TEXAS COURT OF APPEALS, THIRD DISTRICT, AT AUSTIN

NO. 03-18-00424-CR

The State of Texas, Appellant

v.

Jason Dean Hunter, Appellee

FROM THE 207TH DISTRICT COURT OF COMAL COUNTY
NO. CR2016-704A, THE HONORABLE DIB WALDRIP, JUDGE PRESIDING

O P I N I O N

This is the State's pretrial appeal of an order quashing one count of an indictment. *See* Tex. Code Crim. Proc. art. 44.01(a)(1). Jason Dean Hunter stands charged in Count I of an indictment with the first-degree felony offense of solicitation to commit capital murder based on text messages sent to his girlfriend E.E. requesting that she obtain an abortion.[1] *See* Tex. Penal Code §§ 15.03 (defining offense of criminal solicitation), 19.03(a)(8) (defining offense of capital murder where individual murdered is under age ten). Hunter filed a motion to quash contending that the indictment fails to allege an offense and violates his constitutional rights. The district court signed an order granting the motion and dismissing Count I, which the State challenges in six issues. We will affirm the order quashing Count I of the indictment.

[1] Counts II through IV of the indictment charge Hunter with committing the felony offenses of sexual assault, aggravated assault with a deadly weapon, and stalking against E.E. *See* Tex. Penal Code §§ 22.02(a)(2), .011(a)(1), 42.072(b). Only the offense alleged in Count I is at issue here.

BACKGROUND

Count I of Hunter's indictment charges him with the offense of solicitation to commit capital murder. *See id*. §§ 15.03(a) ("A person commits an offense if, with intent that a capital felony or felony of the first degree be committed, he requests, commands, or attempts to induce another to engage in specific conduct that, under the circumstances surrounding his conduct as the actor believes them to be, would constitute the felony or make the other a party to its commission"), (d) (defining criminal solicitation offense as first-degree felony), 19.03(a)(8) (defining offense of capital murder as person's commission of "murder as defined under section 19.02(b)(1) and . . . the person murders an individual under 10 years of age"). Solicitation to commit capital murder is punishable by imprisonment for up to ninety-nine years or life. *See id*. §§ 12.32(a), 15.03(d) (defining criminal solicitation offense as first-degree felony). The indictment alleges that Hunter committed the charged offense by sending a series of offensive, expletive-filled text messages to E.E., and quotes excerpts of those texts. Count I states:

COUNT I

> THE GRAND JURORS, duly selected, organized, sworn and empaneled as such for the County of Comal, State of Texas, at the July term, A.D., 2016, of the 207TH Judicial District Court for said County, upon their oaths present in and to said Court that in the county and state aforesaid, and before the presentment of this indictment, on or about the 20th day of October, 2015, JASON DEAN HUNTER, hereinafter styled Defendant, did then and there, with intent that a capital felony be committed, to-wit: the murder of the unborn child of [E.E.], a child under the age of ten years of age, did request, command or attempt to induce the said [E.E.] to engage in specific conduct to cause the death of said unborn child, to-wit: the said JASON DEAN HUNTER by text messages stated:
>
> "I don't have a kid mother f—r you have a kid try and give birth to it see what happens";

"so I will see you soon mother f—r . . . when you turn around one night when its really dark I'm going to be right there . . . Well [E.] like I said to you on the phone I'm going to enjoy doing it to you and you have no idea what I am. Anyway I sent your mother news of you and your text talking about the baby so she knows you're pregnant have a nice evening bitch. And you and your family are not raising this kid guaranteed. . . . if you had any clue does monsters under your f—g bed would look like f—g daisies if you knew what I'm capable of. [E.] you and never give birth I promise you";

"I'll cut that f—g baby i love you I'll put in a f—g blender important your f—g throat if you f—g lied to me again you f—g piece of shit"; or

"Hey I told you not having that kid and I meant it bitch. You are not allowed to have my child it's not going to happen get used to that fact now. I will go to the ends of this f—g earth to make sure you don't";

