SUMMARY
September 24, 2020

2020C0A140

No. 16CA1941, *People v. Manzanares* — Crimes — Criminal Solicitation; Constitutional Law — Fifth Amendment — Double Jeopardy — Multiplicity

In a matter of first impression, a division of the court of appeals concludes that the unit of prosecution in the solicitation statute, section 18-2-301(1), C.R.S. 2019, is based upon each person solicited, not the number of victims targeted. The division affirms the judgment of conviction.

COLORADO COURT OF APPEALS **2020COA140**

Court of Appeals No. 16CA1941
Jefferson County District Court No. 15CR3099
Honorable Laura A. Tighe, Judge

The People of the State of Colorado,

Plaintiff-Appellee,

v.

Donald Joseph Manzanares, Jr.,

Defendant-Appellant.

JUDGMENT AFFIRMED

Division VII
Opinion by JUDGE CASEBOLT*
Fox and Navarro, JJ., concur

Announced September 24, 2020

Philip J. Weiser, Attorney General, Gabriel Olivares, Assistant Attorney General, Denver, Colorado, for Plaintiff-Appellee

Megan A. Ring, Colorado State Public Defender, Dayna Vise, Deputy State Public Defender, Denver, Colorado, for Defendant-Appellant

*Sitting by assignment of the Chief Justice under provisions of Colo. Const. art. VI, § 5(3), and § 24-51-1105, C.R.S. 2019.

¶ 1 Defendant, Donald Joseph Manzanares, Jr., appeals the judgment of conviction entered on jury verdicts finding him guilty of two counts of solicitation to commit witness retaliation and two counts of solicitation to commit witness intimidation. Addressing a matter of first impression, we conclude that the unit of prosecution in the solicitation statute, section 18-2-301(1), C.R.S. 2019, is based on each person solicited, not the number of victims targeted. We affirm the judgment of conviction.

I. Background

¶ 2 Manzanares's girlfriend, S.M., reported to law enforcement authorities that he had physically assaulted her. Specifically, S.M. reported that Manzanares strangled her and threatened to kill her while in her car, and then ran away. S.M. said that Manzanares later returned to her house, forced his way in, put his hand over her mouth, poked her in the chest, and threatened to kill her if she called the police. In a case not at issue here, Manzanares was charged with, and ultimately convicted of, burglary, two counts of second degree assault, and two counts of felony menacing.

¶ 3 While awaiting trial in jail, Manzanares allegedly solicited two other inmates, Marcus Martinez and Salvador Avitia, to intimidate

S.M. to prevent her from testifying, to retaliate against S.M. for reporting him to the police, and to murder S.M. to prevent her from testifying at his trial. Accordingly, the People charged Manzanares with the following six counts in this case:

1. Solicitation of first degree murder involving the solicitation of Martinez between January 1, 2015, and April 23, 2015.
2. Solicitation of retaliation against a witness involving the solicitation of Martinez between January 1, 2015, and April 23, 2015.
3. Solicitation of intimidation of a witness involving the solicitation of Martinez between January 1, 2015, and April 23, 2015.
4. Solicitation of first degree murder involving the solicitation of Avitia between March 17, 2015, and March 23, 2015.
5. Solicitation of retaliation against a witness involving the solicitation of Avitia between March 17, 2015, and March 23, 2015.

6. Solicitation of intimidation against a witness involving the solicitation of Avitia between March 17, 2015, and March 23, 2015.

¶ 4 A jury acquitted Manzanares of the solicitation for murder charges but convicted him of the other four solicitation counts. The trial court sentenced him to a cumulative prison term of eighteen years to run consecutively to the sentence he received in the burglary, second degree assault, and felony menacing case.

II. Analysis

¶ 5 Manzanares makes four arguments on appeal. He asserts that (1) he was deprived of his right to counsel and to be present at a critical stage of the proceeding; (2) the trial court erred by admitting Avitia's handwritten notes into evidence; (3) the trial court erred by admitting Avitia's comment that Manzanares was a "piece of shit"; and (4) two of his convictions are multiplicitous, in violation of principles of double jeopardy. We are not persuaded by any of these arguments.

A. Right to Counsel and Presence

¶ 6 Manzanares contends that he was deprived of his right to counsel and to be present at a critical stage of the proceeding. The

People argue that Manzanares waived this argument because defense counsel repeatedly acquiesced in procedures the trial court fashioned to cure the alleged error, thereby waiving Manzanares's appellate claim. We agree with the People.

