STATE OF WISCONSIN

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

DISTRICT III

Case No. 2018AP651-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

KELLY JAMES KLOSS,

Defendant-Appellant.

APPEAL FROM A JUDGMENT OF CONVICTION
AND AN ORDER DENYING A MOTION FOR
POSTCONVICTION RELIEF ENTERED
IN THE ST. CROIX COUNTY CIRCUIT COURT,
THE HONORABLE EUGENE D. HARRINGTON,
PRESIDING

BRIEF OF THE PLAINTIFF-RESPONDENT

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ISSUES PRESENTED

1. Does the Double Jeopardy Clause prohibit Defendant-Appellant Kelly James Kloss from being convicted for a charge of solicitation of reckless injury and solicitation of recklessly endangering safety because recklessly endangering safety is a lesser-included offense of reckless injury?

The circuit court answered no.

This Court should affirm the circuit court.

2. As a matter of law, can a person solicit first-degree reckless injury when solicitation requires that the solicitor act "with the intent that a crime be committed"?

The circuit court determined that a person can solicit first-degree reckless injury by soliciting a person to commit conduct that the person knows is likely to result in great bodily harm.

This Court should affirm the circuit court.

3. Was there sufficient evidence in the record for the court to find that Kloss had "unequivocal intent" that his wife commit crimes?

The circuit court found that Kloss had real intent that his wife carry out his instructions.

This Court should affirm the circuit court.

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

The State believes oral argument would be beneficial in this case. Publication may also be appropriate, as there does not appear to be any Wisconsin law addressing solicitation of reckless crimes.

INTRODUCTION

In a series of phone calls recorded from jail, Kloss repeatedly badgered his wife, Cheryl, to follow his demands. Some of those demands included that she arm herself with several firearms and shoot through the door with no warning if the police came to the house. He also told her to get modified bullets for the shotgun, to "take out" as many of the police as possible, and to chase them down shooting if they ran away. Kloss was convicted of one count of solicitation of first-degree recklessly endangering safety and one count of solicitation of first-degree reckless injury. He appeals on three grounds. This Court should affirm.

Kloss first claims that his convictions are multiplicitous because first-degree recklessly endangering safety is a lesser-included offense of first-degree reckless injury. But lesser included crimes only implicate double jeopardy when analyzing convictions for a single act against a single victim. Kloss committed multiple solicitations for different acts against many potential victims. Therefore his convictions are different in fact and are not multiplicitous. Additionally, the structure of the solicitation statute shows that the Legislature intended cumulative punishments for multiple solicitations, so Kloss is due no relief on this ground.

Second, Kloss argues that solicitation of first-degree reckless injury is not a crime known to law because if a person intends the injury to occur, it cannot be solicitation of reckless injury. But Kloss's argument focuses on the intent of someone charged with a particular crime for a completed act. The relevant intent in solicitation is what the solicitor intended the solicitee to do. Kloss unequivocally intended that Cheryl wantonly injure police by acting in a manner that he would know creates an unreasonable and substantial risk of death or great bodily harm under circumstances

showing utter disregard for human life, and repeatedly advised her to engage in that conduct. It is possible to solicit reckless injury, and Kloss did so.

Finally, Kloss contends that the evidence was insufficient to show that he unequivocally intended Cheryl to carry out his instructions. But he is wrong. The circuit court found that the recordings showed Kloss engaged in a pattern of mental and emotional abuse of his wife in order to cow her into following his commands, that she was subservient to Kloss, and that Kloss's words and demeanor demonstrated an unequivocal intent that Cheryl carry out his instructions. Those factual findings are not clearly erroneous, and the contents of the phone calls are more than sufficient to show that Kloss intended his wife to shoot at and injure the police.

STATEMENT OF THE FACTS

In November 2013, Kloss was released on furlough from the Marathon County Jail to attend a family funeral.[1] (R. 227:11.) Kloss absconded. (R. 227:12.) A few weeks later,[2] Kloss contacted his wife, Cheryl. (R. 227:12.) Sometime in late 2013, Kloss clandestinely returned to their home in River Falls, Wisconsin. (R. 227:12.)

The Marathon County Sheriff's Department asked the River Falls police to keep a watch on the residence in case Kloss returned there. (R. 227:12–13.) Officer Joshua Hecht kept an eye on the house, and on September 5, 2014, he

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[1] The defendant's brief says that Kloss's mother died during this time, though the court transcript says it was his stepdaughter. (Kloss's Br. 8; R. 227:11.)

[2] There is no evidence in the record showing on what dates the events leading up to Kloss's police contacts beginning September 4, 2014, occurred.

spoke with a man he believed was Kloss, but who claimed to be Cheryl's brother. (R. 227:131–32.) Hecht called for backup. (R. 227:132.) The man went back inside the house, and Hecht pulled up a photo in his squad car confirming that the man was Kloss. (R. 227:132.) Police broke down the door and searched the house, but did not find Kloss inside. (R. 227:133–34.) Hecht began regularly driving by the house and on October 10, 2014, saw Kloss through the kitchen window. (R. 227:134–35.)

Hecht sought a search warrant, and police again broke down the door and searched the house, this time with the assistance of a K-9 unit from the St. Croix County Sheriff's Department. (R. 227:135.) They did not find Kloss during the initial sweep of the house. (R. 227:136.) The police dog eventually located him hidden in a crawl space behind a night stand. (R. 227:137–38.) Police arrested Kloss and booked him into the St. Croix County Jail. (R. 227:150.)

Kloss then began making phone calls to Cheryl from jail,[3] which were monitored by the sheriff's department. (R. 227:192–203; 226:23–33; 208; 209.) During the calls, Kloss viciously abused and berated Cheryl and lambasted her for not following demands he was making of her. (R. 208; 209.) Kloss told Cheryl to arm herself and be ready to shoot if anyone came into the house. (R. 208:31–36.) Over the course of the calls, Kloss became more explicit that Cheryl was to shoot the police, with no warning, if they returned to the house. (R. 208:48–51.) He told her to keep her shotgun nearby, as well, "[i]n case you run out of cartridges in one, you could just use the other one. I mean, I'm hoping you're going to get at least half a dozen of them if you're going to get one, you know. . . . You see them run, when they run, run

[3] Kloss was eventually transferred to the Marathon County Jail, and continued to call Cheryl from there. (R. 226:30.)

out the door after them. . . . Chase them down and get a couple more." (R. 208:50.)

