**STATE OF WISCONSIN**

**C O U R T O F A P P E A L S**

DISTRICT III

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Case No. 2018 AP 651-CR

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STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

KELLY JAMES KLOSS,

Defendant-Appellant.

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# DEFENDANT-APPELLANT'S BRIEF

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**MILLER APPELLATE PRACTICE, LLC**
Attorneys for the Defendant-Appellant
By Steven L. Miller #1005582
P.O. Box 655
River Falls, WI 54022
(715) 425-9780

On appeal from the Circuit Court
of St. Croix County, Hon. Eugene Harrington,
Circuit Judge, presiding.

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## ISSUES FOR REVIEW

1. Is double jeopardy violated when one solicited crime is a lesser included of the other?

The Trial Court Answered: "Yes."

2. Is solicitation of First Degree Reckless Injury a crime under Wisconsin law?

The Trial Court Answered: "Yes."

3. Is the evidence sufficient to support "unequivocal intent" that a crime be committed when the solicited conduct could not occur without the element of surprise and defendant knowingly forewarned the alleged victims?

The Trial Court Answered: "Yes."

## STATEMENT ON ORAL ARGUMENT AND PUBLICATION

Oral argument is not requested. Publication is requested as Wisconsin has no case law addressing the issues raised in this case.

## STATEMENT OF THE CASE[1]

On November 8, 2013, Kloss was serving time in the Marathon County jail for OWI when he was released on a furlough to attend his mother's funeral. (225:43). He absconded. Prior to his incarceration Kloss resided in River Falls with his wife, Cheryl. River Falls police kept a close eye on his residence while he was missing. On September 5, 2014, an officer spoke to a man in the yard he thought may be Kloss but when questioned claimed to be Cheryl's brother. While the officer was waiting for a photo the man went back into the house. Once the photo confirmed the man was Kloss the officer called back-up, and the police forced open the door and searched. They were unable to find him. (225: 132-134). On October 10, 2014, an officer claims he saw Kloss standing by the kitchen window. (225:135). He obtained a warrant and the house was searched. Kloss was eventually found in a crawl space under the house by a police canine. (225:137-138). The police did not search for guns that day nor did they come across any. (225:147-148).

Kloss was arrested and placed in the St. Croix County Jail. He made frequent calls to his wife, all of them recorded. On October 13, 2014, Cary Rose of the St. Croix County Sheriff's Department started listening to the recorded phone calls starting with the calls Kloss made on October 11th. Rose continued monitoring the calls until October 23rd, which included the period Kloss had been moved to the Marathon County Jail. (224:34, 36; 225:199, 202).

1 The Statement of the Case and the Statement of Facts are combined.

Altogether, some 52 calls over this 12-day period had been recorded. (229; 230). At trial, the State played fourteen calls from the St. Croix County jail (224:4-6, 23-28) and four calls from the Marathon County jail. (224:28, 30, 33). A transcript of the calls from each jail was prepared prior to trial and admitted into evidence by stipulation. (225:124-125; trial exhibits 5 and 6 (record items 229 and 230)). As none of the calls played at trial were taken down by the court reporter, all references to their content will be made by citing the page number of the phone call transcripts. (222:72).

The most inculpatory evidence was two phone calls made on October 14, 2014: one at 4:00 p.m. and the other at 5:35 p.m. In the 4:00 p.m. call, Kloss ranted and raved for some time about the how the police were liars and had made-up facts supporting probable cause for the October 10th search. He then added:

> Kelly Kloss:….And one final thing, I want you to get your handgun out and your shotgun out and if a River Falls cop comes to your door again, you open fire. No warnings. You let them have it.
> Cheryl Kloss: Okay.
> Kelly Kloss: No warnings. They have no right to come into your house and break your doors down, and they're going to lie about it, then there are no rules anymore, Cheri. A cop comes to your door. Let them him have it. The shotgun holds six shells. It's semiautomatic. So after you shoot five, just stick some more in, then shoot again. Let them have it, Cheri.
> Cheryl Kloss: Gotcha
> Kelly Kloss: Blow them away.
> Cheryl Kloss: (inaudible) Gotcha
> Kelly Kloss: So between your pistol and your shotgun, you could pick off quite a few of them before they – oh, they'll run. They're all—they're all scaredy-cats anyway. Never seen such a bunch of pussy-assed motherfuckers like – like River Falls cops. But I'm going to have fun with Joshua. I'm going -- maybe I can go visit him in jail when he gets his sentence because what he did is a crime.

(230:288-289). Kloss then complained about his probation agent and went on to discuss other topics.

In the 5:35 p.m. call, Kloss brought the topic up again:

Kelly Kloss: But I'm serious, Cheri. I want you to get your shotgun out. It's fully loaded, if I remember correctly, and your .357 out. And if the cop comes to the door, you say you have till the count of two to get off my property or I'm opening fire, then you count to one and you open fire. Understand me?
Cheryl Kloss: Yes.
Kelly Kloss: You kill them. Dead. Because if you don't, they will kill you. They are going to harass you. They are going – you might as well get ready to move, Cheri. Do you know what they are going to do to you now? After you humiliate –
Cheryl Kloss: Anything they can.
Kelly Kloss: them in court, after you humiliate them in court, they aren't going to stop. They have no shame. I read all three police statements. They're all identical lies. They have no shame, Cheryl, so you might as well—
…
--get ready to move. But in the meantime, if they come to your home, you kill them dead. ….
…..
Kelly Kloss: -- but you got to do it. If you don't back these fuckers off, they're just going to keep doing it. They're going to keep kicking your doors down. Aren't you sick and tired of having to get your doors fixed?
Cheryl Kloss: Yes, I am.
Kelly Kloss: So the next time they come to the door, you walk down to the door with your gun in hand and you say you have two – until the count of two to get off my property. And you say one, and at two you shoot right through the door right into the cop, because he's no more welcome on your property than a robber. He is no different than a – than a –than a rapist or a breaker and enterer or a thief or a robber as you can see, can't you?
Cheryl Kloss: Yes.
Kelly Kloss: They are no different, so you shoot them down just like you would a mangy dog. And then you call your lawyer.
Cheryl Kloss: Gotcha
….
Kelly Kloss: You just wipe them out, Cheri. Wipe them out. I hope – I hope it doesn't happen, though, because I want Joshua for myself.