1. Additional Facts

¶ 7 On the first day of trial, defense counsel asserted that Manzanares's constitutional rights to due process and a fair trial had been violated when the prosecution scheduled and conducted a hearing the previous week before a duty judge during which the prosecution offered use immunity to a witness who was scheduled to testify against Manzanares. Defense counsel informed the court that neither she nor Manzanares had been present at this ex parte proceeding and she had learned about the hearing only after it had been concluded. She argued that this was a critical stage of the proceeding during which she and Manzanares were entitled to be present.

¶ 8 The trial court then asked defense counsel what relief she was requesting, and counsel replied that she wanted a transcript of the hearing so she could ascertain what had occurred. She also

asserted that a mistrial might be warranted "if we have a jury sworn before I get this information."

¶ 9 The trial court proposed the following:

> I think that as a professional courtesy at the very least that the defense should have been given a heads up here, but I don't find that the omission in doing that has harmed Mr. Manzanares. I think that what we can do to cure this situation is, A, to get the transcript, and B, if [the witness] is willing to speak to [defense counsel] then they will be permitted an opportunity to do so, so the People need to tell the defense when you plan to call [the witness]. What we will then do is we will have the sheriffs bring [the witness] over. He can sit in the jury box. [Defense counsel] can conduct a conference with him. I'm going to give you up to 15 minutes with him, all right, and everybody else is going to be cleared out of the courtroom to allow them an opportunity to do that and then once they – if [the witness is] willing to conduct – to have this conference with you, you can observe his demeanor. You can ascertain whether the [People's] proffer is in the ballpark.

¶ 10 Although the prosecution's position was that the defense did not have standing to be present for the hearing, the prosecution agreed to provide the transcript. After sorting out the logistics of getting the transcript expedited to defense counsel, the trial court

asked, "Anything else on that issue?" Defense counsel responded, "Not on that issue, Judge."

¶ 11 The next day, the trial court asked defense counsel whether she had received the transcript. The court also reiterated the procedure it had put into place for defense counsel to speak with the witness in the event the prosecution was planning to call the witness to testify. Defense counsel requested a printed copy of the transcript but raised no further objections. The transcript was provided.

¶ 12 Then, while the court was handling preliminary matters on the third day of trial, the prosecution informed the trial court and defense counsel that the prosecution would not be calling the witness. Although defense counsel responded that she would be calling the witness, ultimately this witness did not testify for either party at trial.

2. Applicable Law

¶ 13 "Waiver . . . is 'the intentional relinquishment of a known right or privilege.'" *People v. Rediger*, 2018 CO 32, ¶ 39 (citation omitted). A "'waived' claim of error presents nothing for an appellate court to review." *People v. Bryant*, 2013 COA 28, ¶ 13 n.2

(quoting *People v. Rodriguez*, 209 P.3d 1151, 1160 (Colo. App. 2008)).

¶ 14 In *People v. Tee*, 2018 COA 84, ¶¶ 23, 30, a division of this court considered a situation analogous to the circumstances here and held that a waiver had occurred when defense counsel said "[n]othing else" following "an ongoing, interactive exchange" with the trial court regarding a claim that two jurors had engaged in predeliberation. The *Tee* division held that defense counsel's statement amounted to a waiver of the issue for appellate purposes. *Id.* at ¶ 42 ("So, as to Tee's contention [regarding] predeliberation . . . , we have nothing to review.").

¶ 15 The division in *Tee* explained that, while defense counsel's approval of the jury instructions in *Rediger* could have resulted from inadvertence, Tee's counsel — like "everyone involved" — had recognized the "specter of predeliberation." *Id.* at ¶¶ 30-31; *see also People in Interest of A.V.*, 2018 COA 138M, ¶ 17 (waiver occurred when defense counsel responded affirmatively to the prosecution's clarification of its understanding of the defendant's stipulation on causation).

3. Analysis

¶ 16 Here, after learning that a witness immunity hearing before a duty judge had taken place without defense counsel's or Manzanares's presence, counsel's requested relief was to be provided with a transcript of the hearing. Defense counsel worked with the trial court in ensuring she would get the transcript, and ultimately received it. Like in *Tee*, the record shows that the trial court and defense counsel were involved in an ongoing, interactive exchange. *See Tee*, ¶¶ 23, 42. Because defense counsel agreed to the trial court's curative procedure and requested nothing further, Manzanares waived any claim that he was deprived of his right to counsel and to be present at a critical stage of the proceeding. Because of the waiver, we have "nothing to review." *Id.* at ¶ 42.

