STATE OF WISCONSIN

IN SUPREME COURT

Case No. 2018AP651-CR

STATE OF WISCONSIN,

Plaintiff-Respondent-Cross Petitioner,

v.

KELLY JAMES KLOSS,

Defendant-Appellant-Petitioner.

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

BRIEF-IN-CHIEF AND APPENDIX OF THE PLAINTIFF-RESPONDENT-CROSS PETITIONER

JOSHUA L. KAUL
Attorney General of Wisconsin

LISA E.F. KUMFER
Assistant Attorney General
State Bar #1099788

Attorneys for Plaintiff-Respondent-Cross Petitioner

Wisconsin Department of Justice
Post Office Box 7857
Madison, Wisconsin 53707-7857
(608) 267-2796
(608) 266-9594 (Fax)
kumferle@doj.state.wi.us

TABLE OF CONTENTS

Page

Page

TABLE OF AUTHORITIES

Cases

Page

Page

Statutes

Other Authorities

ISSUES PRESENTED

1. Do the elements of the offense solicited become the elements of a solicitation charge?

The court of appeals assumed that they did and concluded that Kloss's convictions for solicitation of first-degree recklessly endangering safety and solicitation of first-degree reckless injury were therefore identical in law, because first-degree recklessly endangering safety would be a lesser-included offense of a completed act of first-degree reckless injury.

This Court should reverse the court of appeals.

2. When determining whether two offenses are identical in fact for a multiplicity analysis, is the court of appeals required to independently review the facts in the record to determine whether the offenses were different in fact?

Because the State—in a pretrial motion hearing discussing whether the charges were duplicitous—described the phone calls as a "course of conduct," the court of appeals refused to consider whether the evidence showed that Kloss's acts of solicitation were sufficiently different in fact to constitute two separate offenses for a multiplicity analysis. It did not acknowledge the State's argument showing that the Legislature intended cumulative punishments. It further held, essentially, that the State was judicially estopped from arguing that position as respondent on appeal.

This Court should reverse the court of appeals.

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

As with any case warranting this Court's review, oral argument and publication are appropriate.

INTRODUCTION

Kloss's convictions for solicitation of recklessly endangering safety and solicitation of first-degree reckless injury are not multiplicitous, for two reasons:

First, solicitation of recklessly endangering safety is not a lesser-included offense of solicitation of first-degree reckless injury. This is so because it is the solicitor's intent to produce a particular result that matters—the elements of the solicited crime are relevant only to ensure the acts the defendant urged and intended would result in the felony alleged. A person who intends that a person commit a particular crime and urges them to commit that crime does not intend that the person commit a lesser offense, even though the solicitee would necessarily have to do so to complete the solicited act.

Second, The court of appeals was required to consider, de novo, whether the acts were different in fact. The record shows that Kloss continually solicited two acts. His offenses are therefore different in fact. The burden should have been on Kloss to show that the Legislature did not intend cumulative punishments for his multiple acts of solicitation, which he could not meet.

STATEMENT OF THE CASE

The facts and procedural background of this case are undisputed.

Proceedings in the Circuit Court

After Kloss absconded from a furlough from the Marathon County Jail, the Marathon County Sheriff's Department asked the River Falls police to keep watch on the house where Kloss and his wife Cheryl lived. (R. 227:12–13.) Officer Joshua Hecht surveilled the house, and on September 5, 2014, he spoke with a man he believed was Kloss. (R. 227:131–32.) Police searched the house, but they did not find Kloss. (R. 227:133–34.) A short time later, Hecht saw Kloss through the kitchen window. (R. 227:134–35.)

Hecht obtained a search warrant, and police again searched the house, this time with the assistance of a K-9 unit. (R. 227:135.) The police dog located Kloss in a hidden crawl space. (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,[1] which were monitored by the sheriff's department. (R. 227:192–203; 226:23–33; 208; 209.) Kloss repeatedly 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 also told her to chase officers through the yard, shooting as many as possible. (R. 208:50.)

During the calls, Kloss viciously abused and berated Cheryl and lambasted her for not following demands he was making of her. (R. 208; 209.)

Police got another warrant for the Kloss house based on the phone calls—55 calls total. (R. 226:38–39.) They

---

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

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.)

The State charged Kloss with, as relevant here, seven counts of soliciting various crimes against the police. (R. 76; 144.) Kloss requested a bench trial. (R. 98.)

The trial proceeded before Judge Eugene Harrington. (R. 225; 226; 227.) After hearing the content of the phone calls and testimony from Cheryl and several police officers, the court found Kloss guilty of two of the solicitation charges: one count of solicitation of first-degree reckless injury and one count of solicitation of first-degree recklessly endangering safety.

Before sentencing, Kloss moved to dismiss the charges. (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 further stated that the two offenses were identical in fact but not in law. (R. 215:19–22.) The court concluded 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) as a matter of law, he could not solicit reckless injury without an injury; (2) 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; and (3) his convictions were multiplicitous because first-degree reckless endangerment is a lesser-included offense of first-degree reckless injury. (R. 186:2; 230:7–11.)

The court 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—the convictions were different in fact. (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. (R. 230:39–40.)

Kloss appealed.

