...[T]he offer was open to *me*, as well. You know, if I wanted to  
18 and could use the money...If I could use the money, you know, I'm  
19 serious.

20 ...

21 State: Was he specific about what it was he wanted *you* to do when he  
22 was saying he wanted the whole thing over with?

23 Kit: Well, either beat – either beat or killed, either one. It's just did *you*  
24 want 5,000 or did you want 10,000.

25 - (RP 416, 418, 419-20, *emphasis added*).

26 The defendant clearly enticed more than one person to brutally assault and/or to  
27 murder his wife. With each person he enticed, the risk increased that the crime would  
28 actually be carried out. This is exactly the type of conduct that the legislature has found  
29 should be punished more severely, under the solicitation statute. The defendant's  
30 solicitations of Jordan and Kit were clearly separate units of prosecution. Therefore,

1 the double jeopardy clauses of both the Federal Constitution and Washington  
2 Constitution were not implicated when the trial court imposed consecutive sentences for  
3 Counts One and Two. Neither conviction should be vacated.  
4

5  
6 **2. The trial court did not abuse its discretion when it denied the defendant's**  
7 **motion for a mistrial.**

8  
9 The defendant claims the trial court erred when it denied the defendant's motion  
10 for a mistrial. The defendant moved for a mistrial after Kit Spry blurted out a statement  
11 during direct examination. The defendant did not raise this issue in his direct appeal;  
12 however, he did raise the issue in his Petition for Review with the Supreme Court. The  
13 Court denied the defendant's Petition. For the following reasons, the defendant's claim  
14 is without merit.  
15

16 The court's ruling on a motion for mistrial is reviewed for abuse of discretion.  
17 *State v. Lewis*, 130 Wn.2d 700, 707, 927 P.2d 235 (1996); *see also State v. Luvene*,  
18 127 Wn.2d 690, 704, 903 P.2d 960 (1995) (noting the "high degree of deference" given  
19 to trial court in its decision to deny a mistrial). A trial court "should grant a mistrial only  
20 when the defendant has been so prejudiced that nothing short of a new trial can insure  
21 that the defendant will be tried fairly." *Lewis*, 130 Wn.2d at 707 (citing *State v. Johnson*,  
22 124 Wn.2d 57, 76, 873 P.2d 514 (1994)).  
23

24  
25 The trial court's ruling on a motion for a mistrial does not, in and of itself, provide  
26 a basis for relief under CrR 7.8. In order to prevail in a CrR 7.8 motion for relief from  
27 judgment, based on a denial of a motion for mistrial, the trial court's decision must have  
28 implicated one of the five bases for relief under CrR 7.8(b) (to wit: mistakes, newly  
29

1 discovered evidence, fraud, void judgment, or any other reason justifying relief from  
2 judgment). CrR 7.8(b)(5) ("any other reason justifying relief from judgment") is not a  
3 "catchall" for any allegation that is not addressed by CrR 7.8(b)(1)-(4). *State v. Gomez-*  
4 *Florencio*, 88 Wn. App. 254, 257, 945 P.2d 228 (1997). The trial court may not grant  
5 relief from judgment for any reason other than that which is authorized under CrR 7.8.  
6  
7 *Gomez-Florencio*, 88 Wn. App. at 257.

8  
9 In the present case, during direct examination of Kit Spry, the State asked Mr.  
10 Spry if he had talked to the police about Mr. Constance. (RP 435). Kit Spry responded  
11 with the following statement:

12  
13 Kit: [y]es, the sheriffs. There may have been police also. I know there  
14 were sheriffs there one of the times. There were police – I don't  
15 know if it was the police or the sheriffs that came in that evening  
16 that he had the woman trapped in his bedroom and wouldn't let her  
17 out.

18 State: Okay – thank you, Mr. Spry.

19 - (RP 436).