¶ 17 We therefore reject this contention.

B. Evidentiary Rulings

¶ 18 Manzanares next contends that the trial court reversibly erred by admitting two items of evidence during the testimony of the prosecution's witness, Avitia. We first address the admission of Avitia's handwritten notes and then turn to the admission of Avitia's testimony that Manzanares was a "piece of shit."

1. Additional Facts

¶ 19 In opening statement, defense counsel averred that Avitia "is a snitch," and explained that a snitch is someone who gives information to the government to seek a benefit for himself. Defense counsel also said that Avitia "at this particular time had everything to gain and nothing to lose for making up this story, for providing this information to the government to benefit him."

¶ 20 The prosecution called Avitia to testify as its first witness. Avitia testified that he spent about four to five weeks in the Jefferson County jail around March of 2015. During that time, he met Manzanares, who told him about the case against Manzanares. First, Manzanares showed Avitia police reports about his case and told Avitia that he was facing significant time in prison. Manzanares then told him that he did not want S.M. to go to court. Ultimately, Manzanares told Avitia that when Avitia got out of jail, "[g]et ahold of your people to take care of this bitch so she don't go to court."

¶ 21 Avitia testified that when he asked Manzanares "like, what is it he wanted done," Manzanares "pretty much said just take care of

the bitch and take care of the bitch means kill the bitch." He also said Manzanares was offering him money to do it.

¶ 22 Avitia also testified that Manzanares gave him a detailed map of S.M.'s house and told him that "around 10 o'clock at night [S.M.] puts the kids to bed. She goes outside to smoke a cigarette. That's when it would be easier and would be the best time." Avitia said that he was concerned about the kids, and asked Manzanares, "[W]hat if one of the kids wake up?" Avitia said Manzanares's response was that, at first, he just "gave [Avitia] almost a dead look," that he just "stared at [Avitia]" and "shook his head." Manzanares then said, "[H]e didn't care. Take care of them too. Do what [you] got to do, just make sure she does not show up in court."

¶ 23 The prosecutor then asked Avitia, "How did you feel about that statement, particularly about the kids?" Defense counsel objected on relevance grounds, but the trial court overruled the objection, because it went to Avitia's motivation to come forward. Avitia testified:

> That pissed me off. That drew the line for me. That kind of – I changed the whole perspective of me, myself being a convict, me and myself,

> I'm sitting here in these clothes. It changed everything. That's my way of thinking and living, it just, how can somebody be like that with their own kids. To me, yeah, what I'm doing ain't right neither and my code it's just – I'm being a snitch right now too and I – but I'm telling the truth and it was to save her and possibly the kids, and to me he's – he's a piece of shit.

Defense counsel objected again and moved to strike the "last statement, [Avitia's] opinion of Mr. Manzanares." The trial court overruled the objection.

¶ 24 Defense counsel's cross-examination of Avitia focused on Avitia's motivation to accuse Manzanares and benefits Avitia received in return for his testimony.

¶ 25 On redirect examination, the People sought to admit several pages of handwritten notes that Avitia had taken regarding his conversations with Manzanares. Avitia testified that he wrote things down to help him remember what had happened and when it happened. The People initially sought to introduce the notes as a recorded recollection pursuant to CRE 803(5).

¶ 26 Defense counsel objected, arguing the notes were inadmissible on the grounds of relevance, prejudice, and hearsay. Defense counsel also asserted that the notes were inadmissible under CRE

404(b). The People responded that the notes were also admissible as a prior consistent statement following impeachment of Avitia's credibility.

¶ 27 The trial court excised reference to other acts under CRE 404(b) and then admitted the balance of the notes into evidence based on both CRE 803(5) and "on the basis of rehabilitating the witness's credibility." Because we later conclude that the court's admission was correctly based on rehabilitating the witness's credibility, we need not address the applicability of CRE 803(5). *See People v. Everett*, 250 P.3d 649, 653 (Colo. App. 2010) (noting that, on review, a trial court's decision to admit evidence of other acts may be supported by the court's stated rationale or by any ground supported by the record).