"I want to make this loud and clear your life is going to be miserable I do not want you raising that kid with his f—g nose turned up the way yours is it's not going to happen in the only way that would be assure if if you didn't have that kid ... Its my baby as well and yes you are going to kill it I promise you you won't make it through a full term";

"quit trying to buy time [E.] ... And time is running out a lot quicker than you think it is . . . come one [E.] it's just a little maggot inside of you. I know you are a sloth also but get up. While you're sleeping I'll be busy . . . You can go get it done or I will have you do it yourself you pick . . . Since you have chosen not to take me seriously the price for that will be paid shortly and this will be just a taste of what is to come";

"It's just a matter of a little pill right now not too much longer it's a matter of putting a shop vac up your c—t and sucking the body parts out . . . Time is of the essence love";

"I assure you your family will not be raising our child . . . your own hand [E.] your own hand think about it . . . There's not going to be a child [E.] . . . Cuz I'm going to spend a lot of time in jail for what I'm going to do"; or

"Oh you mother f—s think you going to play me I will put every one of your f—g throats. You're going to get it now bitch you're dead . . . affecting what I'm not going to let you have the kid . . . It takes one half second to slash a throat didn't f—k with me."

[Spelling, punctuation, and typographical errors and expletives in original.].

Hunter filed a motion to quash challenging Count I contending that "it does not appear from the indictment that an offense against the law was committed" and specifically, that no legislative intent or legal precedent exists for the State to interpret his words as criminal solicitation of capital murder as alleged in Count I. *See* Tex. Code Crim. Proc. art. 27.08(1) (providing for exception to substance of indictment when "it does not appear therefrom that an offense against the law was committed by the defendant"); *see also id*. art. 1.14(b) (requiring defendant to object to defect of substance in indictment before date trial on merits commences or defendant "waives and forfeits right to object" to such defect). Hunter's motion to quash also contended that the indictment violates his due-process, equal-protection, and free-speech rights under the United States and Texas Constitutions.

The district court held a hearing on the motion and considered the parties' legal arguments.[2] After taking the matter under advisement, the district court granted the motion to quash in an order stating, "Having received the arguments of counsel and considered the applicable authorities as to whether Count I of the instant indictment properly alleges that an offense against the laws of the State of Texas was committed by the Defendant, the Court concludes, as a matter of law, it does not." The district court concluded "as a matter of law—not fact," that Hunter did not have adequate notice because the indictment "does not, and cannot—under current Texas law, sufficiently allege specific conduct that would constitute a felony offense that the Defendant solicited Ms. [E.] to commit."[3] The order noted that "[t]his specific

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[2] No testimony or exhibits were offered or admitted at the hearing on the motion to quash. During the hearing, defense counsel stated, "I'm willing to admit that those [the text messages as alleged] were [Hunter's] words for the sole purpose of him asking her to get an abortion, which is a legal act."

[3] At the hearing, the State informed the district court that E.E. did not have an abortion.

issue appears to be a matter of first impression in the State of Texas" and specified that the ruling was "based only upon state statutory grounds" and not on the constitutional arguments in the motion to quash.[4] The district court dismissed Count I and severed it into a separate cause. The court's ruling is the subject of this appeal.

DISCUSSION

The State contends that the district court erred by quashing Count I of Hunter's indictment, among other reasons, because the provisions of the criminal solicitation statute in section 15.03 of the Penal Code do not support the district court's conclusion that Hunter cannot be prosecuted because E.E., the person that Hunter solicited, cannot be prosecuted.[5]

The sufficiency of a charging instrument presents a question of law. *State v. Ross*, 573 S.W.3d 817, 820 (Tex. Crim. App. 2019); *State v. Zuniga*, 512 S.W.3d 902, 906 (Tex. Crim. App. 2017); *Smith v. State*, 309 S.W.3d 10, 13 (Tex. Crim. App. 2010). Accordingly, we review a trial court's ruling on a motion to quash de novo. *Ross*, 573 S.W.3d at

[4] The order further specified that the remaining three counts of Hunter's indictment were not affected by the ruling.