20 Defense counsel immediately moved the court to strike Kit Spry's statement. (RP  
21 436-37). The court responded with the following instruction to the jury:

22 Court: [A]ny additional comments by the witness should be stricken, you  
23 should disregard them.

24 - (RP 437).

25  
26 Following defense counsel's objection and the trial court's instruction, Kit Spry  
27 did not offer any further unsolicited testimony on this topic. The State did not ask Kit  
28  
29

1 Spry any further questions regarding this statement. Defense counsel did not ask Kit  
2 about this statement during cross-examination. The State did not reference Kit Spry's  
3 statement during closing argument.  
4

5 The defendant later moved for a mistrial. The trial court denied the defendant's  
6 motion, finding the State had not solicited the impermissible statement, the State  
7 cautioned the witness to not make the statement, the State did not follow-up with any  
8 related questions, and the jury was promptly instructed to disregard Kit's statement.  
9 (RP 601-02).  
10

11 Assuming arguendo, this court finds it has jurisdiction under CrR 7.8 to review the  
12 defendant's claim regarding the trial court's denial of his motion for a mistrial, the court  
13 should find it did not abuse its discretion in denying the defendant's motion. First, the  
14 trial court did not let the objectionable statement into evidence; instead, the court  
15 instructed the jury to disregard the statement. Jurors are presumed to follow  
16 instructions to disregard improper evidence. *State v. Russell*, 125 Wn.2d 24, 84, 882  
17 P.2d 747 (1994). In addition, neither the State nor the defendant elicited any other  
18 testimony regarding this statement. Also, neither Kit Spry nor any other witness  
19 referenced this statement again during any other portion of testimony.  
20  
21

22 The defendant has not established this singular utterance substantially influenced  
23 the jury's verdict. Further, the defendant has not established that the trial court abused  
24 its discretion in concluding the defendant could still receive a fair trial, after this  
25 statement was stricken from the record. For these reasons, this court should find no  
26 error occurred and the defendant's claim is without merit.  
27  
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1  
2  
3 **3. The trial court did not err when it instructed the jury as to the definition of**  
4 **recklessness.**

5 In his CrR 7.8 motion the defendant alleges instruction No. 22 was erroneous.  
6  
7 Instruction No. 22 defined recklessness (for the purpose of Count Four: Solicitation to  
8 Commit Assault in the Second Degree).

9 In instruction no. 20, Assault in the Second Degree was defined as follows:

10 A person commits the crime of Assault in the Second Degree when he  
11 intentionally assaults another and thereby recklessly inflicts substantial bodily  
12 harm.

13 - (Instruction no. 20, Appendix B).

14 In instruction no. 22, "recklessness" was defined as follows:

15 [a] person is reckless or acts recklessly when he or she knows of and disregards  
16 a substantial risk that a wrongful act may occur and the disregard of such  
17 substantial risk is a gross deviation from conduct that a reasonable person would  
18 exercise in the same situation.

19 Recklessness is also established if a person acts intentionally or knowingly.

20 - (Instruction no. 22, Appendix C).<sup>3</sup>

21 The defendant alleges instruction no. 22 improperly conflated two separate mens  
22 rea elements that must be proven by the State in order to find the defendant guilty of  
23 Solicitation to Commit Assault in the Second Degree (to wit: intent and recklessness).

24 The defendant relies on the court's holding in *State v. Hayward* to support his  
25

26  
27 <sup>3</sup> In Appendix D, the State has provided the court with the following additional instructions that were  
28 provided to the jury: Instruction no. 14 (defining intent); Instruction no. 19 (to convict the defendant of  
29 Solicitation to Commit Assault in the Second Degree); Instruction no. 21 (defining assault); Instruction no.  
23 (defining substantial bodily injury); Instruction no. 24 (defining Attempted Assault Second Degree).