2. Standard of Review

¶ 28 We review a trial court's evidentiary rulings for an abuse of discretion. *People v. Elmarr*, 2015 CO 53, ¶ 20. A trial court abuses its discretion when its ruling is manifestly arbitrary, unreasonable, or unfair, *Campbell v. People*, 2019 CO 66, ¶ 21, or where it is based on an erroneous view of the law, *People v. Wadle*, 97 P.3d 932, 936 (Colo. 2004).

¶ 29 Because these evidentiary claims were preserved, we review any error for harmlessness. *See, e.g.*, *People v. Curren*, 2014 COA 59M, ¶ 49. Under the harmless error standard, "reversal is required only if the error affects the substantial rights of the parties." *Hagos v. People*, 2012 CO 63, ¶ 12.

3. Notes Admissible as Prior Consistent Statements

¶ 30 Manzanares asserts that the trial court erred by admitting the notes as a recorded recollection, prior consistent statement, or pursuant to any other hearsay exception, and that they improperly bolstered Avitia's testimony. We conclude that the notes qualify for admission as prior consistent statements, and thus reject his contention.

a. Applicable Law

¶ 31 Prior consistent statements may "be used for rehabilitation when a witness' credibility has been attacked, as such statements are admissible outside CRE 801(d)(1)(B)." *People v. Eppens*, 979 P.2d 14, 21 (Colo. 1999).

¶ 32 Determining "how much of a prior consistent statement is admissible is based upon its relevance and probative use," which "turns on the scope of impeachment and the attack on the witness's

credibility." *People v. Miranda*, 2014 COA 102, ¶ 15 (quoting *People v. Elie*, 148 P.3d 359, 362 (Colo. App. 2006)). If the impeachment goes only to specific facts, then only prior consistent statements regarding those specific facts are relevant and admissible. *Id.* If, however, "the impeachment is general and not limited to specific facts . . . the jury should have access to all the relevant facts, including consistent and inconsistent statements." *Id.* at ¶ 16 (quoting *Elie*, 148 P.3d at 362).

b. Analysis

¶ 33 Consistent with defense counsel's opening statement that Avitia had "made the story up," defense counsel's cross-examination of Avitia focused on Avitia's motivation to accuse Manzanares, which was that he "had everything to gain and nothing to lose." In other words, defense counsel launched a general and sustained attack on Avitia's credibility that was not limited to specific facts.

¶ 34 Under these circumstances, we discern no abuse of discretion in the trial court's decision to admit the prior consistent statements. *See id.* at ¶¶ 18-20 (the trial court did not abuse its discretion by admitting the entire video recording of a witness's

pretrial interview where the defense had made a general attack on the witness's credibility); *Elie*, 148 P.3d at 362-63 (same). And while Manzanares contends on appeal that the court should not have admitted the notes as substantive evidence, he has not argued that the court erred by failing to give a limiting instruction, nor did he ask for one at trial, nor did he object to the exhibit containing the notes being given to the jury. Accordingly, we reject this contention. *See Miranda*, ¶¶ 13-20 (division affirmed admission of entire video recording as rehabilitation evidence, even though the trial court had admitted it in part as substantive evidence).

4. "Piece of Shit"

¶ 35 Manzanares asserts that the trial court erred by refusing to strike Avitia's opinion that Manzanares was a "piece of shit" and that reversal is required. We disagree that reversal is required.

¶ 36 While a better course would have been for the trial court to strike the "piece of shit" comment, we cannot conclude that this passing, gratuitous remark substantially influenced the verdict or affected the fairness of the trial proceedings. It consisted of one statement in a multiple-day trial, the statement was not repeated during closing argument, and the jury was adequately instructed

concerning its role in evaluating witness testimony. *See Curren*, ¶ 49.

C. Unit of Prosecution for Solicitation

¶ 37 Manzanares was convicted of four counts: one count of solicitation to commit retaliation against a witness or victim and one count of solicitation to commit intimidation of a witness or victim related to his solicitation of Avitia, and the same two counts related to his solicitation of Martinez. He asks us to vacate one count of solicitation to commit retaliation and to vacate one count of solicitation to commit intimidation. The People respond that that the unit of prosecution under the solicitation statute authorizes prosecution of separate counts for each separate person solicited and that the facts presented established all the separately charged offenses. We agree with the People.