The Court of Appeals' Decision

Kloss raised the same three issues on appeal. In an opinion authored by Judge Kloppenburg and recommended for publication, the court of appeals affirmed in part and reversed in part, disposing of the issues as follows:

Whether Kloss's convictions for solicitation of first-degree reckless injury and solicitation of first-degree recklessly endangering safety were multiplicitous.

The court of appeals concluded that Kloss's convictions were multiplicitous because his conviction for solicitation of first-degree recklessly endangering safety was a lesser-included offense of his conviction for solicitation of first-degree reckless injury. *State v. Kloss*, 2019 WI App 13, ¶¶ 19–31, 386 Wis. 2d 314, 925 N.W.2d 563; (State's Pet. App. 184–201.) It determined that the two charges were identical in law. *Id.* ¶ 27. It then determined that Kloss's two convictions were also identical in fact. *Id.* ¶¶ 28–31. The court recognized that postconviction, the State argued, and the circuit court found that the separate calls were separate acts constituting separate solicitations, but held that "[t]he State could not then, and cannot now, change tack and argue that each phone call constituted a separate solicitation . . . ." *Id.* ¶¶ 29–30.

The court of appeals reversed Kloss's conviction for solicitation of recklessly endangering safety. *Kloss*, 386 Wis. 2d 314, ¶ 33. Because Kloss's sentences for the two convictions were imposed consecutive to one another, it remanded for resentencing on Kloss's conviction for solicitation of first-degree reckless injury. *Id.* ¶ 36.

Whether solicitation of first-degree reckless injury is a crime known to law.

The court of appeals concluded that solicitation of first-degree reckless injury is a crime under Wisconsin law. *Kloss*, 386 Wis. 2d 314, ¶ 11. It noted that the crime of solicitation has "two elements: (1) '[t]he defendant intended that [a particular felony] be committed;' and (2) '[t]he defendant advised another person . . . to commit [that felony] and did so under circumstances that indicate, unequivocally, that the defendant intended that [the felony] be committed.'" *Id.* ¶ 7 (citing Wis. JI–Criminal 550 (2001)). The court observed that while the solicitor could not know with certainty whether an injury will occur from a solicitee's conduct, there was "no reason why a *solicitor* cannot intend, at the time he or she solicits reckless conduct from another, that great bodily harm result from the *solicitee's* reckless conduct." *Id.* ¶ 10.

Whether there was sufficient evidence showing Kloss unequivocally intended that Cheryl engage in reckless conduct resulting in injury.

The court of appeals rejected Kloss's argument that the unlikelihood that Cheryl would have the opportunity to commit the crimes negated Kloss's intent. *Kloss*, 386 Wis. 2d 314, ¶¶ 13–15. The court determined that it was "far from impossible" that police may again approach the Kloss home, therefore "a fact finder could readily find that, based on the phone call evidence, if the police did come to the Kloss home, Kloss actually intended that Cheryl shoot the police." *Id.*

Both Kloss and the State petitioned this Court for review. This Court granted both petitions on June 11, 2019.

STANDARDS OF REVIEW

This case requires interpretation of the solicitation statute, Wis. Stat. § 939.30(1). Statutory interpretation presents a question of law that this Court reviews de novo. *State v. Hemp*, 2014 WI 129, ¶ 12, 359 Wis. 2d 320, 856 N.W.2d 811.

Whether a crime is a lesser-included offense of another crime is also a question of law this Court reviews de novo. *State v. Moua*, 215 Wis. 2d 511, 517, 573 N.W.2d 202 (Ct. App. 1997).

Finally, whether convictions are multiplicitous is also a question of law reviewed de novo. *State v. Steinhardt*, 2017 WI 62, ¶ 13, 375 Wis. 2d 712, 896 N.W.2d 700.

ARGUMENT

I. Kloss's conviction for solicitation of first-degree recklessly endangering safety had different elements and required a different intent than his conviction for solicitation of first-degree reckless injury.

A. General principles of statutory interpretation.

This question requires this Court to interpret the solicitation statute, Wis. Stat. § 939.30. Courts employ statutory interpretation to determine the meaning of a statute "so that it may be given its full, proper, and intended effect." *State ex rel. Kalal v. Circuit Court for Dane Cty.*, 2004 WI 58, ¶ 44, 271 Wis. 2d 633, 681 N.W.2d 110. Submission to the plain meaning of a statute requires courts to begin with the language of the statute, which is given "its common, ordinary, and accepted meaning." *Id.* ¶ 45. "[S]tatutory language is interpreted in the context in which it is used; not in isolation but as part of a whole; in relation

to the language of surrounding or closely-related statutes; and reasonably, to avoid absurd or unreasonable results." *Id.* ¶ 46.

B. Solicitation criminalizes the solicitor's advising that a particular felony be committed with the intent that that particular felony be committed.

Solicitation is a discrete crime. Wis. Stat. § 939.30. It is an inchoate crime, meaning the crime of solicitation is complete even if the intended substantive crime is never actually committed. 5 Wisconsin Legislative Council, *Judiciary Committee Report on the Criminal Code* at 25 (1953). As relevant here, Wis. Stat. § 939.30(1) defines solicitation and provides the penalties:

> 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.