1 argument. *State v. Hayward*, 152 Wn. App. 632, 217 P.3d 354 (2009). The defendant  
2 did not object to this instruction at the trial court. Also, the defendant did not raise this  
3 issue in his direct appeal. The defendant *did* raise this issue in his Petition for Review  
4 with the Supreme Court; however, the Court denied the defendant's Petition. For the  
5 reasons set forth below, the defendant's argument is without merit.  
6  
7

8 An alleged error in jury instructions must be objected to at the trial court in order  
9 to preserve the issue for appeal. *State v. Scott*, 110 Wn.2d 682, 685-86, 757 P.2d 492  
10 (1988). "No error can be predicated on the failure of the trial court to give an  
11 instruction when no request for such an instruction was ever made." *Scott*, 110 Wn.2d  
12 at 686, *citing State v. Kroll*, 87 Wn.2d 829, 843, 558 P.2d 173 (1976).  
13

14 An exception to this rule arises when a party alleges manifest error in an  
15 instruction that affects a constitutional right. *McKague*, 159 Wn. App. at 507. This  
16 exception is a "narrow one," which affords review only of "certain constitutional  
17 questions." *Scott*, at 687, (citing Comment (a), RAP 2.5). It is the defendant's burden  
18 to make a showing that manifest error occurred at the trial court. See *State v. Sibert*,  
19 168 Wn.2d 306, 316, 230 P.3d 142 (2010). If the defendant cannot make this showing,  
20 then a non-preserved error is not ripe for review by the appellate court. *Scott*, at 689.  
21

22 Manifest error may exist if an instruction erroneously creates a mandatory  
23 presumption. *McKague*, at 507. A mandatory presumption is an error of law that  
24 relieves the State of its burden of proof and, thereby, implicates the defendant's due  
25 process rights. *Id*; *Scott*, at 688 n.5.  
26  
27  
28  
29

1  
2 In the present case, the defendant did not object to the instruction defining  
3 "recklessness" (instruction no. 22) at the time of trial. Therefore, any alleged error has  
4 been waived. If this court finds the "error" in jury instruction no. 22 gives rise to a  
5 manifest error affecting a constitutional right, then it necessarily finds an error of law.  
6 Errors of law are not reviewable by the trial court under CrR 7.8. *Robinson*, at 695-96.

7  
8 Assuming for the sake of argument this court has jurisdiction under CrR 7.8 to  
9 review errors of law, the court should find instruction no. 22 was not erroneous pursuant  
10 to *State v. Keend*. 140 Wn. App. 858, 166 P.3d 1268 (2007).

11 The defendant in *Keend* was charged with Assault in the Second Degree. The  
12 jury was given an instruction defining recklessness that mirrored the instruction  
13 provided in our case, to wit: "[r]ecklessness also is established if a person acts  
14 intentionally or knowingly." *Keend*, 140 Wn. App. at 862. Division Two found this  
15 instruction was not erroneous because the "to convict" instruction clearly instructed the  
16 jury that the mens rea element of "intentionally" related to the act of assault, while the  
17 mens rea element of "recklessness" clearly related to the result (substantial bodily  
18 harm).  
19  
20

21 In July of 2008, the legislature amended WPIC 10.03 (which defines  
22 "recklessness"). *Hayward*, 152 Wn. App. at 644. WPIC 10.03 was amended in order to  
23 conform more closely with 9A.08.010(1)(c) (the statute in which recklessness is  
24 defined). The revised WPIC 10.03 stated, "[When recklessness [as to a particular  
25 [result][fact]] is required to establish an element of a crime, the element is also  
26  
27  
28  
29

1 established if a person acts [intentionally] [or] [knowingly] [as to that [result] [fact]].]"  
2  
3 *Hayward*, 152 Wn. App. at 644; 11 WPIC 10.03, at 209 (2008).