(230:335-338). (See also 229:47-48 for similar comments).

These and other related comments were a relatively small part of Kloss's vulgar ranting and rambling conversations that covered a vast number of topics, including health insurance, real estate, selling personal items, changing cellular providers, what to feed the dog, attorneys, and other financial, medical and legal issues. (223:22-23, 26-27). Kloss had been seriously injured from a beating in jail (225:74-75) and he frequently spoke of his medical, AODA, and mental health ailments.[2] His lack of adequate treatment by jail staff, for example, was a consistent theme. (225:80). Cheryl testified that Kloss was just "talking stupid" and did not take him seriously. She "went along" with his rantings and raving because otherwise he would get upset. (223:30). Many of the statements he made she knew were untrue. (223:33-37).

Kloss repeatedly remarked that he knew the calls were being monitored and recorded. (see e.g. 230:149, 218, 282, 349-350; 229: 220, 236). In some instances, he made comments directly to law enforcement as if they were listening.[3] Kloss also told his wife to make sure both their lawyers knew what their "plans" were:

> …you let your lawyer know what you plan to do and you let Barry Cohen know what you plan to do, both of them. You let them know what the cops have been doing to you and you let them know what you are going to do from now on. Shoot to kill. You are going to defend your property. Fair enough? Your right to (inaudible) to defend your property against intruders.

(230:336-337).

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2 Kloss stated to the circuit court he was bi-polar; had PTSD and ADHD; and was an alcoholic. (223:60)

3 "Record all you want to record, you cocksuckers. You did me, you did--my wife, you did us dirty. You're a bunch of criminal slime. Thugs. And now I'm going to enforce the real fucking law." (230:218). "--give them the fucking information. We're on the phone that being recorded, Cheri." (230:281-282); "For God and the recorders, you don't have to record, I want you to tell your lawyer, write it down, when I get out I'm going to find Joshua Hecht and I'm going to beat his ass to a pulp." (230: 236).

> You should talk to your lawyer about this. You should tell them, they pull this shit again, I'm going to open fire. I'm going to wipe them out. This is ridiculous. Did you tell him they never knocked?

(229:234). See also 223:37, 75, 115.

In the later part of the 5:35 p.m. call on October 14, Kloss suggested it was all just "stupid" talk: "Yep. Well, just, they want to talk stupid and lie and all that, I'll just talk stupid as I want to, too." (230: 340). He added: "Let them take me to court, listen in on everything I have to say and let them try and decide what's satire and what's true. Good luck with that folks." (230: 340-341). In another call he stated: "They are compiling a tape and they are – they are just going to scan this motherfucker and try and find anything on it they can use against me. But if they think I'm that fucking stupid to say anything incriminating, well, then that just goes to show how fucking stupid they are…." (230:342).

On October 24, 2014, the police arrested Cheryl Kloss at her place of employment. (223:46). They also obtained a warrant to search the house. Police found a cased shotgun and a rifle under a bed in the basement, and a loaded single-action revolver in the living room couch. (224:55-59, 63). Cheryl claimed she put the revolver in the couch after the search warrant was executed on October 10th, because it made her feel safer. (223:44). In the mid-90's she had been burglarized and robbed at gun point and suffered from PTSD as a result. When she was awoken on October 10th with guns pointed in her face, it brought the PTSD back. (225:65, 88). There was no line of sight between the couch and the front door. (225:66).

The State charged Kloss with seven counts of solicitation (Wis. Stat. § 939.30[4]). The conduct Kloss solicited (shooting at the door)

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4 **939.30. Solicitation.**
(1) Except as provided in sub. (2) and s. 961.455, whoever, with intent that a felony be committed, advises another to commit that crime under circumstances that indicate unequivocally that he or she has the intent is guilty of a Class H

allegedly resulted in seven distinct felony offenses. (135:9). Those "distinct" felony offenses were:

> *Count 12*[5], Solicitation of First Degree Intentional Homicide, Wis. Stat. § 940.01(1)(a);
> *Count 13*, Solicitation of Resisting an Officer Causing Great Bodily Harm to Officer, Wis. Stat. § 946.41(2t);
> *Count 14*, Solicitation of Failure to comply with Officer's Attempt to Take Person into Custody, Wis. Stat. § 946.415(2);
> *Count 15*, Solicitation of Battery of a Peace Officer, Wis. Stat. § 940.20(2);
> *Count 16*, Solicitation of Aggravated Battery, Wis. Stat. § 940.19(5);
> *Count 17*, Solicitation of First Degree Reckless Injury, Wis. Stat. § 940.23(1)(a); and,
> *Count 18*, Solicitation of First Degree Recklessly Endangering Safety, Wis. Stat. § 941.30(1).

The case was tried to the circuit court. Kloss did not testify.

The circuit court acquitted Kloss on five counts (Counts 12-16) and convicted him on two (counts 17 and 18). The two convictions were both based on reckless conduct: First Degree Reckless Injury (see Wis. Stat. § 940.23(1)(a)); and First Degree Recklessly Endangering Safety (see Wis. Stat. § 941.30(1)). (223:124-127; A:13-16).

The circuit court acquitted Kloss on counts 12-16 because the State failed to prove specific intent to cause harm, among other reasons. The court rejected count 12 (Solicitation of First Degree Intentional Homicide, contrary to Wis. Stat. § 940.01(1)(a)) because the evidence was insufficient to prove an intent to kill. (223:124-125;

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felony.