[5] The State's remaining issues contend that: (1) the homicide exceptions in section 19.06 of the Penal Code, considered in the context of the entire statute, contemplate that the mother must consent to an abortion; (2) the homicide exception in subsection 19.06(1) of the Penal Code was created to expand third parties' criminal liability for the death of an unborn child "against the wishes of the mother" and the exemption was designed to exclude "applications of the law for any action to which a pregnant woman consented, including abortion"; (3) according to the Court of Criminal Appeals, *Roe v. Wade* and its progeny presuppose that the mother's consent to an abortion is required; (4) case law indicates that Hunter could be prosecuted for soliciting E.E. to solicit a doctor to perform an involuntary abortion without the "requisite consent" of the mother under subsections 19.06(2)-(3) of the Penal Code; and (5) Hunter provided no other legitimate basis for quashing the indictment pretrial. Because it is dispositive of this appeal, we address only the State's contention that given the provisions of the criminal solicitation statute in section 15.03 of the Penal Code, the district court erred in concluding that Hunter could not be prosecuted because E.E., the person that Hunter solicited, could not be prosecuted. *See State v. Zuniga*, 512 S.W.3d 902, 906 (Tex. Crim. App. 2017) ("The trial court's ruling should be upheld if it is correct under any theory of law applicable to the case.").

820; *Zuniga*, 512 S.W.3d at 906; *Smith*, 309 S.W.3d at 13-14. We uphold the trial court's ruling if it is correct under any theory of law applicable to the case. *Zuniga*, 512 S.W.3d at 906.

We construe the Penal Code statutes addressed in this appeal by looking to their literal text and attempting to discern the fair, objective meaning of that text when it was enacted. *Lang v. State*, 561 S.W.3d 174, 179-80 (Tex. Crim. App. 2018); *Boykin v. State*, 818 S.W.2d 782, 785 (Tex. Crim. App. 1991) (noting that focus is on literal text because it is "the only definitive evidence of what the legislators (and perhaps the Governor) had in mind when the statute was enacted into law" and because "[t]here really is no other certain method for determining the collective legislative intent or purpose at some point in the past"). '"[I]f the meaning of the statutory text, when read using the established canons of construction relating to such text, should have been plain to the legislators who voted on it, we ordinarily give effect to that plain meaning.'" *Lang*, 561 S.W.3d at 180 (quoting *Boykin*, 818 S.W.2d at 785). In our interpretation of the literal text of a statute, "we must 'presume that every word in a statute has been used for a purpose and that each word, phrase, clause, and sentence should be given effect if reasonably possible.'" *Id*. (quoting *State v. Hardy*, 963 S.W.2d 516, 520 (Tex. Crim. App. 1997)). Words and phrases are read in context and construed using the rules of grammar and common usage. *Id*. Finally, if a statute's language is ambiguous or if application of the statute's plain meaning would lead to an absurd result that the Legislature could not possibly have intended, "then and only then" we may consider extra-textual factors such as executive or administrative interpretations of the statute or legislative history. *Boykin*, 818 S.W.2d at 785-86; *see Lang*, 561 S.W.3d at 180. Statutory construction is a question of law that we review de novo. *Lang*, 561 S.W.3d at 180.

Pretrial exception to indictment under article 27.08(1)

A motion to quash tests the facial validity of that indictment as a matter of law. *See*, *e.g.*, *Diruzzo v. State*, 581 S.W.3d 788, 798 (Tex. Crim. App. 2019) (citing *State v. Rosenbaum*, 910 S.W.2d 934, 948 (Tex. Crim. App. 1995) (op. on reh'g) (adopting dissenting opinion on original submission, which contended that "[a]n indictment must be facially tested by itself under the law, as a pleading")); *see also Ex parte Niswanger*, 335 S.W.3d 611, 620 (Tex. Crim. App. 2011) (Womack, J., concurring) (noting that motion to quash tests only facial validity of indictment); 42 George B. Dix & John M. Schmolesky, *Texas Practice Series: Criminal Practice and Procedure* § 26:15 (3d ed. 2011) (noting that motion to quash is traditionally regarded as "vehicle by which a challenge to a charging instrument is made").