4 The defendant in *Hayward* was charged with Assault in the Second Degree. The  
5 jury was given an instruction defining recklessness that mirrored the pre-amended  
6 version of WPIC 10.03 (it also mirrored the instruction that was provided to the jury in  
7 *Keend*). The court found the instruction defining recklessness was erroneous because it  
8 did not sufficiently mirror the language in amended WPIC 10.03. *Hayward*, at 645.

9  
10 In *Hayward*, the court did not state its holding was retroactive. Further, the court  
11 did not state its holding overruled the court's prior decision in *Keend*. Rather, in  
12 *Hayward*, the court simply noted it decided *Keend* prior to the amendment of WPIC  
13 10.03. *Id.*

14  
15 In the instant case, trial was held between February 25, 2008 and February 28,  
16 2008, prior to the July 2008 amendment of WPIC 10.03. Consequently, the court's  
17 holding in *Keend* controls here. The jury in our case was provided with a definition of  
18 recklessness that mirrored the definition that was provided to the jury in *Keend*.  
19 Division Two found this instruction was proper in *Keend*; therefore, the instruction was  
20 also proper in our case.

21  
22 Also, reviewing the instructions as a whole, there was no risk that the jury in our  
23 case improperly conflated the two separate and distinct mens rea elements of Assault  
24 in the Second Degree. *Compare Keend*, at 682. Therefore, any *potential* error was  
25 harmless. Instruction no. 20 (which defined "assault") clearly instructed the jury that the  
26 mens rea element of "intentionally" related to the act of assault, while the mens rea  
27  
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29

1 element of "recklessness" clearly related to the result (substantial bodily harm).  
2  
3 (Appendix B). In addition, the jury was provided with a separate definition of assault  
4 (Instruction no. 21), a separate definition of substantial bodily injury (Instruction no. 23);  
5 and separate definition of intent (Instruction no. 14). (Appendix D). The instructions  
6 here were clear and they comported with the instructions that the court found were  
7 properly given in *Keend*. For each of these reasons, the defendant's argument is  
8 without merit.  
9

10  
11 **4. The trial court did not err when it did not provide an instruction regarding**  
12 **"true threats"**.

13  
14 The defendant was charged with three counts of Solicitation to Commit Murder in  
15 the First degree and one count of Solicitation to Commit Assault in the Second Degree.  
16 In his CrR 7.8 motion, the defendant claims the court erred because it did not provide a  
17 jury instruction that defined "true threats." The defendant cites *State v. Kilburn* as  
18 authority. *State v. Kilburn*, 151 Wn.2d 36, 54, 84 P.3d (2004). The defendant did not  
19 propose a true threat instruction at the time of trial. Also, the defendant did not raise  
20 this issue in his direct appeal. The defendant *did* raise this issue in his Petition for  
21 Review. The Court denied the defendant's petition.  
22

23  
24 The defendant waived any claim of error regarding the trial court's failure to give  
25 a "true threat" instruction because he did not request a "true threat" instruction at the  
26 time of trial. *Scott*, 110 Wn.2d at 685-86. Further, this is a claim of error of law. The  
27  
28  
29

1 trial court does not have jurisdiction to review errors of law under CrR 7.8. *Robinson*, at  
2 695-96.  
3

4 Assuming arguendo, the court finds this claimed error is manifest error affecting  
5 a constitutional right and assuming the court finds it has jurisdiction under CrR 7.8, the  
6 court should find it did not err when it failed to give a "true threat" instruction.  
7

8 The courts have held a "true threat" instruction may be required when a  
9 defendant is charged with harassment, pursuant to RCW 9A.46.020. *State v. Kilburn*,  
10 151 Wn.2d at 54; *State v. Schaler*, 169 Wn.2d 274, 236 P.3d 858 (2010). A true threat  
11 is "a statement made in a context or under such circumstances wherein a reasonable  
12 person would foresee that the statement would be interpreted as a serious expression  
13 of intention to inflict bodily harm upon or to take the life of another person." *Schaler*,  
14 169 Wn.2d at 283, (quoting *Kilburn*, at 42-43). Under RCW 9A.46.020, a person is  
15 guilty of harassment if:  
16