5 The State amended the information multiple times. For administrative purposes, the new or amended charges were added sequentially, while prior counts remained on the information but were dismissed.

A:13-14). The court rejected Count 13 (resisting an officer) because "there was no anticipated need for any officer to go back to Mrs. Kloss's house, particularly after the second or third search." (223: 125; A:14). In addition, there was no evidence a law enforcement officer "would be at her door to arrest her or somebody else,…." (223:125-126; A:14-15). The court rejected Count 14 (Failure to comply with Officer's Attempt to Take Person into Custody) for the same reasons. The charge just wasn't supported by the facts. (223:126; A:15). Count 15 (Battery of a Peace Officer) was not proven either. There were no "facts to support a known circumstance where a law enforcement officer is going to come to her house on a date certain if she's going to be ready and shoot the person, shoot the law enforcement officer." (223: 126; A:15). Finally, the court rejected Count 16 (solicitation of aggravated battery) because "it requires a specific intent to go out and cause bodily harm to another person; and quite frankly, just shooting through the door in and of itself in my view isn't enough. Mental purpose to cause bodily harm to another human being. Not guilty." (223:127; A:16).

As to Counts 17 and 18, the Court found Kloss guilty and made the following findings of fact:

> First, the defendant unequivocally intended that his wife place firearms in specific locations such that they would be readily available for her if someone, intruder or police officer, came to the door.
>
> Two, he specifically intended that she load the firearms and have them ready upon immediate need, or imminent need.
>
> Three, he intended that she shoot law enforcement officers that might happen to come through or to her door for whatever purpose, questioning, searching, general discussion, perhaps even finding directions.
>
> Four, he intended that she shoot though the door or the wall with a 16-gauge shotgun or a .357 handgun.
>
> Five, he intended that she shoot and then chase law enforcement officers down as they ran away.
>
> Six, specifically, and perhaps most importantly, he told and specifically intended that Mrs. Kloss follow her instructions.

> And seven, he specifically told Mrs. Kloss to not harm Officer Hecht as he, on more than one specific instance, told her he wanted to save that fella for himself.

(223: 117-118; A:6-7). As to Count 17, Solicitation of First Degree Reckless Injury, the Court specifically found as follows:

> The findings of fact based on the credibility…of the witnesses is that *Mr. Kloss unequivocally told his wife to get a firearm, and if the police officers came to the door to shoot through the door.* Shooting through a door, shooting through a wall at somebody that may be outside the door is reckless conduct. *It's conduct which* ***creates a risk*** *of death or great bodily harm* to another person, and the risk of death or great bodily harm is unreasonable and substantial, and the defendant was aware that his or her conduct created the unreasonable and substantial risk of death or great bodily harm.
>
> Third element: The circumstances of the defendant's conduct show utter disregard for human life. Mr. Kloss' utter disregard for human life is replete in his venom expressed in the transcripts for Joshua Hecht in particular *and law enforcement officers in general,* and the system. There is no question in my mind and in the law that shooting a firearm though a door—steel, metal, wood or otherwise—is criminally reckless conduct that creates a risk of great bodily harm or death that unreasonable and substantial, and that anybody that does that is aware that the conduct is unreasonable and substantial. Defendant is Guilty on 17.

(emphasis added) (223: 128-129; A:17-18). As to Count 18, Solicitation of First Degree Reckless Endangerment, the Court found as follows:

> Count 18, first-degree recklessly endangering safety. *Again, let's harken back to the elements of the findings of fact.* The defendant endangered the safety of another person. He instructed his wife to take the handgun and shoot through the door. Criminally reckless conduct is the second element. Again, it's created a risk or (sic) death. Great bodily harm was unreasonable and substantial, and the defendant was aware of that. Great bodily harm means injury which creates a substantial risk of death, or which causes serious permanent disfigurement, or which causes a permanent or protracted loss or impairment of the function of any bodily organ or member, or

> other serious bodily injury. Gunshot wound to the body is going to cause permanent injury.
>
> Three, third element, the circumstances of the defendant's conduct showed utter disregard for human life. Telling one to shoot through the door with a hand gun, a shotgun, or his real intent when he instructed his wife to chase them down and shoot more than satisfies that last requirement.
>
> It isn't just the defendant's words that convict him. It isn't just control. It isn't just Mrs. Kloss' susceptibility. It isn't just the dynamic between the two. Perhaps the most important fact of all, this is not only the dynamic, the instructions, the commands, the demands, the insults, the relationship between them, but when Mr. Nelson said there is no smoking gun, no, but there's a gun, and it's in the location—the precise location where Mr. Kloss instructed his wife to do it.[6] Given the dynamic, the instructions, her various efforts and assertions in the record to do precisely what he told her to do, the fact that the handgun was in the couch, loaded, really are the determining facts whereby one looks at the credibility …and totality of this evidence, convinces me that the defendant is guilty as to Counts 17 and 18, the last two counts.

(emphasis added) (223:129-130; A:18-19).[7]

### 2. Postconviction Facts.

Kloss filed a postconviction motion seeking dismissal of one or both counts: 1) his separate convictions for Solicitation of First Degree Reckless Injury and Solicitation of First Degree Endangering Safety were multiplicitous; 2) he could not, as a matter of law, solicit a reckless crime (First Degree Reckless Injury) that required the state to prove a specific type of injury; and 3) the evidence was insufficient to convict on either count because the State failed to prove Kloss unequivocally intended that a felony crime be committed. Kloss

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6 This finding has no basis in the record. Kloss never instructed his wife to put a gun in the couch.