1. Standard of Review

¶ 38 The parties agree that this issue is preserved. The parties also agree that "[w]hether an indictment is multiplicitous and, if so, whether double jeopardy concerns warrant reversal are questions of law reviewed de novo." *People v. Rhea*, 2014 COA 60, ¶ 7.

2. Applicable Law

¶ 39 Under the Double Jeopardy Clauses of the United States and Colorado Constitutions, a person may not be placed in jeopardy twice for the same crime. U.S. Const. amend. V; Colo. Const. art. II, § 18; *Woellhaf v. People*, 105 P.3d 209, 214 (Colo. 2005). The Double Jeopardy Clauses protects not only against a second trial for the same offense, but also against multiple punishments for the same offense. *Woellhaf*, 105 P.3d at 214. However, because the General Assembly defines offenses, it may authorize multiple punishments for the same criminal conduct without violating the Double Jeopardy Clauses if the conduct violates different statutes. *Id.*

¶ 40 "Multiplicity is the charging of multiple counts and the imposition of multiple punishments for the same criminal conduct." *Id.*; *see also Quintano v. People*, 105 P.3d 585, 589 (Colo. 2005). One type of multiplicity "involves a series of repeated acts that are charged as separate crimes even though they are part of a continuous transaction and therefore actually one crime." *Woellhaf*, 105 P.3d at 214. The question in these situations is whether the General Assembly has defined the crime as a

continuous course of conduct. *Id.* at 214-15. A second type of multiplicity arises when a statute provides for alternative ways of committing the same offense, and the prosecution charges a defendant with multiple counts for committing the crime using more than one of the alternative methods. *Id.* at 215. We deal here with the first type of multiplicity allegation.

¶ 41 To determine whether charges are multiplicitous, we employ a two-prong test. *Id.* First, we determine the legislatively prescribed "unit of prosecution." *Id.* The unit of prosecution is the manner in which a criminal statute permits a defendant's conduct to be divided into discrete acts for purposes of prosecuting multiple offenses. *Id.*; *People v. Borghesi*, 66 P.3d 93, 98 (Colo. 2003). To determine the unit of prosecution, we look exclusively to the statute. *Borghesi*, 66 P.3d at 98.

¶ 42 Second, we review the facts to determine whether the defendant's conduct constituted factually distinct offenses. *Woellhaf*, 105 P.3d at 215, 219; *Quintano*, 105 P.3d at 592 ("[W]e look to all the evidence introduced at trial to determine whether the evidence on which the jury relied for conviction was sufficient to support distinct and separate offenses.").

3. Analysis

a. Unit of Prosecution for Solicitation

¶ 43 The parties disagree as to what constitutes the unit of prosecution for solicitation. Manzanares argues that the unit of prosecution is each person who is the target of a solicited crime. Therefore, although he solicited two separate people to retaliate against and intimidate S.M., because she was just one target, only one unit of prosecution was proved for each retaliation and intimidation offense. The People disagree and argue that, under the plain language of the solicitation statute, the unit of prosecution is each person solicited, even if there is one common target.

¶ 44 The solicitation statute provides as follows:

> Except as to bona fide acts of persons authorized by law to investigate and detect the commission of offenses by others, a person is guilty of criminal solicitation if he or she commands, induces, entreats, or otherwise attempts to persuade *another person*, or offers his or her services or another's services to a third person, to commit a felony, whether as principal or accomplice, with intent to promote or facilitate the commission of that crime, and under circumstances strongly corroborative of that intent.

§ 18-2-301(1) (emphasis added).

¶ 45 In construing a statute, we must determine and effectuate the intent of the General Assembly. *People v. Longoria*, 862 P.2d 266, 270 (Colo. 1993). Whenever possible, we discern such intent from the plain and ordinary meaning of the statutory language. *People v. Davis*, 794 P.2d 159, 180 (Colo. 1990).

¶ 46 Section 18-2-301(1) speaks of soliciting "another person" to commit a crime. The plain meaning of the word "another" is singular, that is, (1) different or distinct from the one first considered; (2) some other; or (3) being one more in addition to one or more of the same kind. Webster's Third New International Dictionary 89 (2002). This connotes a distinct offense for each discrete person solicited.

¶ 47 In addition, the use of the singular "person" in the statute suggests a like result. Consider, for example, the difference between this statute and the conspiracy statute, which defines a crime as occurring when one "agrees with another person *or persons*" to commit an offense. § 18-2-201(1), C.R.S. 2019 (emphasis added). The language "or persons" is not included in the solicitation statute.