17 (a) Without lawful authority, the person knowingly threatens:  
18

19 (i) To cause bodily injury immediately or in the future to the person threatened or  
20 to any other person; or

21 (ii) To cause physical damage to the property of a person other than the actor; or

22 (iii) To subject the person threatened or any other person to physical  
23 confinement or restraint; or

24 (iv) Maliciously to do any other act which is intended to substantially harm the  
25 person threatened or another with respect to his or her physical or mental health  
26 or safety; and

27 (b) The person by words or conduct places the person threatened in reasonable  
28 fear that the threat will be carried out. "Words or conduct" includes, in addition to  
29 any other form of communication or conduct, the sending of an electronic  
communication.

1  
2 - (RCW 9A.46.020).

3 The First Amendment and the Fourteenth Amendment of the Washington  
4 Constitution protect free speech. "True threats;" however, are not protected speech.  
5 *Schaler*, at 283. There is no requirement under the harassment statute that the  
6 offender "intends," by his or her words or conduct, to place the person threatened in  
7 reasonable fear that the threat will be carried out. When a defendant is charged with  
8 harassment, a "true threat" instruction is necessary so that the defendant's speech is  
9 criminalized only if the jury finds the defendant intended (or "truly threatened"), by his  
10 words or conduct, to place the person threatened in reasonable fear that the threat will  
11 be carried out. *Id.*

12  
13  
14 There has been no finding by the courts that a "true threat" instruction is required  
15 when the defendant is charged with Solicitation to Commit Murder in the First Degree or  
16 Solicitation to Commit Assault in the Second Degree.<sup>4</sup> The reason a "true threat"  
17 instruction is not required when the defendant is charged with either of these crimes is  
18 patently clear on the face of the statutes. Unlike the harassment statute or the bomb  
19 threat statute, the solicitation statute includes the mens rea element of intent.  
20

21 For example, the "to convict" instruction for Solicitation to Commit Murder in the  
22 First Degree provides in pertinent part:  
23

24 [t]o convict the defendant of the crime of criminal solicitation as charged in Count  
25 1, each of the following elements of the crime must be proved beyond a  
26 reasonable doubt:

27  
28 <sup>4</sup> In his motion, the defendant cites only to cases in which the defendant was charged with harassment or  
29 bomb threats in order to support his argument that a "true threat" instruction was required in this case.  
Defendant's Motion to Vacate Under CrR 7.8, p. 76-80.

1 (1) That on or between January 15, 2007 and April 10, 2007, the defendant  
2 offered to give money or other thing of value to Michael Spry to engage in  
3 specific conduct;

4 (2) That such giving or offering was done with the **intent** to promote or facilitate  
5 the commission of the crime of Murder in the First Degree;

6 (3) That the specific conduct of the other person would constitute the crime of  
7 Murder in the First Degree or would establish complicity of the other person in  
8 the commission or attempted commission of the crime of Murder in the First  
9 Degree if such crime had been attempted or committed; and

10 (4) That the acts occurred in the State of Washington.

11 - (Instruction no. 9, Appendix E, *emphasis added*).

12 Similarly, the "to convict" instruction for Solicitation to Commit Assault in the  
13 Second Degree provides:

14 [t]o convict the defendant of the crime of criminal solicitation as charged in Count  
15 4, each of the following elements of the crime must be proved beyond a  
16 reasonable doubt:

17 (1) That on or between March 28, 2007 and April 1, 2007, the defendant offered  
18 to give money or other thing of value to Zachary Brown to engage in specific  
19 conduct;

20 (2) That such giving or offering was done with the **intent** to promote or facilitate  
21 the commission of the crime of Assault in the Second Degree;

22 (3) That the specific conduct of the other person would constitute the crime of  
23 Assault in the Second Degree if such crime had been attempted or committed;  
24 and

25 (4) That the acts occurred in the State of Washington.