Kloss further told Cheryl to ask a contractor "if he can rig something up so the next time a cop comes to the door he'll get electrocuted. Serious, Cheri . . . . tell him." (R. 208:107.) He said,

> I got an old Navy buddy who knows how to rig explosives. Maybe you should rig your door with explosives, and if they try that shit again, just (inaudible). It's your property. If they come in your property uninvited, breaking your doors down, they get what they get. I can get you his name.
>
> . . . .
>
> Okay? I'll get it to you in code --
>
> . . . .
>
> -- so nobody else that's listening on this phone knows it. Maybe it's -- maybe it's time we wired--
>
> . . . .
>
> -- maybe it's time we wired your house to protect yourself against thugs that break in your house.
>
> . . . .
>
> But you need to stay vigilant and stay on top of this and not be your usual procrastinating fuck-off self. Do you understand me? . . .
>
> . . . .
>
> Either do what you're told or we're done. Okay?
>
> . . . .
>
> Put yourself on the line for me instead of the other way around. I put my ass on the line for you, now let's see if you've got the balls to do it for me. . . .
>
> . . . .

> And just -- just bear this in mind. Your next screw-up could be your last.

(R. 209:18–19, 21–22, 39.)

Kloss further berated Cheryl for "not standing up" for him, saying that her declaring his innocence was not the same thing. He also told her to commit suicide and made her repeat that she was useless. (R. 209:83–128, 157, 160–61, 279.) At another point, he told her he was giving her "an order" not to speak to certain people again and said that if she did not follow it, "you're divorced. Clear?" (R. 209:226–27.) He said, "Your husband asked you to do something, and either you do what your husband says, or get the fuck out. . . . Love, honor, obey. Obey, motherfucker. Obey." (R. 209:227.)

After Kloss was charged with obstructing for lying to Hecht about his identity, Kloss became more graphic. (R. 209:241, 248.) He told Cheryl, "I want you to get your handgun out and get your shotgun out and if a River Falls cop comes to your door again, you open fire. No warnings. You will let them have it." (R. 209:289.) Cheryl replied, "Okay." Kloss elaborated,

> No warnings. . . . A cop comes to your door, let 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]: Gotcha.
>
> [KLOSS]: Blow them away.
>
> [CHERYL]: (Inaudible) gotcha.
>
> [KLOSS]: So between your pistol and your shotgun, you could pick off quite a few of them before they -- oh, they'll run. . . .

(R. 209:289–90.)

Kloss said he was in a good mood that day, but "[t]hat doesn't let you off the hook for what I expect, you know." (R. 209:293.) He later told her,

> 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]: Yes.
>
> [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 was well get ready to move, Cheri. Do you know what they are going to do to you now?
>
> . . . .
>
> Get ready to move. But in the meantime, if they come to your home, you kill them dead. . . . Shoot to kill. You are going to defend your property. I know it's a scary thought . . . but you got to do it.
>
> . . . .
>
> 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 to 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 breaker and enterer or a thief or a robber as you can see, can't you?
>
> [CHERYL]: Yes.
>
> [KLOSS]: They are no different, so you shoot them down just like you would a mangy dog. And then you call your lawyer.
>
> [CHERYL]: Gotcha.
>
> . . . .

> [KLOSS]: You just wipe them out, Cheri. Wipe them out. I hope -- I hope it don't happen, though, because I want [Hecht] for myself. I got plans for him. . . .
>
> . . . .
>
> I have big plans for him, and they don't involve a quick death.

(R. 209:336–39.)

Kloss also made Cheryl promise that if he was convicted, she would track down and assassinate the judge. (R. 209:355.) He asked her if she "got your guns out yet," and Cheryl said she did. (R. 209:377.)

After hearing these phone calls, police got another warrant for the Kloss house. (R. 226:38–39.) They arrested Cheryl while she was at work and searched the house. (R. 226:40.) They found a loaded .357 revolver tucked into a couch near the front door of the house, a loaded shotgun, a loaded .308 caliber rifle, and notes Cheryl had made from her conversations with Kloss. (R. 226:40–48, 57–59.)

Based on the phone calls and guns found at the house, the State charged Kloss with one count of threat to a judge, one count of possession of a firearm by a felon, and seven counts of soliciting various crimes against the police.[4] (R. 76; 144.) The State dropped the threat to a judge charge, and Kloss pled guilty to the possession of a firearm charge. (R. 83.) Kloss requested a bench trial on the remaining solicitation charges. (R. 98.)

The trial proceeded before Judge Eugene Harrington. (R. 225; 226; 227.) The court heard testimony from Cheryl,

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[4] The information in this case was amended several times. The seventh amended information contained the charges that Kloss finally contested at trial. (R. 144.)

several of the police officers involved in Kloss's arrest and the searches of the Kloss home, and the contents of the phone calls.[5] (R. 225; 226; 227.) The court found Kloss guilty of two of the solicitation charges: one count of solicitation of first-degree reckless injury[6] and one count of solicitation of first-degree recklessly endangering safety.[7]

The court said that the tapes showed that Kloss "exerted control over his wife by degradation, numerous insults, attempts to alienate her from her family and other loved ones," and that he "profanely demanded, directed, insulted, degraded her intelligence, her very being." (R. 225:119.) Cheryl would then "cave[ ] in and said either yes or I don't remember or I don't know" in response to Kloss's badgering. (R. 225:120.)