¶ 48 Manzanares nevertheless contends that *Melina v. People*, 161 P.3d 635 (Colo. 2007), forecloses this result. We disagree.

¶ 49 In *Melina*, the prosecution charged the defendant with solicitation to commit a murder and presented evidence that the defendant had spoken to numerous people about committing the offense. The supreme court concluded that the prosecution had charged and tried its case on the theory that the defendant was involved in a single transaction of solicitation, *id.* at 637, 639-40, and thus the jury was not required unanimously to determine which specific person the defendant had solicited. So, no unanimity instruction to the jury was necessary.

¶ 50 Of greater import here, the court specifically declined to answer the question on which it had originally granted certiorari: What constitutes the unit of prosecution for solicitation? *Id.* at 641 n.5. In fact, the *Melina* court explicitly stated that it was leaving the question open: "We do not decide whether the People could have charged separate counts of solicitation for each person with whom Melina was alleged to have spoken." *Id.* at 638 n.3.

¶ 51 Hence, *Melina* does not support Manzanares's contention. But the concurrence by Justice Coats in *Melina* does support the

People's contention. Justice Coats wrote that the solicitation statute "simply cannot be construed to include, as a single offense, disparate acts, soliciting different people, on different occasions, over a lengthy span of time, and with different inducements." 161 P.3d at 642 (Coats, J., concurring in the judgment only). Furthermore, the *Melina* concurrence not only pointed out its disagreement "that . . . all of the acts of solicitation evidenced at trial were part of a single criminal transaction," *id.* at 644 (Coats, J., concurring in the judgment only), but also highlighted the majority's "unwilling[ness] to find that the various acts of solicitation committed by the defendant over the period included in the charge constitute[d] no more than a single crime of solicitation," *id.* at 642 (Coats, J., concurring in the judgment only).

¶ 52 Other Colorado cases dealing with the solicitation statute do not provide direct assistance in deciding this issue. But in *People v. Hood*, 878 P.2d 89 (Colo. App. 1994), a division of this court affirmed the defendant's two convictions for solicitation, in both of which the defendant solicited different persons to kill a single victim. In discussing whether the two offenses would merge into the defendant's conviction for conspiracy, the court noted that

"[o]nce the inducement is made, with the intent to promote the underlying crime and under circumstances that corroborate that intent, the solicitation is complete even if the person solicited does nothing at all." *Id.* at 95.

¶ 53 There is no direct legislative history concerning the statute, but the purpose of a statute is an indication of legislative intent. *See People v. Thoro Prods. Co., Inc.*, 70 P.3d 1188, 1195 (Colo. 2003). Each time a solicitor entreats another person to kill a single potential victim, that victim is placed at greater risk because with each subsequent entreaty, there is an increased likelihood that one of the persons solicited will fulfill the solicitation. Protecting the victim and deterring criminal behavior among different people would seem to be best accomplished by recognizing that independent solicitations of two different people to separately kill the same victim constitute two crimes, not one. *See Borghesi*, 66 P.3d at 102-03 (purpose of robbery statute -- that is, protecting the people robbed more than the property taken -- means that "each person who is subject to force and intimidation constitutes a victim of a separate offense under our robbery statutes"; therefore, two

robberies occurred for a single taking of property in the joint control of two store clerks).

¶ 54 While we have found little case law from other jurisdictions directly on point on this issue, there is support for this view.

¶ 55 In *State v. Varnell*, 170 P.3d 24, 25 (Wash. 2007), the court confronted whether a defendant's single conversation with two different persons to kill four victims amounted to five units of prosecution for solicitation to commit murder. There, the defendant solicited his employee to kill his wife. *Id.* The employee declined the offer and decided to contact the wife, who contacted the police. *Id.* The police asked the employee to call the defendant to tell him she had met someone who would agree to kill the wife. *Id.* Later, an undercover detective contacted the defendant, identifying himself as an acquaintance of the employee. *Id.* Arrangements were made for the defendant and the detective to meet. *Id.* During that conversation, the defendant asked the detective to kill his wife, her parents, and her brother. *Id.*

¶ 56 The defendant was charged with five counts of soliciting murder: one count was based on the conversation with the employee; the other four counts originated from the single

conversation the defendant had with the undercover detective. *Id.* The jury found the defendant guilty of all five counts. *Id.* The defendant did not appeal his conviction for soliciting the employee.