26 - (Instruction no. 19, Appendix F, *emphasis added*).

27 To convict the defendant of Solicitation to Commit Murder in the First Degree or  
28 Solicitation to Commit Assault in the Second Degree a jury must find the defendant  
29

1 "intended" that his words would promote or facilitate the crimes of Murder in the First  
2 Degree or Assault in the Second Degree. Because the statutes require a finding of  
3 criminal intent, the statutes do not criminalize constitutionally protected speech. For  
4 this same reason, there is no need for an additional "true threat" instruction in order to  
5 convict the defendant of either Solicitation to Commit Murder in the First Degree or  
6 Solicitation to Commit Assault in the Second Degree.  
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9 For these reasons, the trial court did not err when it failed to give a "true threat"  
10 instruction in this case. A "true threat" instruction here would have been superfluous.  
11

12 **Conclusion**  
13

14 For each of the foregoing reasons, the State respectfully requests the court  
15 DENY the defendant's motion to vacate and/or motion for relief from judgment.  
16

17 Respectfully submitted this 17 day of August, 2011.  
18

19  
20   
21 Anthony F. Golik, WSBA #25172  
22 Prosecuting Attorney  
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**APPENDIX A**

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IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON  
IN AND FOR THE COUNTY OF CLARK

STATE OF WASHINGTON,  
Plaintiff,  
v.  
DINO J CONSTANCE  
Defendant.

**AMENDED  
INFORMATION**

No. 07-1-00843-8  
(CCSO 07-5635)

COMES NOW the Prosecuting Attorney for Clark County, Washington, and does by this inform the Court that the above-named defendant is guilty of the crime(s) committed as follows, to wit:

**COUNT 01 - SOLICITATION TO COMMIT MURDER IN THE FIRST DEGREE -  
9A.32.030(1)(a) /9A.28.030(2)/10.99.020**

That he, DINO J CONSTANCE, in the County of Clark, State of Washington, between January 15, 2007 and April 10, 2007, with intent to promote or facilitate the commission of the crime of Murder in the First Degree, did offer to give money or another thing of value to another person, to-wit: Michael Spry, 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, to wit: he offered money or other things of value to Michael Spry, with the intent that Michael Spry or another commit the crime of Murder in the First Degree of a person known as Jean Koncos, where Murder in the First Degree is to act, with a premeditated intent to cause the death of another person and thereafter cause the death of the person; in violation of RCW 9A.28.030 (1) and RCW 9A.32.030(1)(a), contrary to the statutes in such cases made and provided, and against the peace and dignity of the State of Washington.

And further, that this crime was committed by one family or household member against another, and that this is domestic violence offense as defined by RCW 10.99.020 and within the meaning of RCW 9.41.040. [DV]

This crime is a "most serious offense" pursuant to the Persistent Offender Accountability Act (RCW 9.94A.030(28), RCW 9.94A.505(2)(a)(v) and RCW 9.94A.570).

**COUNT 02 - SOLICITATION TO COMMIT MURDER IN THE FIRST DEGREE -  
9A.32.030(1)(a) /9A.28.030(2)/10.99.020**

That he, DINO J CONSTANCE, in the County of Clark, State of Washington, between January 15, 2007 and April 10, 2007, with intent to promote or facilitate the commission of the crime of Murder in the First Degree, did offer to give money or another thing of value to another person,

1 to-wit: Jordan Spry, to engage in specific conduct which would constitute such crime or which  
2 would establish complicity of such other person in its commission or attempted commission had  
3 such crime been attempted or committed, to wit: he offered money or other things of value to  
4 Jordan Spry, with the intent that Jordan Spry or another commit the crime of Murder in the First  
5 Degree of a person known as Jean Koncos, where Murder in the First Degree is to act, with a  
6 premeditated intent to cause the death of another person and thereafter cause the death of the  
7 person; in violation of RCW 9A.28.030 (1) and RCW 9A.32.030(1)(a), contrary to the statutes in  
8 such cases made and provided, and against the peace and dignity of the State of Washington.