An exception to an indictment that fails to charge an offense must be raised pretrial. *See* Tex. Code Crim. Proc. arts. 1.14(b) (requiring pretrial objection to defect of substance in indictment or defendant "waives and forfeits right to object" to such defect), 27.08(1) (authorizing "exception to substance of an indictment" when "it does not appear therefrom that an offense against the law was committed by the defendant"), 28.01(4) (providing for trial court's determination of exceptions to substance of indictment at pretrial hearing); *Ex parte Rodgers*, No. WR-89,477-01, — S.W.3d —, 2020 Tex. Crim. App. LEXIS 286, at *9-10 (Tex. Crim. App. Apr. 8, 2020) ("Because Applicant and his trial counsel raised no objection to the indictment, they may not now challenge its efficacy to invoke the jurisdiction of the district court."); *Studer v. State*, 799 S.W.2d 263, 273 (Tex. Crim. App. 1990) (concluding that defendant forfeited complaint about defect of substance in charging instrument by failing to make any pretrial objection to it). A defendant may move to quash an indictment—as Hunter did here—on the ground that it does not allege an offense, and he may seek construction of the

statute under which the prosecution is brought. *State v. Hoffman*, 999 S.W.2d 573, 574 (Tex. App.—Austin 1999, no pet.); 42 *Texas Practice Series: Criminal Practice and Procedure* § 26:29 (addressing challenge to charging instrument contesting meaning of statutory provision defining offense).

Offense of solicitation to commit capital murder

The State contends that, given the provisions of the criminal solicitation statute in section 15.03 of the Penal Code, the district court erred in concluding that Hunter could not be prosecuted because E.E., the person that Hunter solicited, could not be prosecuted. Neither party contends that this statute is ambiguous. Count I of Hunter's indictment alleges that he

> did then and there, with intent that a capital felony be committed, to-wit: the murder of the unborn child of [E.E.], a child under the age of ten years of age, did request, command or attempt to induce the said [E.E.] to engage in specific conduct to cause the death of said unborn child, to-wit: the said JASON DEAN HUNTER by text messages stated: [setting forth excerpts of text messages as to the manner and means of the commission of the alleged offense].

According to the allegations on the face of this indictment, the person solicited for the capital murder offense is E.E., and the target of the solicited capital murder is the unborn child of E.E.

The indictment defines solicitation to commit capital murder by reference to sections 15.03 and 19.03 of the Penal Code. *See* Tex. Penal Code §§ 15.03, 19.03(a)(8). Murder is committed if a person "intentionally or knowingly causes the death of an individual." *Id*. § 19.02(b)(1). Capital murder is committed, among other ways, if a person commits murder as defined in subsection 19.02(b)(1) and if the victim is "under 10 years of age." *Id*. § 19.03(a)(8); *see id*. § 19.03 (listing various ways of committing offense of capital murder). Criminal solicitation is committed "if, with intent that a capital felony or felony of the first degree be

committed, [a person] requests, commands, or attempts to induce another to engage in specific conduct that, under the circumstances surrounding his conduct as the actor believes them to be, would constitute the felony or make the other a party to its commission." *Id*. § 15.03(a); *see Jacob v. State*, 587 S.W.3d 122, 127 (Tex. App.—Houston [14th Dist.] 2019, pet. ref'd) ("A person commits a solicitation-to-commit-capital-murder offense, if with intent that a capital murder be committed, the person 'requests, commands, or attempts to induce another to engage in specific conduct that, under the circumstances surrounding [the person's] conduct as the [person] believes them to be, would constitute [capital murder] or make the other a party to its commission.'" (quoting Tex. Penal Code § 15.03(a)) (alteration in original).