¶ 57 Washington's solicitation statute provides that "[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." *Id.* at 26.

¶ 58 The court concluded that this statute focuses on a person's intent to promote or facilitate a crime, rather than the crime to be committed. *Id.* It stated that "[t]he number of victims is secondary to the statutory aim, which centers on the agreement on solicitation of a criminal act. The statute requires only that the solicitation occur." *Id.* It then concluded that the statute "criminalizes the act of engaging another to commit a crime. The unit of prosecution is centered on each solicitation regardless of the number of crimes or objects of the solicitation." *Id.*

¶ 59 The court held that the defendant's solicitation that the detective commit four murders constituted only a single unit of prosecution because there was only a single conversation occurring

at the same time, in the same place, and for the same motive. *Id.* at 27. Hence, three of the four counts related to the conversation with the detective violated principles of double jeopardy, and the court vacated three of the defendant's four convictions at issue. *Id.* But because the employee and the detective were two separate persons who were solicited to kill the wife in separate conversations, in separate places, and at separate times, two of the five counts of solicitation were not barred by double jeopardy. *Id.*

¶ 60 We understand the court in *Varnell* to have emphasized the importance of soliciting "another person" at different times and places in determining the unit of prosecution. A later case from the same court, *State v. Jensen*, 195 P.3d 512 (Wash. 2008), confirms this understanding.

¶ 61 There, the defendant was convicted of four counts of solicitation of first degree murder, one for each targeted victim. *Id.* at 514. On appeal, the court vacated two of the four convictions, noting that the facts showed the defendant solicited a single inmate to kill three persons, which continued when he met with an undercover detective posing as the inmate's accomplice. *Id.* at 519-21. But because the defendant offered the detective an

additional sum to kill a completely different person during his conversation, the evidence supported two units of prosecution. *Id.* at 521.

¶ 62 Given the similarity of the Washington statute to that of Colorado, we view these two cases as support for our statutory interpretation. We therefore reject Manzanares's contentions concerning the unit of prosecution.

b. Factual Examination

¶ 63 Having determined the unit of prosecution, we must consider whether the conduct in question constituted two factually distinct offenses. *Woellhaf*, 105 P.3d at 215; *Quintano*, 105 P.3d at 592.

¶ 64 In *Quintano*, the court concluded that, for sexual assault on a child charges, "each act of touching cannot suffice as a separate offense." *Quintano*, 105 P.3d at 592. The *Quintano* court described factors tending to establish whether sexual contacts are factually distinct and support more than one unit of prosecution. *See id.* at 591. These factors include inquiry into whether the acts charged have occurred at different times, were separated by intervening events, or occurred at the same place; whether there are separate instances of volitional acts involving a new volitional departure, or if

the behavior evidences that the defendant reached a "fork in the road," leading to a fresh impulse; and whether the defendant had time to reflect before embarking on a "new outrage." *Id.* at 591-92. We conclude that some of those factors are relevant here.

¶ 65 First and foremost, the acts of solicitation were directed to two separate individuals and at different times. While all three men were incarcerated together, and the dates of the asserted offenses charged in the indictment overlapped, it does not appear that they occurred while all three men were together. Further, Martinez was a cellmate of Manzanares, but Avitia was not. There was a clear volitional departure from Manzanares's efforts enlisting the help of Avitia and his efforts enlisting the help of Martinez.

¶ 66 We also consider whether the prosecution treated the acts as legally separable. *Id.* at 592. Starting with the indictment and continuing throughout trial, all the way to the six separate jury verdict forms breaking out the charged offenses, the prosecution made it clear that it was prosecuting two distinct sets of crimes. Like the People's presentation of their case in *Quintano*, the prosecution here "treated the defendant's acts as legally separable." *Id.* Unlike in *Melina*, where the prosecution's theory was that the

defendant was trying to get *someone* to kill the victim, here the facts presented by the prosecution made it clear that Manzanares had separately solicited Martinez and Avitia.

¶ 67 We conclude that the evidence supports separate and distinct sets of crimes, and that the charges were not multiplicitous. Hence, there was no double jeopardy violation.

III. Conclusion

¶ 68 The judgment is affirmed.

JUDGE FOX and JUDGE NAVARRO concur.