Solicitation, therefore, has two elements: (1) "[t]he defendant intended that [a particular felony] be committed," and (2) "[t]he 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." Wis. JI–Criminal 550. Like intentional homicide, solicitation is a specific-intent crime because it requires that the solicitor have the intent to cause a specific result.

Here, the court of appeals recognized that the completed crimes of first-degree recklessly endangering safety "have a greater and lesser relationship." *Kloss*, 386 Wis. 2d 314, ¶ 22 (citing *State v. Weso*, 60 Wis. 2d 404, 407–08, 210 N.W.2d 442 (1973). The court of appeals determined that Kloss's conviction for solicitation of first-degree reckless

endangering safety was therefore a lesser-included offense of his conviction for solicitation of first-degree reckless injury. *Id.*

The problem with the court of appeals' analysis, though, is that it failed to do two things. First, it failed to appreciate that solicitation is itself a discreet crime under its own statutory section. Second, as will be discussed in section II, it did not look to the record to determine whether Kloss's two convictions were for two different acts of solicitation.

C. The crime of solicitation therefore has different elements than the substantive crime that is the object of the solicitation.

Inchoate crimes operate differently than most substantive crimes because they criminalize anticipation of a criminal act; therefore, even though they refer to another substantive crime, they have different elements than the substantive criminal objectives themselves. *See* Wis. Stat. §§ 939.30–.32. "Inchoate crimes cover cases where the actor intends that a criminal result be produced either by himself or by another and does certain acts to carry that intent into effect but those acts fall short of producing the intended result." *Judiciary Committee Report* at 25.

"The crime of solicitation . . . is the most inchoate of the anticipatory offenses,'" 2 Wayne R. LaFave, *Substantive Criminal Law* § 11(c) 264–65 (3d ed. 2018) (citation omitted), because it does not require that any act in furtherance of the crime be committed by anyone: solicitation is complete even if the person solicited never agrees to commit the crime. *Id.* at 264. The only act at issue is the solicitor's words urging the crime. *Judiciary Committee Report* at 25. Thus, solicitation is largely a crime of the solicitor's intent. *Id.* ("The crime of solicitation can best be understood by an

analysis in terms of the necessary intent and the type of act which is required.").

"The act required is the advising, inciting, commanding, or soliciting another to commit a crime." *Judiciary Committee Report* at 25. In other words, the actus rea of solicitation is complete when the solicitor advises the solicitee to commit acts that would constitute a particular crime. The objective of the request may include any conduct which is prohibited by any criminal statute. *See Judiciary Committee Report* at 25.

The mens rea is that the solicitor unequivocally intend the solicitee commit the felony solicited. Wis. JI–Criminal 550. "The requirement of an intent that a crime be committed is an abbreviated way of stating that the result which the actor desires or which he believes will be caused if his acts are successful must be prohibited by a criminal statute." *Judiciary Committee Report* at 25.

But because solicitation is an inchoate crime, the intended substantive crime need never actually be committed. Thus, the elements of the criminal offense that is the object of the solicitation are not incorporated into the elements of inchoate solicitation. *See State v. Yee*, 160 Wis. 2d 15, 16–18, 465 N.W.2d 260 (Ct. App. 1990); Wis. Stat. § 939.30(1). The elements of the intended crime merely provide an outline for proof of the necessary intent to procure some particular substantive offense.

The jury instruction for solicitation therefore informs jurors of the elements of the underlying offense as part of the element of the solicitor's intent. It states in full,

> Before you may find the defendant guilty of this offense, the State must prove by evidence which satisfies you beyond a reasonable doubt that the following two elements were present.

> 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.
>
> "Unequivocally" means that no other inference or conclusion can reasonably and fairly be drawn from the defendant's acts.

Wis. JI–Criminal 550.

In that regard, solicitation is similar to the inchoate crime of conspiracy. As relevant here, the conspiracy statute provides that a person is guilty of conspiracy as a substantive offense if, "with intent that a crime be committed, [he or she] agrees or combines with another for the purpose of committing that crime. Wis. Stat. § 939.31. The prohibited criminal act is the agreement to commit another crime. Wis. Stat. § 939.31; *Judiciary Committee Report* at 26. The objective of the agreement can include any result which is prohibited by any other criminal statute. *See id*.

In *State v. Jackson*, 2004 WI App 190, 276 Wis. 2d 697, 688 N.W.2d 688, the court of appeals assessed whether two charges for conspiracy—one to commit arson and one to commit first-degree intentional homicide—that arose from a single plan to firebomb a house and shoot the occupants as they ran out were multiplicitous. *Id.* ¶¶ 1–2. It determined

they were not, because the single agreement contemplated commission of multiple statutorily-prohibited crimes. *Id.* ¶ 8.

The court of appeals observed 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." *Id.* ¶ 8. Accordingly, the court held that because one conspiracy charge would incorporate arson as an element and one conspiracy charge would incorporate intentional homicide, the charges were different in both law *and* fact. *Id.* ¶ 9.