The court said that "[w]hat's critical to this case is . . . his specific intent that she follow his instructions about firearms and shooting is found in the transcripts in his words. Let's not forget the context that I just talked about." (R. 225:122.) It outlined the portions of the transcripts where Kloss gave Cheryl specific instructions about shooting the police, told her she was being given orders, threatened her with divorce, and said that she had to obey him. (R. 225:122–24.) The court went through the elements of the crimes Kloss was charged with soliciting, and convicted him of solicitation of first-degree reckless injury and solicitation of first-degree recklessly endangering safety. (R. 225:128–29.)

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[5] Only portions of the audio recordings were played at trial, but Judge Harrington read the complete transcripts of the calls. (R. 226:6–11.)

[6] Count 17. (R. 225:117.)

[7] Count 18. (R. 225:117.)

Before sentencing, Kloss moved to dismiss Count 17. (R. 215:5.) He claimed that because solicitation is an inchoate crime, he could not be convicted of solicitation of reckless injury because there was no injury. (R. 215:6–7.) He also claimed that the convictions were multiplicitous because he committed a single course of conduct, not separate solicitations. (R. 215:9–10.)

The court denied the motion. (R. 215:17.) It found that it was possible to solicit reckless injury, concluding "there does not have to be [an injury] because solicitation is the inchoate, it's the incomplete crime. It's a course of conduct that if completed would indeed have caused great bodily harm." (R. 215:22.) The court then determined that the Legislature intended cumulative punishments because it had enacted them and changed them consistently, therefore "the intent of the legislature was to create two separate criminal statutes or criminal violations." (R. 215:25.)

The court further found that the two offenses were identical in fact but not in law. (R. 215:19–22.) The court concluded that the offenses were identical in fact because the convictions were for the same course of conduct; that is, soliciting Cheryl to get a firearm, have it nearby, and shoot at law enforcement when they came to the house. (R. 215:19–20.) The crimes were different in law, however, because reckless injury required the defendant to cause great bodily harm, while reckless endangerment required the defendant to endanger the safety of another human being. (R. 215:21–22.)

The court sentenced Kloss to consecutive sentences of three years of initial confinement and three years of extended supervision on both charges. (R. 215:104.)

Kloss moved for postconviction relief and the court held a hearing. (R. 230.)

Kloss challenged his conviction on three grounds: (1) his convictions were multiplicitous because first-degree reckless endangerment is a lesser-included offense of first-degree reckless injury, (2) he could not solicit reckless injury without an injury as a matter of law, and (3) that the evidence was insufficient to show that he had the unequivocal intent that a crime be committed for either count because Kloss knew the police would be listening to his phone calls, and therefore the events were unlikely to occur. (R. 186:2; 230:7–11.)

The State responded, first, that these offenses were different in fact because, even though all of the solicitations were directed at Cheryl, "he solicited her on different days, on different phone calls to do different acts. Those are different and separate solicitations." (R. 230:12.) The State acknowledged that "if it was one act of him doing a reckless injury to someone else, he could not do the reckless endangering safety. It would be a lesser-included. But . . . because there are multiple persons referred to and multiple acts referred to," the two charges were not multiplicitous. (R. 230:15.) Second, the State argued that "solicitation, by its nature, is an intentional act," and therefore Kloss could intend that Cheryl "do a reckless act in [ ] performance." (R. 230:16.) Third, the State argued that Kloss could just as easily have known the calls would drive police to the house, and without Kloss's testimony there was no evidence to support the defense's argument regarding intent. (R. 230:19–20.) Further, because solicitation is complete once the person has been solicited, it did not matter if the event was "conditional" on the police arriving at the house. (R. 230:19–20.)

The circuit court agreed with the State and denied Kloss's motion. (R. 199:1; 230:21.) It found that the charges were not multiplicitous because there were separate solicitations for separate acts. (R. 230:39.) It also recognized

that "solicitation of a crime doesn't require completion of the crime. . . . He told his wife, shoot through the door, count to three, start shooting at two. And then if you want to or he exhorted her to chase them down and shoot them with a Winchester Model 100, 308 caliber rifle." (R. 230:39–40.) It also determined that Kloss unequivocally intended that Cheryl obey him.

Kloss appeals.

STATUTES AT ISSUE

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.

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.

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.

ARGUMENT

I. Kloss's convictions for solicitation of recklessly endangering safety and solicitation of first-degree reckless injury are not multiplicitous.

A. Standard of review

This Court determines de novo whether an individual's right to be free from double jeopardy has been violated and whether convictions are multiplicitous. *State v. Davison*, 2003 WI 89, ¶ 15, 263 Wis. 2d 145, 666 N.W.2d 1. This Court is concerned with the correctness of the circuit court's decision and will affirm that decision even if the court was right for the wrong reason. *See State v. Holt*, 128 Wis. 2d 110, 124, 382 N.W.2d 679 (Ct. App. 1985).

B. Relevant law

"Under the Wisconsin Constitution, multiple punishments may not be imposed for charges that are identical in law and fact unless the legislature intended to impose such punishments." *State v. Patterson*, 2010 WI 130, ¶ 15, 329 Wis. 2d 599, 790 N.W.2d 909 (citing *Davison*, 263 Wis. 2d 145, ¶¶ 30–32). If the Legislature did not so intend, the punishments are unconstitutionally multiplicitous. *State v. Lechner*, 217 Wis. 2d 392, 402, 576 N.W.2d 912 (1998).

There are generally two types of multiplicity challenges: (1) "a 'lesser-included offense' case where the defendant argues that he or she has been punished for committing a greater offense and a lesser-included offense" for a single act against a single victim, and (2) "a 'continuous offense' case 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" against a single victim. *Id.*

A court uses a two-prong test to determine whether convictions are multiplicitous. *State v. Ziegler*, 2012 WI 73,

¶ 60, 342 Wis. 2d 256, 816 N.W.2d 238. The first prong considers whether two offenses are identical in law and fact pursuant to *Blockburger v. United States*, 284 U.S. 299, 304 (1932). *State v. Multaler*, 2002 WI 35, ¶ 52, 252 Wis. 2d 54, 643 N.W.2d 437.

