STATE OF WISCONSIN

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

DISTRICT III

Case No. 2018 AP 651-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

KELLY JAMES KLOSS,

Defendant-Appellant.

DEFENDANT-APPELLANT'S REPLY BRIEF

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

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ARGUMENT[1]

I. SEPARATE CONVICTIONS FOR SOLICITING A GREATER AND LESSER CRIME BASED ON THE SAME FACTS ARE MULTIPLICITOUS AND VIOLATE DOUBLE JEOPARDY.

1 The clerk produced one index on April 25, 2018 and another on May 14, 2018. The May 14 index modified the record item numbers on the transcripts by 2. In other words, 208 became 210, 209 became 211 and so forth. Unfortunately, Kloss had nearly completed his brief by May 14 and did not notice the change. Therefore, all the transcript references in Kloss' brief-in-chief are two numbers lower than they should be. The telephone transcripts were also changed. Record item 229 became 208, and 230 became 209. The May 14 index numbers are used in this brief.

The State agrees reckless endangerment is a lesser included of reckless injury,[2] but argues it doesn't matter. The intended offense must be viewed as *one* element of a solicitation charge. As reckless injury and reckless endangerment are separate offenses, they provide a distinguishing element to each of the solicitation charges. The "solicitation statute, like the conspiracy statute, incorporates the particular criminal '*offense*' that is the object of the solicitation, not the elements of the offense." (emphasis original) (State's Brief, p. 19). In the State's view, there could be as many separate solicitation charges as there are lesser included offenses. The State relies on *State v. Jackson*, 2004 WI App 190, 276 Wis. 2d 697, 688 N.W.2d 688, for the proposition that the elements underlying these intended offenses are irrelevant. The *Jackson* court "did not consider the elements of the underlying offenses; the dispositive factor was that the arson and intentional homicide were different felonies." (State's Brief, p. 17).

The flaws in the State's reasoning are three-fold. First, solicitation of reckless endangerment is a lesser included offense because it doesn't require proof of any additional fact. Second, statutory elements are the only way to identify and differentiate an intended offense. The State cannot prove a particular felony was intended unless it can prove the elements of that felony were intended. Third, *Jackson* does not help the State because the underlying felonies had distinct elements and with distinct supporting facts.

Greater and lesser included offenses are identical in law because proving the greater necessarily proves the lesser. The lesser doesn't require proof of any additional fact. See Wis. Stat. § 939.66(1); *State v. Lechner*, 217 Wis.2d 392, ¶11, 576 N.W.2d 912 (1998). It doesn't matter whether the intended felony constitutes one element of solicitation or multiple elements. One cannot, for example, commit delivery of methamphetamine without committing the lesser included offense of possession. Likewise, one cannot solicit delivery of

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2 "Reckless endangerment" refers to First-Degree Recklessly Endangering Safety, contrary to Wis. Stat. § 941.30(1). "Reckless injury" refers to First Degree Reckless Injury, contrary to Wis. Stat. § 940.23(1).

methamphetamine without necessarily soliciting possession of methamphetamine. The State's argument fails because solicitation of a greater and lesser included crime may only be charged separately if they are distinguishable in fact.

Next, an intended crime can only be defined by its statutory elements. To prove a particular "felony" was intended, the State must prove the elements of that offense were intended as well. The "mens rea of solicitation is a specific intent to have someone commit *a completed crime*." (emphasis added). Ira P. Robbins, *Double Inchoate Crimes*, 26 Harv. J. on Legis. 1, 116 (1989), p. 29. WIS JI-Criminal 550, for example, requires a jury be instructed on the "elements and definitions" pertaining to the intended offense. See also *State v. Crowe*, 656 S.E.2d 688, 692 (N.C. Ct. App. 2008) (solicitation of murder requires the State to prove the solicitor "counseled, enticed, or induced another to commit each of the following: (1) an unlawful killing; (2) with malice; (3) with the specific intent to kill formed after some measure of premeditation and deliberation."). As the elements of reckless injury concededly include all the elements of reckless endangerment, the solicitation charges are identical in law. (See Brief-in-Chief, pp. 19-21).

Finally, *Jackson* did not address whether elements of the intended crimes become elements of the conspiracy charge because it didn't need to. The issue in *Jackson* was whether a defendant could be charged with two counts of conspiracy—one for arson and one for intentional homicide—based on a single plan to commit arson and then shoot people as they fled from the burning building. *Jackson*, at ¶2. There was no dispute arson and intentional homicide are distinct felonies. There was no dispute that neither was a lesser included of the other. The conspiracy charges were not multiplicitous because the underlying offenses "*would have been charged as separate crimes had they been completed*." (emphasis added). *Id*., at ¶3. The two conspiracy counts were different not only in law but also in fact, as "each charge requires proof of facts that the other does not,…." *Id*., at ¶9. In contrast, solicitation of reckless endangerment does not require

proof of any facts beyond those needed to prove solicitation of reckless injury.