Limitation in section 19.06 on chapter defining homicide offenses

Here, the charged offense of criminal solicitation required proof that the conduct Hunter solicited from E.E. would constitute capital murder. *See* Tex. Penal Code § 15.03(a); *Bien v. State*, 550 S.W.3d 180, 186 (Tex. Crim. App. 2018) (noting that criminal solicitation indictment "required proof that, under the circumstances as [defendant] believed them to be, the conduct solicited actually would constitute capital murder"); *Schwenk v. State*, 733 S.W.2d 142, 148 (Tex. Crim. App. 1987) (op. on reh'g) (affirming conviction for criminal solicitation after concluding that indictment clearly alleged specific conduct constituting capital murder).

However, as the district court correctly noted, the chapter of the Penal Code defining criminal homicide offenses, including capital murder, is subject to a limitation providing that

> [t]his chapter *does not apply* to the death of an unborn child if the conduct charged is:

(1) conduct committed by the mother of the unborn child;

(2) a lawful medical procedure performed by a physician or other licensed health care provider with the requisite consent, if the death of the unborn child was the intended result of the procedure;

(3) a lawful medical procedure performed by a physician or other licensed health care provider with the requisite consent as part of an assisted reproduction as defined by Section 160.102, Family Code; or

(4) the dispensation of a drug in accordance with law or administration of a drug prescribed in accordance with law.

Tex. Penal Code § 19.06 (emphases added); *see Lawrence v. State*, 240 S.W.3d 912, 915 (Tex. Crim. App. 2007) (noting that person who intentionally or knowingly causes two deaths, "the death of a woman and her unborn child, at any stage of gestation, commits capital murder" but that section 19.06 of homicide statute "exempts conduct committed by a woman who chooses to terminate her own pregnancy or a health care provider performing an abortion on a consenting patient"). Thus, under the plain language of subsection 19.06(1), if an unborn child's death is charged to conduct committed by that unborn child's mother, the mother's conduct does not constitute a criminal offense under chapter 19. *See* Tex. Penal Code § 19.06(1) ("[t]his chapter does not apply to the death of an unborn child if the conduct charged is: (1) conduct committed by the mother of the unborn child"). In other words, under subsection 19.06(1), the conduct solicited from E.E. as to her unborn child would not have been a criminal homicide offense because the Penal Code chapter defining homicide offenses specifically excludes application to her conduct.

Effect of subsection 15.03(c)(1) in criminal solicitation statute

The State contends that even if subsection 19.06(1) protects a mother from prosecution for her conduct, "Hunter could not rely on the fact that E.E. could not be prosecuted for the offense to bar his prosecution." At the hearing on the motion to quash, the State pointed the district court to subsection 15.03(c)(1) of the criminal solicitation statute providing "[i]t is no defense to prosecution under this section that: (1) the person solicited is not criminally responsible for the felony solicited." *Id*. § 15.03(c)(1). The State contends that under this statute, only the mother E.E., who "is not criminally responsible," is protected from criminal liability, not Hunter.

However, subsection 15.03(c)(1) refers to "the *felony* solicited." *Id*. (emphasis added). The conduct solicited from E.E. as to her unborn child would not have been a *felony*, or any homicide crime, because the Penal Code chapter defining homicide offenses specifically excludes application to her conduct. *See id*. § 19.06(1). We must presume that the inclusion of the word "felony" in the criminal solicitation statute was used purposefully. *See Lang*, 561 S.W.3d at 180 (requiring courts to "presume that every word in a statute has been used for a purpose and that each word, phrase, clause, and sentence should be given effect if reasonably possible"); 3 Norman J. Singer & J.D. Shambie Singer, *Sutherland Statutory Construction* § 59.8 (8th ed. 2018) ("Courts assume every word, phrase, and clause in a legislative enactment is intended and has some meaning and none is inserted accidentally.").

Moreover, as we have noted, the offense of criminal solicitation requires proof that, under the circumstances as the defendant believed them to be, "the conduct solicited actually would constitute capital murder." *Bien*, 550 S.W.3d at 186; *see Lawhorn v. State*,

898 S.W.2d 886, 891 (Tex. Crim. App. 1995) (noting that "legal impossibility" exists if what the actor intends to do would not constitute crime charged); *see also Sterling v. State*, Nos. 05-08-00347-CR, 05-08-00348-CR, 2012 Tex. App. LEXIS 2389, at *13 (Tex. App.—Dallas Mar. 27, 2012, pet. ref'd) (mem. op., not designated for publication) (affirming conviction for solicitation of capital murder where conduct that defendant solicited from third party was killing of defendant's pregnant wife). The Penal Code specifies that "[c]onduct does not constitute an offense unless it is defined as an offense by statute, municipal ordinance, order of a county commissioners court, or rule authorized by and lawfully adopted under a statute." Tex. Penal Code § 1.03(a).