This Court employs the "elements only" test set forth in *Blockburger* to determine whether offenses are different in law or whether one crime is a lesser-included offense of another crime, which is codified in Wis. Stat. § 939.66(1). *Lechner*, 217 Wis. 2d at 405. "Under this test, two offenses are different in law if each statutory crime requires for conviction proof of an element which the other does not require." *Id.*

"Two offenses, which are legally identical, are not identical in fact if the acts allegedly committed are sufficiently different in fact to demonstrate that separate crimes have been committed." *Ziegler*, 342 Wis. 2d 256, ¶ 60.

Offenses are considered sufficiently different in fact if they "are separated in time or are of a significantly different nature." *Multaler*, 252 Wis. 2d 54, ¶ 56 (citation omitted). To determine whether charged acts were separate in time, "the court asks whether there was sufficient time for reflection between the acts such that the defendant re-committed himself to the criminal conduct." *Id.* "Similarly, whether the charged acts are significantly different in nature is not limited to a straightforward determination of whether the acts are of different types. Acts may be 'different in nature' even when they are the same types of acts as long as each required 'a new volitional departure in the defendant's course of conduct.'" *Id.* ¶ 57 (citation omitted).

The second prong considers legislative intent. *Ziegler*, 342 Wis. 2d 256, ¶¶ 61–63. The outcome of the first prong determines which of two presumptions a court will apply when analyzing the second prong. *Id.* ¶¶ 61–62. A court

considers the second prong regardless of the outcome of the first prong. *Patterson*, 329 Wis. 2d 599, ¶ 16.

If two offenses are identical in both fact and law, then a court presumes that the Legislature did not authorize cumulative punishments, unless the State shows "a clear indication of contrary legislative intent." *Ziegler*, 342 Wis. 2d 256, ¶ 61. If the State cannot meet that burden, multiple punishments for the same offense violate the prohibition on double jeopardy. *Id.* ¶ 62.

By contrast, if two offenses are different in fact or law, then a court presumes that the Legislature authorized cumulative punishments. *Ziegler*, 342 Wis. 2d 256, ¶ 62. At that point, "we are no longer concerned with a double jeopardy violation but instead a potential due process violation." *Id.* Under those circumstances, "it is the defendant's burden to show a clear legislative intent that cumulative punishments are not authorized." *Davison*, 263 Wis. 2d 145, ¶ 45.

C. Kloss's convictions for solicitation of recklessly endangering safety and solicitation of first-degree reckless injury are different in fact and law.

Solicitation incorporates the criminal offense that is the object of the solicitation into the elements of solicitation. It does not incorporate the elements of the underlying offense. The elements of the offense that is the object of the solicitation are only relevant to show that the conduct solicited would bring about that result. But it is the offense itself that becomes one of the elements of the offense of solicitation. Kloss's convictions therefore necessarily had different elements and are different in law. Furthermore, he solicited his wife to commit separate reckless acts against many potential victims, which means his convictions are also different in fact. And, like the conspiracy statute, the way

the solicitation statute is written shows that the Legislature contemplated multiple charges arising out of a single course of conduct. Consequently, there is no double jeopardy or due process issue.

1. Solicitation of first-degree reckless injury and solicitation of first-degree recklessly endangering safety have different elements and are thus different in law.

"The crime of solicitation . . . is committed by one who, with intent that a felony be committed, advises another to commit that crime under circumstances that indicate unequivocally that he or she had that intent." Wis. JI—Criminal 550. Solicitation has two elements. *Id.* The State must prove that (1) "the defendant intended that [a particular felony] be committed," and (2) "the defendant advised another person, by the use of words or other expressions to commit [that felony], and did so under circumstances that indicate, unequivocally, that the defendant intended that [felony] be committed." *Id.* "'Unequivocally' means that no other inference or conclusion can reasonably and fairly be drawn from the defendant's acts." *Id.* "[A]s to those crimes which are defined in terms of certain prohibited results, it is necessary that the solicitor intend to achieve that result through the participation of another." 2 Wayne R. LaFave, *Substantive Criminal Law* § 11.1(c) 272 (3d ed. 2018).

In *State v. Jackson*, 2004 WI App 190, ¶ 8, 276 Wis. 2d 697, 688 N.W.2d 688, this Court explained how to assess the elements of a criminal offense that requires commission of another crime. Jackson was involved in a plot to fire bomb a Milwaukee police officer's home, enabling two others to shoot people running from the building. *Id.* ¶ 2. He "was convicted of two counts of conspiracy (conspiracy to commit arson and conspiracy to commit intentional homicide)." *Id.* ¶ 1. Jackson

argued that his convictions and sentences on two counts of conspiracy arising out of one course of conduct were multiplicitous and violated the double jeopardy clause. *Id.* ¶ 3.

This Court disagreed. It noted that the elements of conspiracy under Wis. Stat. § 939.31 "incorporate each criminal offense that is the object of the conspiracy." *Jackson*, 276 Wis. 2d 697, ¶ 8. "This means that when a conspiracy has as its object the commission of multiple crimes, separate charges and convictions for each intended crime are permissible. Thus, § 939.31 expresses the Wisconsin legislature's intent to permit multiple punishments." *Jackson*, 276 Wis. 2d 697, ¶ 8. Because one conspiracy charge would incorporate arson as an element and one conspiracy charge would incorporate intentional homicide, the charges were different in law. *Id.* ¶ 9. And because each required proof of facts that the other did not, they were different in fact as well. *Id.*

Like the conspiracy statute, the elements of the solicitation statute "incorporate each criminal *offense* that is the criminal object" of the solicitation. *Jackson*, 276 Wis. 2d 697, ¶ 8 (emphasis added). This Court in *Jackson* did not consider the elements of the underlying offenses; the dispositive factor was that arson and intentional homicide were different felonies. *Id.*

In other words, the offenses themselves become elements of solicitation. For the reckless injury charge, the State had to prove that (1) Kloss intended that first-degree reckless injury be committed, and (2) Kloss advised Cheryl, by the use of words or other expressions to commit first-degree reckless injury, and did so under circumstances that indicate, unequivocally, that Kloss intended that first degree reckless injury be committed. Wis. JI—Criminal 550. For the endangering safety charge, he State had to prove that (1) Kloss intended that first-degree recklessly endangering

safety be committed, and (2) Kloss advised Cheryl, by the use of words or other expressions to commit first-degree recklessly endangering safety, and did so under circumstances that indicate, unequivocally, that Kloss intended that first-degree recklessly endangering safety be committed.