The State next argues the two convictions *are supported by distinct facts* and therefore not multiplicitous: "[t]he record is replete with evidence that Kloss solicited Cheryl to commit multiple reckless acts against multiple victims." (State's Brief, p. 20). The State cites as examples Kloss advising Cheryl to not only shoot through the door, "but to chase the police down and shoot any officers running away." (*Id*., at p. 21). Kloss told Cheryl to get the contractor fixing their door to "rig something up so the next time a cop come to the door he'll get electrocuted." (*Id*.). Kloss also made reference to multiple victims when he talked about "taking them out" or hoping Cheryl was "going to get at least half a dozen of them." (*Id*., at 20).

The problem with the State's analysis is that it fails to apply the standard of review. In fact, it invites the Court to ignore the circuit court's findings and make its own.

In all actions tried without a jury, "*the court shall find the ultimate facts and state separately its conclusions of law thereon.*" Wis. Stat. § 805.17. As trier of fact, the circuit court's function is to "weigh the evidence, resolve conflicts in the evidence, choose among competing reasonable inferences from the evidence, or make credibility determinations." *Milbauer v. Transport Employes' Mut. Benefit Soc.*, 56 Wis. 2d 860, 865, 203 N.W.2d 135, 138 (1973). These findings are reviewed under the clearly erroneous standard. Wis. Stat. § 805.17. Only the trial court's conclusions of law *from* those fact findings are reviewed de novo. See *First Nat'l Leasing Corp. v. City of Madison*, 81 Wis.2d 205, 208, 260 N.W.2d 251, 253 (1977).

As the circuit court noted in its decision, "[t]he ultimate question here is what did Kelly Kloss unequivocally intend that Cheryl Kloss do? *These are the findings of fact.*" (225:117) The court's findings of fact are cited at length in Kloss' Brief-in-Chief and will not be repeated here. (See Brief-in-Chief, pp. 13-16). What Kloss "intended," according to the circuit court, was that Cheryl shoot through the door

and perhaps chase the officer(s) down as they ran away. This was the factual basis for *both* reckless charges. The court made no distinction between the two. (225:117-118, 124-130). The court's finding that Kloss told "his wife to shoot through the door" affected at least three of the acquittals as well. (225:125, 126, 127). On one acquittal, for example, the court found there was no specific intent to cause bodily harm as "just shooting through the door in and of itself in my view wasn't enough." (225:127).

In post-verdict motions the circuit court re-affirmed that both convictions were "identical in fact":

> These convictions for ***Counts 17 and 18 were based upon the same course of conduct*** *that Kelly Kloss encouraged Cheryl Kloss to engage in.* He was arrested. They talked over the phone. He, in pretty specific language, badgered her to be prepared the next time law enforcement came to her house.
>
> She was to get a firearm, and he used at various times reference to a handgun and also a long gun, and have it in the davenport, and *when they came through the door shoot them, or shoot them outside the door, shoot them through the door, shoot through the wall, whatever. That was the course of conduct.*
>
> *So the first prong of Blockburger and Davison is,* ***are the offenses identical in fact, and I find that they are. There isn't any question that they were.***

(emphasis added) (215:20).

Only in its postconviction decision did the circuit court suggest more than one conviction was justified 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,…." (229:6, 13-14). This new rationale is contrary to the circuit court's findings of fact, its verdict, and its post-verdict decision, as noted above.

It also contradicts the statutory language of Wis. Stat. § 939.30(1) as well as the court's express holding that this was a continuous offense.

The "number of efforts" rationale is 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.

At trial, the State insisted that Kloss' phone calls were a single course of conduct and refused to identify any particular conversation or point in time as a completed crime: "The charges in this information flow from a continuous course of conduct spanning a (sic) ten (10) days…." (104:1; 224:60-61). The circuit court agreed with the State, satisfied that Kloss' solicitation was based on "his course of conduct, rather than each telephone [call]…." (224:67). The court's holding directly impacted Kloss' trial strategy since it now required him to defend each count based on all the phone calls. This ruling is not only the law of the case, but a position taken by and thus binding on the State.

The court also suggests postconviction 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." (229:6). The court, however, made no new findings of fact, drew no factual distinction between the two counts, and never identified which facts were "dissimilar." Rather, it referenced "back" to the previous findings it made on January 22, 2017. (229:6-7). The elements of each conviction must be weighed solely against the findings the court actually made, not just any fact in the record.

Lastly, the State argues multiple counts are justified because there was more than one "potential" victim. Counting more than one victim, however, would be arbitrary and speculative. No finding was made that Kloss intended to harm a specified number of persons. Nor did the circuit court make any findings related to the number of

"potential" victims. There was simply no way for anyone—Kloss included—to anticipate how many police officers would be standing at the door. In *Jackson*, for example, the plan was to cause a fire and then shoot "people fleeing" from the building. *Jackson*, at ¶2. Despite the "potential" for multiple victims, Jackson was only charged with one count of conspiracy to commit homicide. *Id*., at ¶¶1-2

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.