The court of appeals in this case dismissed *Jackson* as irrelevant because it dealt with conspiracy rather than solicitation. *Kloss*, 386 Wis. 2d 314, ¶ 23 n.5. But it failed to explain why the solicitation statute operates any differently than the conspiracy statute in this regard. *Id.* Both are specific intent crimes that require the defendant intend a particular result. *Compare* Wis. Stat. § 939.30(1) *with* Wis. Stat. § 939.31(1); *see also* Wis. Stat. § 939.23 ("'with intent that' means that the actor either has a purpose to do the thing or cause the result specified."). Whether a defendant has solicited the intended crime under Wis. Stat. § 939.30 or joined a conspiracy to commit it under Wis. Stat. § 939.31 depends on what act the defendant took to effectuate that intent: if he joined in an agreement with another to commit the crime intended, the defendant committed conspiracy. Wis. Stat. § 939.31(1). If he urged or advised another to commit the crime intended, he committed solicitation. Wis. Stat. § 939.30(1).

But in either scenario, the defendant only conspires to produce or solicits the specific result intended. If the solicitor advises and intends that two different crimes be committed,

he has committed two solicitations. But if not, he has only solicited the result intended. *See Judiciary Committee Report* at 25 ("a statement may or may not be solicitation to a crime depending on the circumstances in which it is made.").

An example illustrates the point. A tells B, "I'll pay you $5000 to make C disappear. Just make sure C never comes back." What crime A solicited in that scenario, if any, will depend entirely on what result the circumstances unequivocally show A intended. If it was A's unequivocal intent that B make C a lucrative offer to move abroad, A has solicited nothing. If it was A's unequivocal intent that B kill C, A has solicited first-degree intentional homicide. But in that circumstance he did not solicit battery; that is not the crime he advised nor the result he unequivocally intended to achieve through B, even though B would necessarily commit a battery by killing C. LaFave, *supra*, 272 ("If [the solicitor] does not intend such a result, then the crime has not been solicited, and this is true even though the person solicited will have committed the crime if he proceeds with the requested conduct and thereby causes the prohibited result."). Conversely, if A tells B, "I want you to teach C a lesson. Go break C's legs and make sure he knows it was me," but B beats C so badly that C dies, A did not solicit a homicide because there is nothing suggesting that A intended that B kill C.

If Kloss had told Cheryl, "I want you to mace the officer with bear spray and then kill him," he would have committed two separate solicitations even though he uttered only a single sentence.[2] One conviction for solicitation of

---

[2] Assuming that the circumstances unequivocally showed that he intended these acts be committed.

battery and one conviction for solicitation of first-degree intentional homicide would be warranted even though battery is a lesser-included offense of first-degree intentional homicide, because Kloss would have intended and advised two separate acts constituting two statutorily prohibited crimes.

Conversely, had Kloss said only, "if an officer comes to the door I want you to kill him," he would have committed only one solicitation for first-degree intentional homicide, despite the fact that a person necessarily commits multiple lesser-included crimes if they complete an act of first-degree intentional homicide. In that scenario, the act urged unambiguously shows that first-degree intentional homicide is the only result Kloss unequivocally intended.

In sum, when a person is charged with solicitation, it is the fact that the acts and result intended are prohibited by a felony statute that becomes one of the elements of solicitation. *See Judiciary Committee Report* at 25 ("Conduct which is prohibited by *any criminal statute* is included.") (emphasis added). The elements of the offenses solicited are relevant only to show that the acts the solicitor urged and intended would meet the elements of those specified felonies; but because of the inchoate nature of solicitation, the elements of the underlying crimes do not become part of the two elements of solicitation itself. They are relevant only to show that the acts intended by the solicitor are prohibited by statute. First-degree reckless injury and first-degree recklessly endangering safety are different criminal offenses prohibited by different statutes. By operation of the solicitation statute, Kloss's offenses are different in law.

Even if this Court disagrees, though, it should hold that Kloss's two convictions for solicitation of first-degree reckless injury and first-degree recklessly endangering safety do not have a lesser-included relationship and are not

multiplicitous. Kloss's convictions carried the same penalty, and the record shows that he committed multiple acts of solicitation. His convictions were different in fact even if they are the same in law, and the burden should therefore have fallen on Kloss to prove that the Legislature did not intend cumulative punishments—a burden he could not meet.

II. The court of appeals misframed and misapplied the multiplicity test.

A. Convictions are multiplicitous only if the offenses are the same in law and fact and the Legislature did not intend cumulative punishments.

"The Fifth Amendment to the United States Constitution and Article I, Section 8 of the Wisconsin Constitution guarantee the right to be free from double jeopardy." *Steinhardt*, 375 Wis. 2d 712, ¶ 13 (footnotes omitted). "This right provides 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.'" *Id.* (citation omitted).

Multiplicity potentially implicates the third of these protections, if the offenses are identical in both law and fact—in other words, if they constitute "the same offense"—and the Legislature did not authorize cumulative punishments. *Steinhardt*, 375 Wis. 2d 712, ¶ 13. If the offenses are not identical in law and in fact, but the Legislature "intended multiple offenses to be brought as a single count," the convictions are unconstitutionally multiplicitous because they amount to a due process violation. *State v. Davison*, 2003 WI 89, ¶ 45, 263 Wis. 2d

145, 666 N.W.2d 1. If the Legislature intends to authorize cumulative punishments for the same offense, however, "we may no longer say that the charges are 'multiplicitous' or that they violate double jeopardy." *Davison*, 263 Wis. 2d 145, ¶ 37.