The State does not dispute that first-degree recklessly endangering safety is a lesser-included offense of first-degree reckless injury when the charges arise from a single *completed reckless act* by one perpetrator against one victim. *State v. Weso*, 60 Wis. 2d 404, 408, 210 N.W.2d 442 (1973); Wis. Stat. § 939.66(1). But here, Kloss was not convicted of first-degree reckless injury and first-degree reckless endangerment. He was convicted of two counts of solicitation of two statutorily different crimes. The two elements of solicitation require only that the state prove that the solicitor intended to achieve a result that constitutes a particular, statutorily defined felony, and that he advised another to commit that crime. Solicitation is complete upon the solicitor's advice or urging to commit that felony. After the crime of solicitation is complete, it does not matter whether the elements of the solicited felony are later met. Therefore, as long as the crimes being solicited are different felonies, two solicitation charges are different in law regardless of whether one crime would be a lesser included offense of the other for a completed act, because with solicitation there need not be a completed act; the solicitation is based solely on the result the solicitor intended to achieve. The elements of the underlying crimes are relevant only to evaluate whether the conduct solicited could meet the statutory elements of the intended result. But with no completed act, there is nothing to "include" in the greater crime. Consequently, a person can solicit a greater crime without committing solicitation of the lesser crime.

For example, if Kloss had told Cheryl "I want you to commit first-degree reckless injury," he would have committed solicitation of first-degree reckless injury without committing solicitation of reckless endangerment. That is so because by those words he would unequivocally intend that first-degree reckless injury be committed, not recklessly endangering safety. And solicitation is all about the solicitor's intent: what crime the solicitor "intended . . . be committed." Wis. JI—Criminal 550. Because in that scenario Kloss clearly would have intended one and not the other, he could not be convicted of solicitation of recklessly endangering safety because that is not the crime he "indicate[d], unequivocally, that [he] intended . . . be committed." *Id.* It would not be the felony solicited, because the acts of those felonies do not have to be completed in order for the offense of solicitation to occur. And without an actual act, there is no conduct to be "included" in first-degree reckless injury.

Consequently, these two charges necessarily have different elements. *Jackson*, 276 Wis. 2d 697, ¶¶ 8–9. Kloss fails to recognize the distinction between a charge for solicitation of a crime and being charged with the underlying crime itself. (Kloss's Br. 19–20.) But the solicitation statute, like the conspiracy statute, incorporates the particular criminal *offense* that is the object of the solicitation, not the elements of that offense. That means Kloss may be charged with two counts of solicitation, one incorporating the crime of first-degree reckless injury, and one incorporating the crime of first-degree recklessly endangering safety. *Jackson*, 276 Wis. 2d 697, ¶ 9. Pursuant to *Jackson*, his charges are different in law.

2. Kloss's two convictions are also different in fact.

But even solicitation of first-degree recklessly endangering safety and first-degree reckless injury are identical in law, Kloss's convictions are different in fact. While it is true that the State had to prove that Kloss intended that first-degree reckless injury and first-degree recklessly endangering safety be committed, which necessarily required the State to show that Kloss intended Cheryl to commit those crimes, that does not mean that the latter charge was a lesser-included offense of the former. Kloss fails to acknowledge that first-degree recklessly endangering safety is a lesser-included offense of first-degree reckless injury only if the defendant is convicted of both crimes for one act against one victim. That is not what happened here.

The record is replete with evidence that Kloss solicited Cheryl to commit multiple reckless acts against multiple victims.[8] While discussing the damage the police did to the house when they came to arrest him, Kloss asked Cheryl, "[a]re you ready to shoot them when they come to your house next time? . . . No warning shot. Take them out. . . . They'll run . . . ." (R. 208:48–49.) He told Cheryl "In case you run out of cartridges in one, you could just use the other one. I mean, I'm hoping you're going to get at least half a dozen of them . . . ." (R. 208:50.) "And one final thing, I want you to get your

[8] This Court is not limited to reviewing the circuit court's repeated references at trial to Kloss's urging Cheryl to shoot through the door when determining whether there were sufficient facts to show that Kloss solicited multiple acts against multiple victims. (*See* Kloss's Br. 22.) "Where the trial court makes the right decision for the wrong reason, this Court will affirm." *State v. Rognrud*, 156 Wis. 2d 783, 789, 457 N.W.2d 573 (Ct. App. 1990).

handgun out and your shotgun out and if a River Falls cop comes to your door again, you open fire. No warnings. You will let them have it. . . . you say one, and at two you shoot right through the door right into the cop." (R. 209:289, 338.) Furthermore, Kloss advised Cheryl not only to shoot through the door, but to chase the police down and shoot any officers running away: "You see them run, when they run, run out the door after them. . . . Chase them down and get a couple more." (R. 208:50.) "You kill them. Dead. . . . if they come to your home, you kill them dead. . . . I know it's a scary thought . . . But you got to do it." (R. 209:337–38.) Telling Cheryl to chase the police down and kill them as they are running away is solicitation of an act separate from shooting through the door. Kloss further told Cheryl to find someone to "juice up" ammunition for her shotgun "so if they do come over, you know, there's no mistaking that you fire that gun, somebody's going to go down." (R. 209:412.) And he told her to get the contractor fixing the house to "rig something up so the next time a cop comes to the door he'll get electrocuted. Serious Cheri, make no mistake . . . Tell him. Tell him." (R. 208:107.)