7 Kloss was also convicted of Possession of a Firearm by Felon, contrary to Wis. Stat § 941.29(2), after entering a no contest plea prior to trial. Kloss does not appeal that conviction.

contended these arguments were adequately raised by trial counsel, but also alleged ineffective assistance of counsel in the event they weren't. At the postconviction hearing, the circuit court accepted a stipulation between Kloss and the State that trial counsel did preserve these issues and therefore an ineffective assistance of counsel claim was unnecessary. (228:4).

The circuit court orally denied the postconviction motion on March 16, 2018. (227; A:20-34). A written Order denying the postconviction motion was entered on April 2, 2018. (199; A:35). Defendant filed a Notice of Appeal on April 2, 2018. (200).

The circuit court's reasons for denying Kloss' postconviction motion will be addressed in the argument section of this brief.

## ARGUMENT

## I. SEPARATE CONVICTIONS FOR SOLICITING FIRST DEGREE RECKLESS INJURY AND SOLICITING FIRST DEGREE RECKLESSLY ENDANGERING SAFETY ARE MULTIPLICITOUS AND VIOLATE DOUBLE JEOPARDY.

### 1. Summary

Counts 17 and 18 are multiplicitous because First Degree Recklessly Endangering Safety is a lesser included offense of First Degree Reckless Injury.

### 2. Legal Standards for Multiplicity Analysis

The double jeopardy clause of both the Wisconsin and U.S. Constitutions embody three protections: "protection against a second prosecution for the same offense after acquittal; protection against a second prosecution for the same offense after conviction; and

protection against multiple punishments for the same offense." *State v. Lechner*, 217 Wis. 2d 392, ¶10, 576 N.W.2d 912 (1998), *citing State v. Sauceda*, 168 Wis. 2d 486, 492, 485 N.W.2d 1 (1992).

Multiplicity challenges invoke the protection against multiple punishments for the same offense. These generally consist of two types: 1) the "lesser-included offense" claim, where the defendant claims he or she was punished for committing both a greater and a lesser-included offense; and, 2) a "continuous offense" claim, where the defendant argues that he or she has been punished for two or more counts of the same offense arising out of one criminal act. *Lechner*, at ¶11.

A defendant may be charged and convicted of multiple crimes arising out of one criminal act only if the legislature intends it. *Lechner*, at ¶12, citing *State v. Kuntz*, 160 Wis. 2d 722, 754, 467 N.W.2d 531 (1991). In determining the legislature's intent, the court must consider: (1) whether each offense is identical in law and in fact; and (2) whether the legislature intended to allow multiple convictions for the offenses charged.

When both offenses have the same factual basis, a "lesser-included offense" challenge focuses on whether the offenses are identical in law. The determinative inquiry is whether the criminal statutes define one offense as a lesser-included offense of the other. Whether one offense is a lesser-included offense of another is controlled by the "elements only" test set out in *Blockburger v. United States*, 284 U.S. 299, 304, 76 L. Ed. 306, 52 S. Ct. 180 (1932) (codified in Wis. Stat. § 939.66(1))[8]. *Lechner*, at ¶15. Under this test, two offenses are different in law if each statutory crime requires proof

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8 **Wis. Stat. § 939.66 Conviction of included crime permitted.** Upon prosecution for a crime, the actor may be convicted of either the crime charged or an included crime, but not both. An included crime may be any of the following:

(1) A crime which does not require proof of any fact in addition to those which must be proved for the crime charged.

of an element which the other does not. *Id*. If one offense is not a lesser included of the other based on the *Blockburger* test, the court presumes the legislature intended to permit cumulative punishments for both offenses. This presumption is rebutted only if other factors clearly indicate a contrary legislative intent. Factors that may indicate a contrary legislative intent regarding multiple punishment include the language of the statutes, the legislative history, the nature of the proscribed conduct, and the appropriateness of multiple punishment. *Lechner*, ¶¶17-18.

Whether a criminal defendant has a double jeopardy claim is a question of law reviewed de novo. Statutory interpretation also presents a question of law. *State v. Jackson*, 2004 WI App 190, ¶5, 276 Wis. 2d 697, 688 N.W.2d 688 (Ct. App. 2004).

### 3. Kloss cannot be convicted of both a greater and lesser crime based on the same solicited conduct.

Kloss was convicted of both Solicitation[9] of First Degree Recklessly Endangering Safety (Wis. Stat. § 941.30(1)[10]) and Solicitation of First Degree Reckless Injury (Wis. Stat. 940.23(1)(a)[11]) based on the same solicited conduct. These convictions are

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9 **939.30. Solicitation.**
(1) Except as provided in sub. (2) and s. 961.455, whoever, with intent that a felony be committed, advises another to commit that crime under circumstances that indicate unequivocally that he or she has the intent is guilty of a Class H felony.

10 **941.30. Recklessly endangering safety.**
(1) First-degree recklessly endangering safety. Whoever recklessly endangers another's safety under circumstances which show utter disregard for human life is guilty of a Class F felony.

11 **940.23. Reckless injury.**
(1) First-degree reckless injury. (a) Whoever recklessly causes great bodily harm to another human being under circumstances which show utter disregard for human life is guilty of a Class D felony.

multiplicitous because First Degree Recklessly Endangering Safety is a lesser included of First Degree Reckless Injury:

> [Wis. Stats. §§ 940.23 and 941.30] are identical in their elements of the crimes with the exception that sec. 940.23 has the element of causing great bodily harm while sec. 941.30 requires only the endangering of another's safety. In *Martin v. State* (1973), 57 Wis. 2d 499, [505], 204 N. W. 2d 499, *this court recognized these two sections were identical with the exception of the distinction in the description of the resultant harm. Consequently, the offense under sec. 941.30 is a lesser included offense of the crime created by sec. 940.23* and [defendant] could be convicted of the lesser crime even though he had been charged with and pleaded not guilty to the greater crime.