There are generally two types of multiplicity challenge: (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," 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." *State v. Lechner*, 217 Wis. 2d 392, 402, 576 N.W.2d 912 (1998). "As a general proposition, different elements of law distinguish one offense from another when different statutes are charged. Different facts distinguish one count from another when the counts are charged under the same statute." *Davison*, 263 Wis. 2d 145, ¶ 41.

A court uses the same two-prong test to determine whether convictions are multiplicitous under either type of challenge. *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 both 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 two offenses are different in law. *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 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 (quoting *State v. Anderson,* 219 Wis. 2d 739, 750, 580 N.W.2d 329 (1998)).

The second prong of the test considers legislative intent. *Ziegler*, 342 Wis. 2d 256, ¶¶ 61–63. A court considers the second prong regardless of the outcome of the first prong. *State v. Patterson*, 2010 WI 130, ¶ 16, 329 Wis. 2d 599, 790 N.W.2d 909. The outcome of the first prong determines which of two presumptions a court will apply when analyzing the second prong. *Ziegler*, 342 Wis. 2d 256, ¶¶ 61–62.

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. 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.

"A contrary legislative intent may be derived from the language of the statutes, the legislative history, the nature of the proscribed conduct, and the appropriateness of multiple punishments." *State v. Sauceda*, 168 Wis. 2d 486, 497, 485 N.W.2d 1 (1992).

B. The court of appeals mischaracterized the challenge at issue and did not conduct a de novo review of whether the convictions were different in fact.

Here, the court of appeals committed two errors regarding essential components of the first prong of the multiplicity analysis, and consequentially misapplied the multiplicity test. First, it mischaracterized Kloss's case as raising a lesser-included offense challenge. Second, it failed to review the record to determine whether Kloss's offenses were different in fact.

1. This should have been analyzed as a continuous offense challenge.

The court of appeals failed to recognize that Kloss was charged with two violations of the same section of the solicitation statute, Wis. Stat. § 939.30(1), not with charges under Wis. Stat. §§ 940.23 and 941.30 for the felonies solicited. *Kloss*, 386 Wis. 2d 314, ¶ 19. Consequently, the

court should have analyzed this case as a continuous offense challenge.[3]

Solicitation is a discrete crime with discrete penalties. *See* Wis. Stat. § 939.30. The solicitation statute states that unless the felony solicited is "a crime for which the penalty is life imprisonment" or a Class I felony, a person who commits solicitation of any other felony "is guilty of a Class H felony." Wis. Stat. § 939.30. In other words, Kloss's two solicitation convictions are two convictions under the same statutory section for two Class H felonies. But "a lesser offense means 'lesser in terms of magnitude of punishment.'" *State v. Smits*, 2001 WI App 45, ¶ 26, 241 Wis. 2d 374, 626 N.W.2d 42 (citation omitted). When two charges are brought under the same statutory section and carry the same penalty, neither can be considered "lesser" than the other.

A lesser-included offense challenge is at issue only when multiple charges arising from the same act are "brought under different statutory sections." *Anderson*, 219 Wis. 2d at 747. This is so because "[t]he applicable rule is that, where the same act or transaction constitutes a violation of two distinct statutory provisions, . . . whether there are two offenses or only one" depends on whether each contains an element the other does not. *Blockburger*, 284

---

[3] The State maintains that the offenses here were different in both law and fact due to the unique nature of the operation of the inchoate crimes statutes, and accordingly the court of appeals should have found that they were different in law when assessing Kloss's lesser-included offense challenge. Assuming for the sake of argument that Kloss's two convictions for violating Wis. Stat. § 939.30 are identical in law—either because the two elements of solicitation, urging a crime and intending the crime, are the same for both charges, or because the felonies solicited have a lesser and greater relationship—the court of appeals' analysis still fails for the reasons explained in this section.

U.S. at 304. If each statute requires proof of an element the other does not, the defendant has not been punished twice for one act under different statutory sections that criminalize "the same offense." *Davison*, 263 Wis. 2d 145, ¶ 24. He has committed, and, provided the Legislature intended cumulative punishments, permissibly been punished twice for committing two different offenses despite having committed a single act. *See generally Blockburger*, 284 U.S. at 301–04.

But this type of analysis is not at issue when a defendant has been charged with two violations of the same statute. Then, the question becomes only whether the defendant committed multiple violations of that statute such that he could permissibly be convicted and sentenced multiple times. In other words, the question is whether the multiple counts are "sufficiently different in fact to demonstrate that separate crimes have been committed." *Ziegler*, 342 Wis. 2d 256, ¶ 60. Accordingly, the lesser-included offense analysis is inapposite when a defendant is charged with two violations of the same statutory provision: "[a] lesser-included offense must be both lesser and included." *Smits*, 241 Wis. 2d 374, ¶ 26. Here, Kloss's two convictions for two violations of Wis. Stat. § 939.30(1) meet neither condition.

The *substantive* crimes of first-degree reckless injury and first-degree recklessly endangering safety are two crimes described under different statutes: Wis. Stat. §§ 940.23 (reckless injury) and 941.30 (recklessly endangering safety). And they have different penalties: first-degree reckless injury is a Class D felony, and first-degree recklessly endangering safety is a Class F felony. Wis. Stat. §§ 940.23, 941.30. Below, both of the parties and the court of appeals all agreed that first-degree recklessly endangering

safety is indeed *legally* a lesser-included offense of an act of first-degree reckless injury. *See Kloss*, 386 Wis. 2d 314, ¶ 22.