Here, the district court correctly concluded that when the State relies on subsection 15.03(c)(1) to contend that it is "no defense" for Hunter that E.E. is "not criminally responsible for the felony solicited," the State's contention wrongly "presupposes that a *felony* was, in fact, solicited." (emphasis added).[6]

[6] The district court's order addressed the effect of subsection 15.03(c)(1), the only subsection that the State referenced in support of its "no-defense-to-prosecution" argument. *See* Tex. Penal Code § 15.03(c)(1). On appeal, the State broadens its argument to include subsections (2) and (3) and contends that the fact that E.E. "is immune from prosecution" or that "she belongs to a class of persons that by definition . . . is legally incapable of committing the offense in an individual capacity" cannot be used by Hunter as a defense to prosecution for criminal solicitation. *See id.* § 15.03(c)(2), (3) (providing that it is no defense to prosecution that: "(2) the person solicited has been acquitted, has not been prosecuted or convicted, has been convicted of a different offense or of a different type or class of offense, or is immune from prosecution; [and] (3) the actor belongs to a class of persons that by definition of the felony solicited is legally incapable of committing the offense in an individual capacity."). To the extent that the State's additional arguments as to subsections (2) and (3) are before us, we note that every subsection of 15.03(c) refers to "the felony solicited" or to a prosecution for a criminal "offense." *Id*. § 15.03(c). But as we have discussed, the conduct solicited from E.E. as to her unborn child would not have been a felony, or any homicide crime, because the Penal Code chapter defining homicide offenses specifically excludes application to her conduct. *See id*. § 19.06(1).

Additionally, Texas law supports the district court's conclusion that "[b]efore the existence, *or not*, of any 'defense' is material to the equation, an offense cognizable under the law must appear from the face of the indictment" to which that defense might apply. *See, e.g., Williamson v. State*, 356 S.W.3d 1, 27 (Tex. App.—Houston [1st Dist.] 2010, no pet.) (concluding that court's charge properly instructed jury to find elements of offense before it considered reasonable-medical-care defense, noting that such defense "only became relevant after the jury had determined from the evidence, beyond a reasonable doubt, that [defendant]'s conduct satisfied the elements of the offense and that the scalpel was a deadly weapon"). Referencing section 2.03 of the Penal Code on defenses, the district court noted that "[h]aving a defense entitles the accused to put on evidence of, and submit a charge to the jury on, the defensive issue at trial," but "[t]he non-existence of a defense at trial is of no moment in response to a pre-trial motion to quash the indictment." *See* Tex. Penal Code § 2.03(c), (d) (addressing when "issue of the existence of a defense" is submitted to jury); *see also Smith v. State*, 577 S.W.3d 548, 552 n.26 (Tex. Crim. App. 2019) (noting that statutes providing that "it is no defense to prosecution"—such as subsection 15.03(c) of the criminal solicitation statute—present "an anti-defensive issue," which "benefits the State's position in the case but is not something the indictment requires the State to prove from the outset"); *cf. Ex parte Ingram*, 533 S.W.3d 887, 894 (Tex. Crim. App. 2017) (affirming denial of relief on defendant's pretrial habeas application and concluding that "even if, in a given case, the State might need an anti-defensive issue to procure a conviction for the charged offense, that fact would not be known until the evidence in the defendant's case was presented at trial").