(Emphasis added) *State v. Weso*, 60 Wis.2d 404, 408, 210 N.W.2d 442 (1973). See also *State v. Williams*, 198 Wis. 2d 516, 524, 544 N.W.2d 406, 409 (1996) (defendant "was found guilty of first-degree recklessly endangering safety which the court had submitted to the jury as a lesser-included offense of first-degree reckless injury….").

The statutory elements confirm this. First Degree Reckless Injury requires the state to prove: 1) The defendant caused great bodily harm to another human being; 2) The defendant caused great bodily harm by criminally reckless conduct; and 3) The circumstances of the defendant's conduct showed utter disregard for human life. See WIS JI-CRIMINAL 1250. First Degree Recklessly Endangering Safety requires the state to prove: 1) The defendant endangered the safety of another human being; 2) The defendant endangered the safety of another by criminally reckless conduct; and, 3) The circumstances of the defendant's conduct showed utter disregard for human life. See WIS JI-CRIMINAL 1345. The only difference between these offenses is that "less serious consequences [endangerment rather than great bodily harm] suffice for the conviction of the less serious offense." *Martin v. State*, 57 Wis. 2d 499, 505, 204 N.W.2d 499 (1973).

Kloss cannot be convicted of soliciting a lesser-included offense based on the *Blockburger* elements test. A charge of Solicitation incorporates the elements of the crime solicited. WIS JI-CRIMINAL

550.[12] See also *Jackson*, 2004 WI App at ¶8 (elements of conspiracy statute "incorporate each criminal offense that is the criminal object of the conspiracy."). Wis. Stat. § 939.30(1) states that "whoever, *with intent that a felony be committed*, advises another to commit *that* crime…is guilty of a Class H felony." (emphasis added). In other words, the State must prove a *particular* felony was intended, which means the State must prove the elements of that particular felony were also intended. In this case, the only distinction between the convictions is the elements of the intended crime. As one of the intended crimes is a lesser included of the other intended crime, one solicitation conviction is a lesser included of the other.

The circuit court's findings of fact show the same factual basis for both solicitation convictions. As for the Solicitation of First Degree Reckless Injury, the circuit court found: "Mr. Kloss unequivocally told his wife to get a firearm, and if the police officers came to the door to shoot through the door." (223:128; A:17). As for the Solicitation of First Degree Recklessly Endangering Safety, the circuit court found: Kloss "instructed his wife to take the handgun and shoot through the door." (223: 129; A:18). In fact, all the charges were based on the same solicited conduct. The circuit court rejected the Solicitation of Aggravated Battery charge, for example, by noting the evidence was insufficient to prove an intent to cause bodily harm: "just shooting though the door in an of itself in my view isn't enough." (223:127; A:16). In sum, the basis for both convictions was Kloss' instruction to "shoot through the door." As First Degree Recklessly

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12 According to WIS JI-CRIMINAL 550, the State must prove:

"1. The defendant intended that the crime of (name of felony) be committed.

The crime of (name of felony) is committed by one who [DEFINE THE CRIME INVOLVED, REFERRING TO THE ELEMENTS AND DEFINITIONS IN THE UNIFORM INSTRUCTION FOR THAT OFFENSE]

2. The defendant advised another person, by the use of words or other expressions, to commit the crime of (name of felony) and did so under circumstances that indicate, unequivocally, that the defendant intended that (name of felony) be committed."

Endangering Safety is a lesser included of First Degree Reckless Injury, and the other elements of Solicitation are otherwise identical, separate convictions for each are multiplicitous and therefore barred by double jeopardy.

The State's charging rationale was that each count of solicitation was based on a distinct "underlying" felony. In response, the circuit court expressed concern as to whether any of these "underlying" felonies were lesser included offenses. The State answered that none were. (211:29-30). In a subsequent memorandum, the State explained:

> If, then, any of these counts were to be lesser included offenses of the others, that would require the underlying felony to be a lesser included offense of one of the other underlying felonies. *That is not the case here*. …. Suffice it to say here that the State does not see any per se lesser included offenses under Wis. Stat. § 939.66 in this case."

(emphasis added) (135:9).

In its postconviction decision, the circuit court acknowledged the case law "suggests" that "[f]irst degree reckless endangering safety is a lesser included offense of first degree reckless injury." (227:14; A:33). Rather than relying on concept of distinct underlying felonies, however, the circuit court now justified the two convictions based on "the number of efforts that Mr. Kloss made to persuade his wife to engage in both…recklessly endangering injury and recklessly endangering safety,…." (227:6, 13-14; A:25, 32-33). The court also suggested that while "[t]he behavior that Mr. Kloss encouraged his wife to engage in was somewhat the same over the course of these conversations," they were also "dissimilar in various facts." (227:6; A:25) The court did not articulate how the facts were "dissimilar," but rather referred back to the findings it made on January 22, 2017. (227:6-7; A:25, 26). This new rationale is contrary to the circuit court's rulings at trial, its findings of fact, the statutory language of Wis. Stat. § 939.30(1), and the rule against multiplicity.

The State repeatedly insisted at trial that Kloss' multiple phone calls constituted a single course of conduct and refused to identify any particular conversation or point in time as constituting a completed crime: "The charges in this information flow from a continuous course of conduct spanning a (sic) ten (10) days…." (104:1; 222:60-61). See also *State v. Jensen*, 195 P.3d 512, ¶34 (Wash. 2008): (Solicitation "constitutes a course of conduct, not a single act, as the object is to engage another person to commit a crime."); *State v. Furr*, 292 N.C. 711, 724-725, 235 S.E.2d 193 (N.C. 1977) ("We recognize that…a single solicitation may continue over a period of time and involve several contacts where the solicitee gives no definite refusal to the solicitor's request."). The circuit court agreed with the State, and denied defense motions requiring the State to identify which phone calls supported which counts in the information:

> I am satisfied, particularly given [the prosecutor's] statement here about his theory, *his course of conduct, rather than each telephone [call]* constitutes a separate crime of thus and such.