Kloss, however, was neither convicted of a violation of Wis. Stat. § 940.23 or violation of Wis. Stat. § 941.30 for a single completed act. He was charged with and convicted of two acts of solicitation in violation of Wis. Stat. § 939.30(1) for a litany of acts.

Accordingly, despite Kloss having framed the issue as a lesser-included offense challenge, the court of appeals should have recognized that what was really at issue was whether Kloss had been impermissibly convicted twice under the same statutory section for offenses that were the same in fact. *Anderson*, 219 Wis. 2d at 746 (multiple charges brought under one statutory section raise a continuous offense challenge).

Indeed, the only case on which the court of appeals relied when discussing whether the convictions were different in fact, *State v. George*, 69 Wis. 2d 92, 230 N.W.2d 253 (1975), involved a continuous offense challenge. *Kloss*, 386 Wis. 2d 314, ¶¶ 28–31.

But the court of appeals' reliance on *George* was misplaced for another reason. The question in *George* was not whether the defendant's *convictions* were multiplicitous. *See George*, 69 Wis. 2d at 96–100; *see Davison*, 263 Wis. 2d 145, ¶ 38 ("a reference to 'charges' must be employed carefully, because it is permissible to *charge* more than one count, even if the state may not punish a defendant on more than one count."). The principal question in *George* was whether the charges alleged in the complaint violated due process and the defendants' constitutional right under Article I, Section 7 of the Wisconsin Constitution and the Sixth Amendment to the United States Constitution "to be

informed of 'the nature and cause of the accusation.'" *George*, 69 Wis. 2d at 97 (citation omitted).

In short, the question there was whether the complaint was sufficient. *Id.* "[T]he test for gauging the adequacy of a complaint in light of such a constitutional right" considers "whether the accusation is such that the defendant [can] determine whether it states an offense to which he is able to plead and prepare a defense and whether conviction or acquittal is a bar to another prosecution for the same offense." *George*, 69 Wis. 2d at 97 (citation omitted).

And while *George* stated that the defendant's charges there were either multiplicitous or duplicitous, the basis for that determination was different than what occurred here. There, the defendant was charged with 30 counts of commercial gambling for "'regularly' through a period of several months, receiving bets on various professional and collegiate athletic events." *George*, 69 Wis. 2d at 94–95. The charges identified eight different bettors, and charged the defendants with separate counts of commercial gambling for taking bets from each person on "basketball games," "professional football games," or "college football games" over a series of months. *Id.* at 95–96. This Court held that "[i]f the various counts of the complaint allege a series of continuous crimes they are multiplicitous because they divide a single charge (continuous commercial gambling) into several counts." *Id.* at 98–99. This Court stated that "[t]he defendant, at the election of the state, can be charged with one continuous offense but only one, or with one or more specific individual offenses but not both, for the reasons set forth above." *Id.* at 100.

But here, the State charged Kloss with solicitation of several different crimes arising out of a course of conduct. As explained above, the solicitation statute, like the conspiracy statute, expressly contemplates that a person can commit

multiple, distinct solicitations by urging a person to commit different criminal acts during a single course of conduct. Wis. Stat. § 939.30(1); *cf. Jackson*, 276 Wis. 2d 697, ¶ 8. The test employed in *George* was a different test for analyzing a different question about the sufficiency of the complaint. The court of appeals therefore should have looked to this Court's many recent opinions explaining the test for multiplicitous convictions and applied all prongs of it.

And while under the proper framing the court still would have had to determine whether the offenses were different in law, the continuous offense analysis would have appropriately focused on whether Kloss committed two or more acts of solicitation that supported his multiple convictions—whether his charges were different in fact. As this Court explained in *Anderson*,

> [O]ur focus changes with respect to the particular challenge raised.
>
> In a "lesser-included offense" challenge, the factual situations underlying the offenses are the same, so our focus is on whether the offenses are also identical in law. In a "continuous offense" challenge, the course of conduct is alleged to have constituted multiple violations of the same statutory provision, so our focus is not on statutory definitions but on the facts of a given defendant's criminal activity.

Anderson, 219 Wis. 2d at 747 (citation omitted).

2. The court of appeals was required to review de novo whether the convictions were different in fact.

The court of appeals' second error was failing to realize that determining whether the offenses are different in law is not the end of the inquiry for a multiplicity analysis even if the defendant makes a true lesser-included offense challenge.

The prohibition against multiple convictions involving a lesser-included offense contemplates convictions for multiple offenses arising out of one criminal act. And while the elements-only test has sometimes been described as determining whether two offenses "require proof of the same facts," *Ziegler*, 342 Wis. 2d 256, ¶ 66, this Court has routinely recognized that for the "elements–only" test "proof of the same facts" means determining whether the two crimes have the same statutory elements, but assessing whether two charges are "identical in fact" under the multiplicity test requires consideration of the particular facts of the case. *Id.* ¶¶ 66–67 ("[A]pplying the 'elements-only' test, all five offenses require proof of the same facts, or elements. . . . It does not follow, however, that the five offenses are necessarily identical in fact."); *see also Davison*, 263 Wis. 2d 145, ¶ 41.