As shown, Kloss advised Cheryl to commit more than one reckless act, and he clearly intended that the police be gravely injured, even killed, by Cheryl's chasing down and shooting them. He also advised Cheryl to take these actions against multiple victims. His offenses are therefore different in fact. *See, e.g., State v. Rabe*, 96 Wis. 2d 48, 66–67, 291 N.W.2d 809 (1980) (where a defendant commits one criminal act with multiple victims, each charge requires proof of a fact the others do not and are not multiplicitous). Accordingly, even if these solicitations arose out of "a single course of conduct," his convictions are not multiplicitous. (Kloss's Br. 23.) *Jackson*, 276 Wis. 2d 697, ¶ 9 ("[e]ven though both offenses may have arisen from the same agreement, '[i]t is well settled that a single transaction can

give rise to distinct offenses under separate statutes without violating the Double Jeopardy Clause'") (quoting *Albernaz v. United States*, 450 U.S. 333, 344 n.3 (1981)). And indeed, postconviction, the circuit court acknowledged that though "the behavior that Mr. Kloss encouraged his wife to engage in was somewhat the same over the course of these conversations, but was dissimilar in various facts," and thus Kloss solicited multiple acts that comprised different crimes against different parties. (R. 229:6–7.) Kloss's conviction for solicitation of first-degree recklessly endangering safety was not a lesser-included offense of his conviction for solicitation of first- degree reckless injury.

D. The Legislature intended cumulative punishments for multiple charges of solicitation arising out of a single course of conduct.

Like the conspiracy statute, the solicitation statute shows that the Legislature intended cumulative punishments for solicitation of multiple crimes even if they arise from a single course of conduct. *See Jackson*, 276 Wis. 2d 697, ¶ 8. The solicitation statute incorporates the criminal offense that is the object of the solicitation. Wis. Stat. § 939.30. "This means that when a [solicitation] has as its object the commission of multiple crimes, separate charges and convictions for each are permissible." *Jackson*, 276 Wis. 2d 697, ¶ 8. Consequently, Wis. Stat. § 939.30 "expresses the Legislature's intent to permit multiple punishments." *Jackson*, 276 Wis. 2d 697, ¶ 8. The statute itself shows "a clear indication" of the Legislature's intent to permit multiple punishments, and as explained above, Kloss's convictions are different in fact. Consequently, even if this Court determines that solicitation of first-degree recklessly endangering safety is a lesser included offense of solicitation of first-degree reckless injury pursuant to Wis.

Stat. § 939.66(1), Kloss is due no relief. *Ziegler*, 342 Wis. 2d 256, ¶ 61.

Kloss has made no attempt to show that the Legislature did not intend cumulative punishments for multiple counts of solicitation, despite acknowledging that his claim fails if the Legislature intended multiple punishments. (Kloss's Br. 18 ("A defendant may be charged and convicted of multiple crimes arising out of one criminal act only if the legislature intends it.").) This Court should conclude that the Legislature intended multiple punishments for multiple counts of solicitation arising out of the same course of conduct and affirm the circuit court.

II. Kloss can be convicted of solicitation of reckless injury as a matter of law.

A. Standard of review

Whether solicitation of first-degree reckless injury exists as a crime in Wisconsin is a matter of statutory interpretation this Court reviews de novo. *State v. Briggs*, 218 Wis. 2d 61, 65, 579 N.W.2d 783 (1998).

B. Relevant law

"The crime of solicitation . . . is committed by one who, with intent that a felony be committed, advises another to commit that crime under circumstances that indicate unequivocally that he or she has that intent." Wis. JI—Criminal 550. Solicitation has two elements. *Id*. To prove a solicitation charge, the State must prove that (1) "the defendant intended that [a particular felony] be committed," and (2) "the defendant advised another person, by the use of words or other expressions to commit [that felony], and did so under circumstances that indicate, unequivocally, that the defendant intended that [felony] be committed." *Id.* "'Unequivocally' means that no other inference or conclusion

can reasonably and fairly be drawn from the defendant's acts." *Id.*

First-degree reckless injury has three elements. The defendant must: (1) cause great bodily harm to a victim, (2) by conduct that created an unreasonable and substantial risk of death or great bodily harm to another of which the defendant was aware, and (3) the circumstances of the defendant's conduct show utter disregard for human life. Wis. JI—Criminal 1250.

C. Kloss intended that his wife cause great bodily harm by reckless conduct and advised her to commit that crime, and therefore he solicited first-degree reckless injury.

Kloss was convicted of solicitation of first-degree reckless injury. That is a wholly different crime than first-degree reckless injury itself, and proof of the solicitation does not depend on actually achieving a particular result. Instead, it depends on the result Kloss intended to achieve by the conduct Kloss advised Cheryl to engage in and whether the acts Kloss urged could constitute the felony charged. And because one can advise someone to engage in reckless conduct with the intent that victims suffer great bodily harm, one can solicit first-degree reckless injury.

As the jury instructions show and as explained above, the intent element of solicitation goes to what crime the solicitor intended to be committed. Wis. Stat. § 939.30. "[A]s to those crimes which are defined in terms of certain prohibited results, it is necessary that the solicitor intend to achieve that result through the participation of another." 2 LaFave, § 11.1(c). LaFave's example is on point, though it deals with criminal negligence rather than criminal recklessness: "if *B* were to engage in criminally negligent conduct which caused the death of *C,* then *B* would be guilty

of manslaughter; but it would not be a criminal solicitation to commit murder or manslaughter for *A* to request *B* to engage in such conduct *unless A* did so for the purpose of causing *C*'s death." *Id.*[9] (footnote omitted). Like the example, here, Kloss requested Cheryl to engage in reckless conduct for the purpose of causing great bodily harm to the police. He therefore solicited first-degree reckless injury.