(emphasis added) (222:67).

The circuit court also relied on the same factual basis for both the reckless injury and recklessly endangering safety convictions in its findings of fact. (223:117-118, 128-130; A:6-7, 17-19). The findings make no distinction between phone calls, but rather consider the sum of those conversations.

The court's new-found reliance on the "number of efforts" Kloss made is also contrary to the statutory language. The solicitation statute links each count of solicitation to "a felony" the perpetrator "advised" another to commit, not the number of conversations he had. In addition, the rule against multiplicity prohibits more than one charge for what the State concedes was a continuing offense. *Lechner*, at ¶11. As Kloss was convicted of two offenses, one of which is a lesser included of the other, only one count survives.

## II. ALTERNATIVELY, KLOSS' CONVICTION FOR SOLICITATION OF FIRST DEGREE RECKLESS INJURY MUST BE DISMISSED BECAUSE HE CANNOT, AS A MATTER OF LAW, SOLICIT A RECKLESS CRIME WHICH REQUIRES A SPECIFIED INJURY.

To prove solicitation of a felony, the State must show the defendant intended the elements of the underlying offense. WIS JI-CRIMINAL 550; *Jackson,* 2004 WI App at ¶8.

Count 17 of the information alleges Kloss intended that his wife commit First Degree Reckless Injury, contrary to Wis. Stat. § 940.23(1).[13] In other words, he intended not only that his wife engage in reckless conduct "under circumstances which show utter disregard for human life," but engage in reckless conduct that "*causes* great bodily harm…." (emphasis added). *Weso*, 60 Wis.2d at 408. The question in this case is whether Kloss can intend an injury that results from reckless conduct. The answer is "no."

One cannot intend an injury caused by reckless conduct because whether an injury occurs is a matter of fortuity. A reckless act by definition excludes a specific intent to cause harm. Were an injury intended, the solicited crime itself would no longer be reckless, but intentional. In other words, one may intend that another commit reckless conduct, or one may intend that another cause injury, but one cannot logically intend both. While Kloss could solicit high-risk-conduct which puts others in danger, he cannot solicit high-risk conduct that he intends *will cause* great bodily harm.

The circuit court's finding that the solicited conduct "***creates a risk** of death or great bodily harm* to another person" is the very

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13 **940.23. Reckless injury.**
(1) First-degree reckless injury. (a) Whoever recklessly causes great bodily harm to another human being under circumstances which show utter disregard for human life is guilty of a Class D felony.

definition of what constitutes First Degree Recklessly Endangering Safety.[14] (emphasis added) (223:128; A:17). See *Weso*, at 408. Whether "great bodily injury" would in fact result from the reckless conduct is entirely unpredictable. Therefore, an element of soliciting First Degree Reckless injury will always be missing. It's only when reckless conduct actually results in great bodily harm that a First Degree Reckless Injury charge is sustainable.

The circuit court's findings of facts expressly exclude any intent to cause great bodily harm. The circuit court specifically found that shooting at the door *did not* show intent to cause *bodily harm*. (223:127; A:16). If shooting at the door is insufficient to show intent to cause bodily harm, then it is insufficient to show intent to cause great bodily harm. Likewise, Kloss could not have intended that great bodily harm result from the same course of conduct.

There are no Wisconsin cases addressing the solicitation of non-intentional crimes, and few elsewhere. More common is the question of whether one can conspire to commit a reckless crime. These cases are analogous, as solicitation and conspiracy are analytically similar. Solicitation has often been described as an "attempted conspiracy." (see e.g. *Jensen*, at ¶18). Both involve "inchoate" crimes where the offense is in the planning, and not execution of the planned offense.

Appellate courts that have addressed the issue are nearly unanimous in holding that one cannot conspire to commit a reckless act that requires injury. In *State v. Donohue*, 834 A.2d 253, 257-258 (N.H. 2003), for example, the issue was whether a defendant could be convicted of conspiracy to commit reckless second-degree assault. A person is guilty of that offense if he "recklessly causes serious bodily injury to another." *Id*., at 255. The court first distinguished a

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14 **941.30. Recklessly endangering safety.**
(1) First-degree recklessly endangering safety. Whoever recklessly endangers another's safety under circumstances which show utter disregard for human life is guilty of a Class F felony.

conspiracy charge from accomplice liability. Conspiracy "is an inchoate crime that does not require the commission of the substantive offense that is the object of the conspiracy but rather fixes the point of legal intervention at the time of the agreement…." By contrast, "accomplice liability is not a separate and distinct crime, but rather holds an individual criminally liable for actions done by another. *Id*., at 257. The court concluded that a person cannot be guilty of a conspiracy to commit a reckless assault because the offense is "controlled by the resulting harm." *Id*., at 257. In other words: "a person cannot agree, in advance, to commit a reckless assault, because, by definition, a reckless assault only arises once a future harm results from reckless behavior." *Id*. The complaint failed to allege a cognizable crime. *Id*. at 258. See also e.g.: See *People v. Swain*, 909 P.2d 994, 997-1001 (Cal. 1996) (conspiracy to commit reckless murder not a crime); *Palmer v. People*, 964 P.2d 524, 528-30 (Colo. 1998) (conspiracy to commit reckless manslaughter not a crime); *State v. Beccia*, 505 A.2d 683, 684-85 (Conn. 1986) (conspiracy to commit reckless arson not a crime); *Conley v. State*, 247 S.E.2d 562, 565 (Ga. Ct. App. 1978) ("One cannot conspire to kill another in the heat of passion."); *Mitchell v. State*, 767 A.2d 844, 847, 854-55 (Md. 2001) (conspiracy to commit a "non-premeditated" murder not a crime); *People v. Hammond*, 466 N.W.2d 335, 336-37 (Mich. Ct. App. 1991) (conspiracy to commit second-degree murder not a crime); *State v. Baca*, 950 P.2d 776, 787-88, 124 N.M. 333 (N.M. 1997) (conspiracy to commit reckless murder not a crime).