9 And further, that this crime was committed by one family or household member against another,  
10 and that this is domestic violence offense as defined by RCW 10.99.020 and within the meaning  
11 of RCW 9.41.040. [DV]

12 This crime is a "most serious offense" pursuant to the Persistent Offender Accountability Act  
13 (RCW 9.94A.030(28), RCW 9.94A.505(2)(a)(v) and RCW 9.94A.570).

14 **COUNT 03 - SOLICITATION TO COMMIT MURDER IN THE FIRST DEGREE -**  
15 **9A.32.030(1)(a) /9A.28.030(2)/ 10.99.020**

16 That he, DINO J CONSTANCE, in the County of Clark, State of Washington, between April 13,  
17 2007 and May 7, 2007, with intent to promote or facilitate the commission of the crime of Murder  
18 in the First Degree, did offer to give money or another thing of value to another person, to-wit:  
19 Ricci Castellanos, to engage in specific conduct which would constitute such crime or which  
20 would establish complicity of such other person in its commission or attempted commission had  
21 such crime been attempted or committed, to wit: he offered money or other things of value to  
22 Ricci Castellanos, with the intent that Ricci Castellanos or another commit the crime of Murder  
23 in the First Degree of a person known as Jean Koncos, where Murder in the First Degree is to  
24 act, with a premeditated intent to cause the death of another person and thereafter cause the  
25 death of the person; in violation of RCW 9A.28.030 (1) and RCW 9A.32.030(1)(a), contrary to  
26 the statutes in such cases made and provided, and against the peace and dignity of the State of  
27 Washington.

28 And further, that this crime was committed by one family or household member against another,  
29 and that this is domestic violence offense as defined by RCW 10.99.020 and within the meaning  
of RCW 9.41.040. [DV]

This crime is a "most serious offense" pursuant to the Persistent Offender Accountability Act  
(RCW 9.94A.030(28), RCW 9.94A.505(2)(a)(v) and RCW 9.94A.570).

**COUNT 04 - SOLICITATION TO COMMIT ASSAULT IN THE SECOND DEGREE -**  
**9A.36.021(1)(a) /9A.28.030(2)/ 10.99.020**

That he, DINO J CONSTANCE, in the County of Clark, State of Washington, between March  
28, 2007 and April 1, 2007, with intent to promote or facilitate the commission of the crime of  
Assault in the Second Degree, did offer to give money or another thing of value to another  
person, to-wit: Zachary Brown, 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, to wit: he offered money or other  
things of value to Zachary Brown, with the intent that Zachary Brown or another commit the  
crime of Assault in the Second Degree of a person known as Jean Koncos, where Assault in the  
Second Degree is to intentionally assault another person and thereby did recklessly inflict  
substantial bodily harm on the person; in violation of RCW 9A.28.030 (1) and

1 RCW 9A.36.021(1)(a), contrary to the statutes in such cases made and provided, and against  
2 the peace and dignity of the State of Washington.

3 And further, that this crime was committed by one family or household member against another,  
4 and that this is domestic violence offense as defined by RCW 10.99.020 and within the meaning  
5 of RCW 9.41.040. [DV]

6 This crime is a "most serious offense" pursuant to the Persistent Offender Accountability Act  
(RCW 9.94A.030(28), RCW 9.94A.505(2)(a)(v) and RCW 9.94A.570).