In other words, the elements of first-degree reckless injury are relevant only to Kloss's intent; did Kloss intend that Cheryl commit acts which would constitute first-degree reckless injury, and did he advise Cheryl to commit them? If Kloss intended that victims suffer great bodily harm by Cheryl's reckless conduct, he solicited reckless injury. It does not matter what acts Cheryl actually took, what her intent was, or what the result of her acts might have been, because the crime charged here was the inchoate crime of solicitation. All that matters is whether the State proved that Kloss intended that the police suffer great bodily harm by conduct that created an unreasonable and substantial risk of death or great bodily harm and under circumstances that show utter disregard for human life, and whether he advised Cheryl to commit that crime under circumstances that show unequivocally that he had that intent. And because the result Kloss intended to achieve does not depend on whether Cheryl took any action or not, Kloss could properly be charged with solicitation of first-degree reckless injury.

Kloss has misunderstood the "intent" necessary for the crime of solicitation. (Kloss's Br. 24–27.) He conflates it with the mental state required of the actor for the completed

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[9] LaFave notes that this particular issue "apparently has not arisen in any reported solicitation case." 2 Wayne R. LaFave, *Substantive Criminal Law* § 11.1(c) 272 n.63 (3d ed. 2018).

crime of first-degree reckless injury. (Kloss's Br. 24 ("one cannot intend an injury caused by reckless conduct because whether an injury occurs is a matter of fortuity.").) But as explained, it does not matter what Cheryl's intent might have been had she committed the crime, nor does it matter that the intended result might never have been achieved. All that matters is that Kloss intended that the police suffer great bodily harm by Cheryl's reckless conduct, and advised her to commit that conduct. And here, the evidence unequivocally shows that he did.

An analogy to party-to-a-crime liability is instructive. The party-to-a-crime statute allows criminal liability to attach if a person "intentionally aids and abets the commission" of a crime. Wis. Stat. § 939.05. A person can be convicted of aiding and abetting a reckless injury even though aiding and abetting requires intent and reckless injury does not. *See State v. Howell*, 2007 WI 75, ¶ 1, 301 Wis. 2d 350, 734 N.W.2d 48; *accord Mendez v. State*, 575 S.W.2d 36, 38 (Tex. Crim. App. 1979) ("It is entirely possible to intentionally solicit or assist an individual in committing a reckless act.") That is because it is the aider and abettor's *intent to participate* in the crime that matters, not whether the actor intended a particular result. Similarly, when the crime charged is solicitation, it is the solicitor's intent to achieve a particular result by certain conduct that matters, not the actual conduct of the solicitee or what the outcome might have been.

Kloss's citation to several foreign jurisdictions that have held that a person cannot enter into a conspiracy to commit a reckless result is not persuasive. (Kloss's Br. 26–27.) The crime at issue here is solicitation, not conspiracy. Conspiracy is more akin to attempt than it is to solicitation, because conspiracy requires that two or more people construct a plan to actually commit a crime, and that someone carries out "an act to effect [the crime's] object."

Wis. Stat. § 939.31. Similarly, attempt requires "that the actor have an intent to perform acts and attain a result which, if accomplished, would constitute such crime and that the actor does acts toward the commission of the crime which demonstrate unequivocally, under all the circumstances, that the actor formed that intent and would commit the crime except for the intervention of another person or some other extraneous factor." Wis. Stat. § 939.32. In Wisconsin, a person cannot *attempt* to commit reckless injury or reckless homicide[10] because attempt requires that the actor intended "to perform acts and attain a result . . . [and] does acts toward the commission of the crime which demonstrate . . . the actor formed that intent." Wis. Stat. § 939.32. "[O]ne individual cannot *act* with both a specific intent . . . and without a specific intent . . . with respect to the *commission* of one crime." *Mendez*, 575 S.W.2d at 38 (emphasis added); *Briggs*, 218 Wis. 2d at 66. But unlike attempt or conspiracy, solicitation is not tethered to the act of committing or somehow furthering the underlying crime. All that matters is what conduct the solicitor urged and the result the solicitor intended to achieve by it.

Additionally, many states have defined and interpreted their inchoate crimes differently than Wisconsin has. *Compare Palmer v. People*, 964 P.2d 524, 527–28 (Colo. 1998) (In Colorado, a person can be charged with conspiracy

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[10] One can attempt recklessly endangering safety, though. If a person attempts to rig a bomb to blow up on a busy sidewalk but the police catch the person while wiring it, all of the elements of attempt to recklessly endanger safety are met. *See Hamiel v. State*, 92 Wis. 2d 656, 664, 285 N.W.2d 639 (1979) (a defendant may be charged with attempt when the person has "actually done things which are steps intentionally taken in furtherance of some specific aim, and which themselves are enough to suggest clearly what that specific aim was.").

only for specific intent crimes but can be charged with attempt of reckless crimes, because under Colorado law attempt requires only that "the accused knowingly engages in the risk producing conduct that could lead to the result") *with Briggs*, 218 Wis. 2d at 66 ("[U]nder Wisconsin law, one cannot attempt to commit a crime which does not itself include an element of specific intent."). And as explained, conspiracy is a qualitatively different crime than solicitation; how other states have interpreted their conspiracy statutes says nothing about solicitation in Wisconsin. Without some showing that these states have a solicitation statute that is substantially similar to Wisconsin's and that they have interpreted it in the way Kloss urges, there is no persuasive value in these cases.

Unlike attempt or conspiracy, solicitation does not depend on what intent the solicitee had or what may or may not have actually happened had the solicitee carried out the act. A person can solicit reckless injury in Wisconsin.