Scholarly authorities have come to the same conclusion. The Model Penal Code states in its comments that "When recklessness or negligence suffices for the actor's culpability *with respect to a result element of a substantive crime*, as for example when homicide through negligence is made criminal, there could not be a conspiracy to commit that crime.") (emphasis added); Model Penal Code § 5.03 comment 2(c)(i) at 408. See also W. LaFave, *Substantive Criminal Law* § 12.2(c) at 278 (2d ed. 2003) ("There is no such thing as a conspiracy to commit a crime which is defined in terms of recklessly or negligently causing a result.")

The same reasoning applies to solicitation. One cannot solicit a reckless crime which requires a specific resulting harm any more than one can conspire to do so. Kloss' conviction for First Degree Reckless Injury presents a logical contradiction and therefore should be dismissed.

## III. THE UNDISPUTED EVIDENCE FAILED TO SUPPORT A FINDING THAT KLOSS HAD PRESENT AND UNEQUIVOCAL INTENT WHEN THE CRIME HE ALLEGEDLY SOLICITED WAS CONDITIONED ON EVENTS KLOSS KNEW WERE UNLIKELY TO OCCUR AND HE KNOWINGLY EXPOSED HIS PLAN TO LAW ENFORCEMENT.

A defendant is guilty of solicitation if he "unequivocally" intended "that a felony be committed…." Wis. Stat. § 939.30(1). "Unequivocal" means "Not ambiguous; plain, clear." (Webster's New World College Dictionary, 4th Ed., 1999). When used "with reference to the burden of proof" the term "unequivocal" "implies proof of the highest possible character and it imports proof of the nature of mathematical certainty." (Black's Law Dictionary, 5th Ed. 1983).

The undisputed evidence not only fails to support a finding of unequivocal intent, it shows the exact opposite. First, Kloss did not solicit his wife to go out and take action. The actions he "advised" were entirely conditional. Those conditions were so highly improbable, moreover, that Kloss knew there was no realistic chance they would ever occur. Second, and more importantly, Kloss could never have intended a plan he made sure the authorities knew about, thus making execution impossible.[15] Third, numerous statements

15 *State v. Duda*, 60 Wis.2d 431, 439, 210 N.W.2d 763 (1973) ("The test of the sufficiency of the evidence…is whether, considering the state's evidence in the most favorable light, the evidence adduced, believed and rationally considered, is sufficient to prove the defendant's guilt beyond a reasonable doubt."); accord *State v. Poellinger*, 153 Wis.2d 493, 501, 451 N.W.2d 752 (1990); A verdict, moreover, cannot be based on an unreasonable inference. *Ford v. Kenosha County*, 160 Wis.2d 485, 492 n. 5, 466 N.W.2d 646 (1991). Whether an inference is

Kloss made during the phone conversations show his purpose was to taunt the authorities.

The sequence of events necessary for the solicited conduct to occur were so obviously improbable that no reasonable fact-finder could find Kloss "unequivocally" intended that "a felony be committed." The circuit court expressly found, first, that the crime would only happen *if the police came to the front door* of the Kloss residence (223:118 (A:7); 128). The court also found there was no reason to expect that was going to happen:

> …there was no anticipated need for any officer to go back to Mrs. Kloss' house, particularly after the second or third search.

(223: 125; A:14).

> …there aren't any facts to support a known circumstance where a law enforcement officer is going to come to her house on a date certain if she's going to be ready and shoot the person, shoot the law enforcement officer.

(223: 126; A:15). Kloss, likewise, had no reason to believe the police *would* go back to the house. The police searches on September 5 and October 10, 2014, were meant to find and arrest Kloss. At the time the "solicitation" occurred, Kloss was in custody. There was no reason to believe the police would return to his house. Even if by some remote chance the police did go back, they would have to come at the fortuitous moment when Cheryl was both home, *and* ready, willing and able to shoot.[16] This 59-year old woman, with no criminal record, no history of violence, and no experience with firearms,[17] was a highly

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reasonably drawn is a question of law. *Groom v. Professionals Ins. Co.*, 179 Wis.2d 241, 249, 507 N.W.2d 121 (Ct. App. 1993).

16 Cheryl Kloss worked full-time and had family and friends in River Falls. (225: 42, 96, 118; 223: 46).

17 Cheryl testified she was not familiar with guns, had never shot a gun; and had never been taught to shoot a gun. (225:63-64). There was no evidence to the

unlikely cop-killer. (225: 74, 84, 109; 229:36) In short, Kloss could not have unequivocally intended a crime be committed when *he* conditioned it on events that *he* had no reason to believe would never happen.

More importantly, no trier of fact could reasonably find Kloss unequivocally intended that a felony be committed, especially one that required the element of surprise, when he knowingly and repeatedly exposed his "plan" to law enforcement.

There is no dispute Kloss knew the jailers were listening to his phone calls. (135:2-4; 223:75). In fact, Kloss used the phone calls to communicate with law enforcement directly. (see e.g. 230:218, 236, 281-282). If that wasn't enough, Kloss also directed his wife to inform both their lawyers of their "plan," information the attorneys would have been ethically bound to report. (223: 37; 230:336-337); SCR 20:1.6(b) & (c)(1). Kloss, therefore, had every reason to believe law enforcement were fully informed of his "plan."