The State argues Kloss can intend both a reckless act and a specified resulting harm, and therefore may be charged and convicted of first degree reckless injury.

The State's logic is flawed. Again, the "mens rea of solicitation is a specific intent to have someone commit a completed crime." *Robbins*, at p. 29. Kloss cannot, by definition, intend the completed crime of reckless injury because reckless conduct does not, by definition, produce a specified result.

Kloss previously cited numerous conspiracy cases and other authority which hold with near unanimity that one cannot conspire to commit a reckless crime which requires a specified result. (See Brief-in-Chief, pp. 25-26). The State argues these cases are not "persuasive" because conspiracy is distinguishable from solicitation:

> 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."

….

> …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.

(State's Brief, p. 26, 27). The State fails to explain how being "tethered" to the underlying crime distinguishes solicitation from conspiracy when the common question is whether, as a threshold matter, one can intend a reckless crime which requires a specified resulting harm. Courts have concluded, for example, that a person cannot conspire to commit a reckless assault because the offense is "controlled by the resulting harm." *State v. Donohue*, 834 A.2d 253, 257 (N.H. 2003). 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*. This rationale applies to both conspiracy and solicitation. A conspirator's intent is analogous to a solicitor's intent because, in both circumstances, the crime will never occur. Like a solicitor, a conspirator may also intend that someone else commit the crime. In fact, solicitation has been characterized as an "attempt to conspire":

> As in common-law conspiracy, disclosure of the criminal scheme to another party constitutes a part of the actus reus of solicitation. But, while the actus reus of a conspiracy is an agreement with another to commit a specific completed offense, the actus reus of a solicitation includes an attempt to persuade another to commit a specific offense. A necessary element of solicitation is the solicitant's rejection of the solicitor's request. *Thus, solicitation can be viewed as an attempt to conspire.*

(emphasis added). *Robbins*, at p. 29.

The State cites a single sentence from 2 Wayne R. LaFave, *Substantive Criminal Law* § 11.1(c) (3d ed. 2018), as its sole authority: it "would not be 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." (emphasis original) (State's Brief, p. 25). This purpose of this comment is to illustrate the general proposition that a solicitor must intend the result required by the crime solicited. The comment contains no analysis. It fails to address the obvious point that if a solicitor expects and therefore intends a harmful result, he is, by definition, no longer soliciting a

reckless crime. The comment acknowledges the lack of "any reported solicitation case" supporting this proposition. 2 Wayne R. LaFave, *Substantive Criminal Law* § 11.1(c) 272, n. 63 (3d ed. 2018).

As criminal recklessness only causes harm by fortuity, the completed crime cannot be intended in advance. Kloss cannot be convicted of soliciting First Degree Reckless Injury.

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.

The State focuses almost entirely on the relationship between Kloss and his wife, arguing that Kloss mentally and emotionally abused her "in order to cow her into following his commands…." (State's Brief, p. 3, 30-31). The State dismisses Kloss' argument he could never have intended a plan he made sure the authorities knew about as "unsupported by the record and common sense." (*Id*., at p. 31).

The problem with the state's analysis is that it rests on its perception of what Cheryl's reaction to these phone calls should have been rather than Kloss' actual intent based on all the circumstances. In fact, Cheryl knew Kloss had mental health problems. She knew many of his outrageous comments were untrue. (see e.g. 227:56, 60-61, 75, 80). She denied taking Kloss' rantings and ravings seriously. (see e.g. 227:89, 93, 109). The bottom line, however, is that doesn't matter what Cheryl would have done. These "crimes" were never going to happen. Kloss told the cops everything. He knew he told the cops everything. He certainly acted that way when he made repeated comments about the fact he was being monitored and even used the calls to address the authorities directly. (see e.g. 209:149, 218, 282, 349-350; 208: 220, 236). Under these circumstances, how could Kloss envision these

crimes would ever happen?

Kloss is not arguing an impossibility defense. Rather, he is arguing he cannot intend for something impossible to happen knowing it's impossible. He knew the calls were being monitored. He knew the "plan," to be successful, required the element of surprise. The State refuses to engage on this issue relying instead on "common sense" when in fact, common sense would dictate Kloss could never have intended these crimes because he knew they never would occur. He made sure of that.

CONCLUSION

Based on Section III of this Brief, the Court should dismiss both 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 10th day of September, 2018.

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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 argument and conclusion of this brief contain 2996 words.

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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.

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~~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.~~

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Dated this 10th day of September, 2018.

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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 10th day of September, 2018. I further certify that the brief or appendix was correctly addressed and postage was prepaid.

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