7 ARTHUR D. CURTIS  
8 Prosecuting Attorney in and for  
9 Clark County, Washington

Date: August 9, 2011

10 BY: \_\_\_\_\_  
11 Anthony F. Golik, WSBA #25172  
12 Deputy Prosecuting Attorney

<b>DEFENDANT: DINO J CONSTANCE</b>			
<b>RACE: W</b>	<b>SEX: M</b>	<b>DOB: 9/12/1959</b>	
<b>DOL: CONSTDJ417OK WA</b>		<b>SID: WA22407872</b>	
<b>HGT: 509</b>	<b>WGT: 170</b>	<b>EYES: BLU</b>	<b>HAIR: BRO</b>
<b>WA DOC:</b>		<b>FBI: 601697TA0</b>	
<b>LAST KNOWN ADDRESS(ES):</b>			
H - 9500 NE 116TH AV, VANCOUVER WA 98661			

## **APPENDIX B**

INSTRUCTION NO. 20

A person commits the crime of Assault in the Second Degree when he intentionally assaults another and thereby recklessly inflicts substantial bodily harm.

## APPENDIX C

INSTRUCTION NO. 22

A person is reckless or acts recklessly when he or she knows of and disregards a substantial risk that a wrongful act may occur and the disregard of such substantial risk is a gross deviation from conduct that a reasonable person would exercise in the same situation.

Recklessness also is established if a person acts intentionally or knowingly.

**APPENDIX D**

INSTRUCTION NO. 21

An assault is an intentional touching or striking or cutting or shooting of another person, with unlawful force, that is harmful or offensive regardless of whether any physical injury is done to the person. A touching or striking or cutting or shooting is offensive if the touching or striking or cutting or shooting would offend an ordinary person who is not unduly sensitive.

INSTRUCTION NO. 23

Substantial bodily harm means bodily injury that involves a temporary but substantial disfigurement, or that causes a temporary but substantial loss or impairment of the function of any bodily part or organ, or that causes a fracture of any bodily part.

INSTRUCTION NO. 14

A person acts with intent or intentionally when acting with the objective or purpose to accomplish a result which constitutes a crime.

INSTRUCTION NO. 24

A person commits the crime of attempted Assault in the Second Degree when, with intent to commit that crime, he or she does any act which is a substantial step toward the commission of that crime.

## **APPENDIX E**

INSTRUCTION NO. 9

To convict the defendant of the crime of criminal solicitation as charged in Count 1, each of the following elements of the crime must be proved beyond a reasonable doubt:

(1) That on or between January 15, 2007 and April 10, 2007, the defendant offered to give money or other thing of value to Michael Spry to engage in specific conduct;

(2) That such giving or offering was done with the intent to promote or facilitate the commission of the crime of Murder in the First Degree;

(3) That the specific conduct of the other person would constitute the crime of Murder in the First Degree or would establish complicity of the other person in the commission or attempted commission of the crime of Murder in the First Degree if such crime had been attempted or committed; and

(4) That the acts occurred in the State of Washington.

If you find from the evidence that each of these elements has been proved beyond a reasonable doubt, then it will be your duty to return a verdict of guilty.

On the other hand, if, after weighing all the evidence you have a reasonable doubt as to any one of these elements, then it will be your duty to return a verdict of not guilty.

**APPENDIX F**

INSTRUCTION NO. 19

To convict the defendant of the crime of criminal solicitation as charged in Count 4, each of the following elements of the crime must be proved beyond a reasonable doubt:

(1) That on or between March 28, 2007 and April 1, 2007, the defendant offered to give money or other thing of value to Zachary Brown to engage in specific conduct;

(2) That such giving or offering was done with the intent to promote or facilitate the commission of the crime of Assault in the Second Degree;

(3) That the specific conduct of the other person would constitute the crime of Assault in the Second Degree if such crime had been attempted or committed; and

(4) That the acts occurred in the State of Washington.

If you find from the evidence that each of these elements has been proved beyond a reasonable doubt, then it will be your duty to return a verdict of guilty.

On the other hand, if, after weighing all the evidence you have a reasonable doubt as to any one of these elements, then it will be your duty to return a verdict of not guilty.