It therefore defies logic to conclude Kloss unequivocally intended a crime be committed when, at the same time, he made sure it would be impossible to execute. The only way Kloss' wife could have shot at the door with police officers on the other side is if the police didn't know what was coming. No one, Kloss included, would expect police officers to deliberately put themselves in danger when they are being told ahead of time what to expect. Indeed, the police easily avoided any possibility this would ever happen by simply arresting Cheryl at work. Exposing his "plan" to the intended "victims"—a plan which requires the element of surprise to succeed—does not in any way, shape or form support a finding of "unequivocal" intent. Quite the opposite. See e.g. *State v. Miller*, 2009 WI App 111, ¶40, 320 Wis. 2d 724, 772 N.W.2d 188 (Insufficient evidence to convict on First Degree Reckless Injury when the undisputed reason for shooting was "inconsistent" with "utter disregard for human life" element).

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contrary.

Rather, Kloss was expressing his anger and taunting the police, which only succeeded *if they heard* what he had to say. Directing his comments at law enforcement, he stated that if "they want to talk stupid and lie" then "I'll just talk stupid as I want to, too. (230:340). They could listen to everything he said and "let them try and decide what's satire and what's true. Good luck with that folks." (230:340-341). He knew the cops would "scan" the tape and "find anything on it they can use against me." (230:342).

The logistical improbability, Kloss' knowing and repeated revelation to the intended victims, his taunting, and indeed, his express statements that he was "talking stupid" and using "satire," clearly demonstrates a lack of intent. Under these circumstances, no trier of fact could reasonably conclude Kloss *unequivocally* intended police would position themselves outside his front door so his wife could fire away.

The State's theory at trial only underscores the gapping-hole in its case. Unable to deny Kloss repeatedly revealed his "plan" to the very people he allegedly sought to harm, the state argued that revealing his plan was part of his plan:

> As Kloss knew he was being recorded, then he must have also known that police action would be taken on foot of his solicitation, police action which he hoped would led (sic) to his wife committing the very crimes, which he was soliciting her to commit.

(135:3).

> …Mr. Kloss knew that he was being recorded and certainly intended his wife not only would have the opportunity to commit this crime but would, in fact, commit it.

(135:7).

> He kind of makes out like uses the code and the magic word, but when he says do this when they come to your house, Cheryl, he is saying it in plain language that he believes the cops are hearing. They hear it.

> They're like, holy hell, someone is going to kill people at Leroy Court. We need to respond. He thinks we are listening. He thinks there is a team of guys in the next room monitoring everything. He intended for this to happen.

(223:81-82). The State's argument contradicts itself. There's no logical way to reconcile an intent to execute the plan with its deliberate exposure. The State may be correct that Kloss wanted to provoke police action, but that was never going to happen in a way that furthered the "plan." The State fails to explain how these revelations would give Kloss' wife the "opportunity" to commit the alleged crimes when, by revealing the "plan," Kloss made sure the opportunity would never arise.

## CONCLUSION

Based on Section III. of this Brief, the Court should dismiss both the Solicitation of First Degree Recklessly Endangering Safety and the Solicitation of First Degree Reckless Injury convictions with prejudice. Alternatively, based on Section I. of this Brief, the Court should dismiss the Solicitation of First Degree Recklessly Endangering Safety conviction with prejudice or, alternatively, dismiss the Solicitation of First Degree Reckless Injury conviction with prejudice. Alternatively, based on Section II. of this Brief, the Court should dismiss the Solicitation of First Degree Reckless Injury conviction with prejudice.

Respectfully submitted this 21st day of May, 2018.

**MILLER APPELLATE PRACTICE, LLC**

By_____
Steven L. Miller #1005582
Attorney for the Defendant-Appellant
P.O. Box 655
River Falls, WI 54022
715-425-9780

## CERTIFICATION OF COMPLIANCE WITH RULE 809.19(8)(b)&(c)

I certify that this brief meets the form and length requirements of Rule 809.19(8)(b)&(c), as modified by the Court's Order, and that the text is:

Times Roman proportional serif font, printed at a resolution of 300 dots per inch, 14 point body text and 12 point text for quotes and footnotes, with a minimum leading of 2 points and a maximum of 60 characters per line.

This brief contains 9207 words.

## CERTIFICATE OF COMPLIANCE WITH RULE 809.19(12)

I hereby certify that: I have submitted an electronic copy of this brief, excluding the appendix, if any, which complies with the requirements of s. 809.19(12).
I further certify that: This electronic brief is identical in content and format to the printed form of the brief filed as of this date. A copy of this certificate has been served with the paper copies of this brief filed with the court and served on all opposing parties.

## CERTIFICATE OF COMPLIANCE WITH RULE 809.19(2)(b)

I hereby certify that filed with this brief, either as a separate document or as a part of this brief, is an appendix that complies with s. 809.19(2)(a) and that contains, to the extent required: (1) a table of contents; (2) the findings or opinion of the circuit court; and (3) portions of the record essential to an understanding of the issues raised, including oral or written rulings or decisions showing the trial court's reasoning regarding those issues.

I further certify that if this appeal is taken from a circuit court order or judgment entered in a judicial review of an administrative decision, the appendix contains the findings of fact and conclusions of law, if any, and final decision of the administrative agency.

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Dated this 21st day of May, 2018.

**MILLER APPELLATE PRACTICE, LLC**

By_____
Steven L. Miller #1005582
Attorney for the Defendant-Appellant
P.O. Box 655
River Falls, WI 54022
715-425-9780

## CERTIFICATION OF MAILING

I certify that this brief or appendix was deposited in the United States Mail for delivery to the Clerk of the Court of Appeals by First Class Mail on 21st day of May, 2018. I further certify that the brief or appendix was correctly addressed and postage was prepaid.

Dated this 21st day of May, 2018.

**MILLER APPELLATE PRACTICE, LLC**

By_____

Steven L. Miller #1005582
Attorney for the Defendant-Appellant
P.O. Box 655
River Falls, WI 54022
715-425-9780

# APPENDIX OF DEFENDANT-APPELLANT

## INDEX TO APPENDIX