Consequently, if a defendant's convictions for two offenses with a greater and lesser relationship are nevertheless different in fact, the lesser offense is not "included in" the greater even though the offenses technically have a greater and lesser relationship under the elements-only test; the convictions are for two separate crimes, and the presumption is that the Legislature intended cumulative punishments absent a clear legislative directive to the contrary. *Harrell v. State*, 88 Wis. 2d 546, 556–63, 277 N.W.2d 462 (Ct. App. 1979).

For example, if A saw B and C standing on the sidewalk, fired a gun toward them but only hit B, and ran away, A could properly be charged with two separate crimes for the single act of shooting: one charge for first-degree reckless injury of B pursuant to Wis. Stat. § 940.23, and one charge for first-degree recklessly endangering C's safety pursuant to Wis. Stat. § 941.30. *Austin v. State*, 86 Wis. 2d 213, 224–25, 271 N.W.2d 668 (1978). Each charge would

require proof of a fact the other did not despite the fact that the two have a lesser and greater relationship, because for each charge, the State would have to prove the identity of the victim. *See State v. Trawitzki*, 2001 WI 77, ¶¶ 28–29, 244 Wis. 2d 523, 628 N.W.2d 801 (ten charges for theft and concealment of ten firearms stolen at the same time were different in fact). Consequently, they would not be multiplicitous. *See Austin*, 86 Wis. 2d at 224–25 (where defendant's single shotgun blast killed one person and injured another, charges for attempted murder of one victim and murder of the other were not multiplicitous).

If, however, A saw only B standing on the sidewalk, shot toward and hit B, and ran away, A could not be convicted of both first-degree reckless injury of B *and* first-degree recklessly endangering B's safety for that single act. This is so because by shooting and injuring B, A (1) recklessly, (2) caused great bodily harm to B, (3) under circumstances which showed utter disregard for human life, the three elements of first-degree reckless injury. Wis. Stat. § 940.23(1). But by recklessly shooting B, A necessarily *also* (1) recklessly, (2) endangered B's safety, (3) under circumstances which show utter disregard for human life. Wis. Stat. § 941.30(1). *Weso*, 60 Wis. 2d at 407–08. The offenses would be identical in law and fact because the conviction under Wis. Stat. § 941.30(1) did not require proof of any element or fact the conviction under Wis. Stat. § 940.23(1) did not, and Wis. Stat. § 939.66 evidences the Legislature's intent to prevent cumulative punishments in that scenario. *Weso*, 60 Wis. 2d at 407–08.

Ergo, in the multiplicity context, conviction for an "included" crime means two convictions that are both identical in law *and* identical in actual fact, i.e, the convictions are both based on precisely the same facts. *See State v. Rabe*, 96 Wis. 2d 48, 63, 291 N.W.2d 809 (1980)

("Because the four offenses charged in the present case are identical in law, '(t)he test for (freedom from) multiplicity is whether each count requires proof of an additional fact which the other count or counts do not.'" (citation omitted).). If the facts of the case show that a person committed two or more separate crimes the lesser crime is not "included" in the greater crime, and the convictions cannot be multiplicitous. *Steinhardt*, 375 Wis. 2d 712, ¶ 15.

This is why the first prong of the multiplicity analysis requires a de novo review of *both* whether the charges were different in law, *or* different in fact given the actual facts of the case. *Multaler*, 252 Wis. 2d 54, ¶ 52. Before the court can move on to the Legislative intent prong of the multiplicity test, it *must* look to the record to determine whether the convictions are different in fact.

The court of appeals misframed the analysis as a lesser-included offense issue, and it conducted no meaningful review of whether the offenses were actually different in fact. *Kloss*, 386 Wis. 2d 314, ¶¶ 19, 28–31. And, accordingly, it reached the wrong conclusion.

C. The court of appeals erroneously conflated duplicity with multiplicity and held that the State, as respondent, was judicially estopped from asserting that the offenses were different in fact on appeal.

Duplicity is charging multiple acts in a single count. *State v. Lomagro*, 113 Wis. 2d 582, 586, 335 N.W.2d 583 (1983). Though both duplicity and multiplicity can raise double jeopardy concerns, the two are different concepts that raise different legal issues.

When "a complaint joins several criminal acts which can properly be characterized as a continuing offense in one count and is challenged by the defendant on grounds of

duplicity, the trial court must examine the allegations in light of the purposes of the prohibition against duplicity." *Lomagro*, 113 Wis. 2d at 589. There are five purposes for the prohibition against duplicity. *Id.* at 586–87. They are:

> (1) to assure that the defendant is sufficiently notified of the charge; (2) to protect the defendant against double jeopardy; (3) to avoid prejudice and confusion arising from evidentiary rulings during trial; (4) to assure that the defendant is appropriately sentenced for the crime charged; and (5) to guarantee jury unanimity.

Id.

"A complaint is duplicitous only where 'any of these dangers are present and cannot be cured by instructions to the jury.'" *State v. Chambers*, 173 Wis. 2d 237, 251, 496 N.W.2d 191 (Ct. App. 1992) (citation omitted).