III. There was sufficient evidence to support the unequivocal intent element of solicitation.

A. Standard of review

A court reviews de novo whether evidence was sufficient to support a conviction. *State v. Smith*, 2012 WI 91, ¶ 24, 342 Wis. 2d 710, 817 N.W.2d 410. However, review for sufficiency of the evidence is very narrow, and this Court "will reverse a conviction only if 'the evidence, viewed most favorably to the state and the conviction, is so insufficient in probative value and force that it can be said as a matter of law that no trier of fact, acting reasonably, could have found guilt beyond a reasonable doubt.'" *State v. Schulpius*, 2006 WI App 263, ¶ 11, 298 Wis. 2d 155, 726 N.W.2d 706 (quoting *State v. Poellinger*, 153 Wis. 2d 493, 501, 451 N.W.2d 752 (1990). This standard applies to bench trials as well as jury trials. *Id.*

B. Relevant law

When determining whether evidence at trial was sufficient to support a conviction, an appellate court "consider[s] the evidence in the light most favorable to the State and reverse[s] the conviction only where the evidence 'is so lacking in probative value and force that no trier of fact, acting reasonably, could have found guilt beyond a reasonable doubt.'" *Smith*, 342 Wis. 2d 710, ¶ 24 (quoting *Poellinger*, 153 Wis. 2d at 507). "Therefore, this court will uphold the conviction if there is any reasonable hypothesis that supports it." *Id.* "[A]n appellate court must consider the totality of the evidence when conducting a sufficiency of the evidence inquiry." *Id.* ¶ 36. "[A] reviewing court 'faced with a record of historical facts that supports conflicting inferences must presume—even if it does not affirmatively appear in the record—that the trier of fact resolved any such conflicts in favor of the prosecution, and must defer to that resolution.'" *Cavazos v. Smith*, 565 U.S. 1, 7 (2011) (per curiam) (citation omitted). The State is not required to prove a defendant's guilt beyond a reasonable doubt on appeal. *Poellinger*, 153 Wis. 2d at 503.

A defendant "bears a heavy burden" on appeal when challenging the sufficiency of the evidence to support a conviction. *State v. Klingelhoets*, 2012 WI App 55, ¶ 10, 341 Wis. 2d 432, 814 N.W.2d 885. "It's very difficult for a defendant to convince an appellate court that the evidence presented to a jury was insufficient to support a conviction." *United States v. Meza-Urtado*, 351 F.3d 301, 302 (7th Cir. 2003).

C. Kloss's commands and treatment of Cheryl were sufficient for the court to find unequivocal intent.

"'Unequivocally' means that no other inference or conclusion can reasonably and fairly be drawn from the

defendant's acts."[11] Wis. JI—Criminal 550. But because the State is not required to prove a defendant's guilt beyond a reasonable doubt on appeal, this Court's review is limited to whether there was any reasonable view of the evidence that allowed the circuit court to find unequivocal intent. *Poellinger*, 153 Wis. 2d at 503. Here, contrary to Kloss's assertions, the undisputed evidence supports a finding that Kloss unequivocally intended that Cheryl shoot the police if they returned to the house.

The transcript of the calls from Kloss to Cheryl shows the content of 55 phone calls. In every one, Kloss viciously abused and berated Cheryl and lambasted her about not following the demands he was making of her. (R. 208; 209.) Kloss told Cheryl, "I want you to get your handgun out and get your shotgun out and if a River Falls cop comes to your door again, you open fire. No warnings. You will let them have it." (R. 209:289.) Kloss said he was in a good mood that day, but "[t]hat doesn't let you off the hook for what I expect, you know." (R. 209:293.) He later told her, "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?" (R. 209:336.) Kloss also said, "Your husband asked you to do something, and either

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[11] Kloss's attempt to construct a different definition of "unequivocal" and change the State's burden of proof to something other than beyond a reasonable doubt was already rejected by this Court in *State v. Hauk*, 2002 WI App 226, ¶¶ 28–29, 257 Wis. 2d 579, 652 N.W.2d 393. (Kloss's Br. 27.) The jury instructions define unequivocal in relation to this statute, and Kloss does not cite any authority supporting his claim that the word unequivocal raises the State's burden of proof when it occurs in a criminal statute.

you do what your husband says, or get the fuck out. . . . Love, honor, obey. Obey, motherfucker. Obey." (R. 209:227.)

Those are just a small fraction of the commands Kloss gave Cheryl. The circuit court found that Kloss controlled Cheryl by manipulating, degrading, and threatening her, and "the telephone calls themselves were his effort to exert control over his wife." (R. 225:119–22.) The court noted numerous instances where Kloss demanded that Cheryl "do what [she was] told or we're done," that she "put [herself] on the line" for Kloss, that her "husband asked [her] to do something, and either you do what your husband says or get the F out," and to "just shut your mouth and do the F you're told." (R. 225:122–24.) He further told her, "You better start doing the things you promise me you're going to do and quit lying to me. It's time, Cheryl. You want to save this relationship, it's in your hands right now. It's time to go to work." (R. 208:221.)

All of these comments are sufficient to show that Kloss unequivocally intended that Cheryl follow his commands, including to shoot through the door at the police if they returned, and to chase them out of the house and shoot as many of them as possible as they were running away. Both of those acts would be felonies, and proof that Kloss intended them to occur is all that solicitation requires. It is irrelevant that the police never may have returned to the house. (Kloss's Br. 27–28.) The phone calls showed that Kloss unequivocally intended Cheryl to shoot them if they did. And Kloss's contention that he "could never have intended a plan he made sure the authorities knew about" is unsupported by the record and common sense. (Kloss's Br. 27–28.) The record showed that Kloss intended that Cheryl follow his instructions without question, and he berated her if she did not comply. And as the State noted, Kloss could just as easily have known the calls would drive police to the house, and therefore did not care that the calls were recorded. (R.

230:20.) Indeed, by Kloss's own admission he used the calls to "taunt[ ]" the police. (Kloss's Br. 30.) The trier of fact easily could find unequivocal intent on this record. This Court should affirm the circuit court.

CONCLUSION

For the foregoing reasons, the State respectfully requests that this Court affirm the decision of the circuit court.

Dated this 29th day of August, 2018.

Respectfully submitted,

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CERTIFICATION

I hereby certify that this brief conforms to the rules contained in Wis. Stat. § 809.19(8)(b) and (c) for a brief produced with a proportional serif font. The length of this brief is 9,012 words.

Dated this 29th day of August, 2018.

_____
LISA E.F. KUMFER
Assistant Attorney General

CERTIFICATE OF COMPLIANCE WITH WIS. STAT. § 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 Wis. Stat. § 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.

Dated this 29th day of August, 2018.

_____
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