No nullification of subsection 15.03(c)(3) and no absurd consequences

The State contends that the district court's interpretation of subsection 15.03(c)—i.e., that no offense has been committed and that the no-defense-to-prosecution provisions in subsection 15.03(c) do not apply—would nullify subsection 15.03(c)(3). To the extent that the State's contention about subsection 15.03(c)(3) is properly before us,[7] we construe it as a complaint about an unintended or absurd consequence of the district court's construction of the statute's plain meaning. *See Boykin*, 818 S.W.2d at 785 (stating that absurd consequences exception is "a narrow exception to the plain meaning rule" of statutory construction, applicable only when "the Legislature could not *possibly* have intended" meaning of statute as read literally) (emphasis in original).

Subsection 15.03(c)(3) provides that "[i]t is no defense to prosecution under this section that: . . . (3) the actor belongs to a class of persons that by definition of the felony solicited is legally incapable of committing the offense in an individual capacity." Tex. Penal Code § 15.03(c)(3). According to the State, "the trial court could similarly say that '*no offense can be committed*[']in a § 15.03(c)(3) situation, because 'by definition of the felony solicited the actor is *legally incapable of committing the offense*.'" (emphases in original). And "a § 15.03(c)(3) situation would consequently *never survive a motion to quash*, effectively nullifying the provision and reading it out of the statute." (emphases in original). The State's contention suggests that subsection 15.03(c)(3) addresses the *solicited person's*—here E.E.'s—

[7] As we have noted, the district court's order addressed the effect of subsection 15.03(c)(1), the only subsection that the State referenced in support of its "no-defense-to-prosecution" argument. *See* Tex. Penal Code § 15.03(c)(1). On appeal, the State added arguments as to subsections 15.03(c)(2) and (3). *See* n.5.

membership in some class of persons that, by definition of the felony solicited, is incapable of committing the offense in an individual capacity. It does not.

Subsection 15.03(c)(3) addresses situations where the *defendant actor*—here Hunter—belongs to a class of persons that, by definition of the felony solicited, is legally incapable of committing the offense in an individual capacity. *Compare id.* § 15.03(c)(1)-(2) (addressing status of "person solicited"), *with id.* § 15.03(c)(3) (addressing status of "the actor"). "Actor" is defined in the Penal Code as "a person whose criminal responsibility is in issue in a criminal action." *Id*. § 1.07(a)(2) (noting additionally that "[w]henever the term 'suspect' is used in this code, it means 'actor'"). E.E.'s criminal responsibility is not an issue in this criminal action, and there is no allegation that Hunter belongs to some class of persons that by definition of the felony solicited is legally incapable of committing the offense in an individual capacity.

Further, a construction of the offense of criminal solicitation in subsection 15.03(c) requiring the defendant to have solicited from another certain conduct constituting the commission of a felony does not belie the legislative intent indicated by the statute's unambiguous words. *See id.* § 15.03(a) ("A person commits an offense if, with intent that a capital felony or felony of the first degree be committed, he requests, commands, or attempts to induce *another to engage in specific conduct that*, under the circumstances surrounding his conduct as the actor believes them to be, *would constitute the felony* or make the other a party to its commission") (emphases added).

The State contends that another consequence of the district court's statutory construction is that in a hypothetical situation one who "threaten[s] and compel[s] a mother to punch herself in the stomach against her will" to cause an abortion is not subject to a first-degree felony prosecution but that doctors who perform "nonconsensual abortions" are subject to a

capital murder prosecution. We cannot conclude that the Legislature "could not possibly have intended" to treat threats of harm and inducement to perform conduct under duress differently from "nonconsensual abortions" by certain doctors who have sworn an oath to do no harm in the practice of medicine. *See* Tex. Penal Code § 19.06 (providing that chapter defining homicide offenses does not apply to death of unborn child if conduct charged is: conduct committed by unborn child's mother; lawful medical procedure performed by physician or other licensed health care provider with requisite consent and death of unborn child was intended result of procedure; lawful medical procedure performed by physician or other licensed health care provider with requisite consent as part of assisted reproduction defined in section 160.102 of Family Code; or dispensation of drug in accordance with law or administration of drug prescribed in accordance with law).

Moreover, the Legislature could have intended for other Penal Code provisions—such as the section addressing conduct committed under duress and the section defining the offense of terroristic threat—to apply to the hypothetical conduct that the State suggests. *See id.* §§ 8.05(a) ("It is an affirmative defense to prosecution that the actor engaged in the proscribed conduct because he was compelled to do so by threat of imminent death or serious bodily injury to himself or another."), 22.07(a)(2) ("A person commits an offense if he threatens to commit any offense involving violence to any person or property with intent to: . . . (2) place any person in fear of imminent serious bodily injury."); *accord Hagen v. State*, 886 S.W.2d 889, 891 (Ark. Ct. App. 1994) (concluding that defendant who threatened to punch pregnant mother hard enough to kill her unborn child had necessarily also threatened to cause "serious physical injury" to mother within definition of first-degree "terroristic threatening" offense). An expectation that prosecutors would look to such statutes in addressing the hypothetical conduct that the State

suggests would be reasonable and not an "absurd result" of a statutory construction that "the Legislature could not *possibly* have intended." *See Boykin*, 818 S.W.2d at 785. And in fact, prosecutors in this case brought other counts against Hunter, charging him with sexual assault, aggravated assault with a deadly weapon, and stalking, as a result of his conduct toward E.E.

A "further anomaly," according to the State, is that "for non-abortion cases involving the solicited murder of a child under 10, a defendant would be subject to a first-degree felony criminal solicitation charge," despite the Penal Code provision stating that the murder of a child under ten years of age is a capital offense. *See* Tex. Penal Code § 19.03(a)(8). But the Legislature has specifically excluded conduct committed by the mother as to her unborn child from the Penal Code chapter defining homicide offenses. *Id.* § 19.06(1); *see Mims v. State*, 3 S.W.3d 923, 927-28 (Tex. Crim. App. 1999) (noting that it is "Legislature's intent to discourage the completion of criminal activity, which is evidenced by its formulation of lesser penalties for attempted offenses"); *see also* Tex. Penal Code §§ 15.03(d) (stating that solicitation offense is first-degree felony if offense solicited was capital offense or second-degree felony if offense solicited was first-degree felony), .01(d) (stating that offense of criminal attempt "is one category lower than the offense attempted"). We are not persuaded that this distinction is an "absurd result" of a statutory construction that "the Legislature could not *possibly* have intended." *See Boykin*, 818 S.W.2d at 785.

Based on current Texas law, we conclude that E.E., as the mother of her unborn child, would not have committed a homicide offense under the Penal Code if the death of her unborn child had been charged to E.E.'s own conduct. *See* Tex. Penal Code § 19.06(1). And because such conduct by E.E. would not constitute a felony (or any offense in the chapter defining homicide offenses), Hunter could not have solicited E.E. to commit conduct toward her

unborn child that would constitute capital murder. *See Bien*, 550 S.W.3d at 186 (noting that criminal solicitation indictment required proof that, under circumstances as defendant believed them to be, conduct solicited "actually would constitute capital murder"). Count I of this indictment, on its face, does not charge Hunter with the criminal offense of solicitation to commit capital murder. *Cf.* Tex. Penal Code §§ 15.03(a), 19.03(a)(8). Accordingly, we conclude that the district court did not err by granting Hunter's motion to quash Count I of the indictment charging criminal solicitation because "it does not appear therefrom that an offense against the law was committed by the defendant." *See* Tex. Code Crim. Proc. art. 27.08(1).

Having concluded that the district court did not err by quashing Count I of Hunter's indictment for failure to allege the offense of solicitation of capital murder, *see id.*, we need not reach the State's remaining issues. *See id.*; Tex. R. App. P. 47.1 (requiring courts to issue opinion that is as brief as practicable but that addresses every issue raised and necessary to final disposition of appeal); *Zuniga*, 512 S.W.3d at 906 (noting that trial court's ruling should be upheld if it is correct under any legal theory applicable to case).

CONCLUSION

We affirm the district court's order quashing Count I of the indictment.

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Jeff Rose, Chief Justice

Before Chief Justice Rose, Justices Kelly and Smith

Affirmed

Filed: May 28, 2020

Publish