Before trial, Kloss challenged the final amended information, which charged Kloss with the solicitation of seven different felonies, as presenting duplicitous charges. (R. 142; 143.) Kloss alleged that they raised a jury unanimity concern.[4] (R. 142; 143.) In the alternative he requested that the State allege with specificity which statement on which day the State was relying on for each particular charge. (R. 142; 143.)

The State responded that there could be no jury unanimity concern because the case was being tried to the court. (R. 146:1.) In addressing Kloss's request to make more definite the statements that the State was relying on for

---

[4] The information in this case was amended numerous times before trial. (R. 2; 20; 33; 47; 58; 76; 129; 144.) The final information charged Kloss with seven counts of solicitation of various felonies. (R. 144.)

each charge, the State appropriately and correctly argued that if "the jury has been presented with evidence of alternative means of committing the actus reus element, i.e., the wrongful act, of one crime, unanimity on the particular alternative means of committing the crime is required only if the acts are conceptually distinct. Unanimity is not required if the acts are conceptually similar." (R. 146:3 (*quoting State v. Gustafson*, 119 Wis. 2d 676, 695, 350 N.W.2d 653 (1984).) It noted that in *Gustafson*, this Court held that "[i]t is for the court . . . to decide as a matter of law whether the defendant's conduct constitutes a single continuing transaction or multiple transactions that could then involve separate crimes" and instruct the jury accordingly. *Gustafson*, 119 Wis. 2d 696–97.

Therefore, the State argued, there was nothing wrong with charging a course of conduct *in a single charge*, rather than a number of offenses, and each charge could be supported by a number of Kloss's statements over the course of the phone calls. (R. 146:3; 224:58–60) The context of this statement and the law cited shows that the State was referring to *each count* being a continuing course of conduct, because Kloss solicited seven felonies and the course of the calls showed his unequivocal intent that they be committed:

> THE COURT: And is it your advocacy on behalf of the State of Wisconsin that the various telephone conversations between Mr. Kloss and his wife constitute one crime or a series of crimes?
>
> [The Prosecutor]: That it is a course of conduct constituting one crime for each count.

(R. 224:60.)

Indeed, that the State was charging seven separate crimes arising from a single course of conduct is how the defense and the court understood the State's framing of the charges as well:

> [The Defense]: If he's going to say it was unequivocal at the end of call 32, I need to be on notice as to that. Right now the charging document says its from here to here, and it's a course of conduct. It starts at this time, on the first call, and it ends on the last call. If that's the notice, I can respond to that.
>
> THE COURT: I think that is the notice, isn't it? You're saying you're charging these crimes, Counts 12 through 18, course of conduct. That course of conduct constitutes a violation of these particular criminal acts. They're all different. Great bodily harm - - 13 is great bodily harm; 14 is failure to comply with officer's attempt to take a person into custody; 15 is battery to police officer; 16 is aggravated battery; 17 is first-degree reckless injury; and 18 is first-degree recklessly endangering safety.
>
> . . . .
>
> [The defense]: He's saying it's a course of conduct that ends on this day, so it can't be undone after that day, which is fine. We're on notice now. . . .

(R. 224:62–63.)

And therefore the circuit court, in accordance with *Gustafson*, *Lomagro*, and general duplicity principles, denied the motion to dismiss the charges as duplicitous. (R. 224:64.) It recognized that to commit solicitation, the defendant must intend a particular crime be committed, and "there's five of them here, six of them here," (R. 224:65), advised another person to commit the crimes, and did so under circumstances that show unequivocally "that the defendant intend the name of the respective crime be committed." (R. 224:65.) The court clarified that the "sum and substance" of the counts was "What did the defendant say? How firmly did he say them? How are they reflected in the transcript?" (R. 224:65.)

At no point did any party or the circuit court indicate that anyone, and particularly the State, was maintaining

that the phone calls were a single transaction that constituted but one crime. The State claimed that the phone calls were a course of conduct and that multiple different crimes arose from it, as charged. (R. 224:60.) The court of appeals, though, misinterpreted the State's response to Kloss's duplicity challenge as an assertion that the entirety of the phone calls constituted but one criminal act. *Kloss*, 386 Wis. 2d 314, ¶ 29 ("to the extent the multiple-acts topic was addressed at trial, all the state did was argue that the circuit court should treat all of the phone calls between Kloss and Cheryl as one "continuous course of conduct."). But the State explicitly stated that it was charging each *separate count* as arising from a continuous course of conduct. (R. 224:60.)

The court of appeals then misunderstood the State's argument on appeal, as well. It determined that "[i]n effect, the State argues that [the convictions] could have been based on the many distinct phone calls made by Kloss, or the distinct acts he solicited Cheryl to perform in each call." *Kloss*, 386 Wis. 2d 314, ¶ 28.

Apparently overlooking the pretrial motion hearing where the parties explicitly discussed that the charges were supported by Kloss's multitude of acts over the two-week period, (R. 224:60), the court of appeals ruled that "[n]othing in the record shows that the State gave the circuit court a basis for differentiating Kloss's many acts with respect to the two solicitation crimes at issue here." *Kloss*, 386 Wis. 2d 314, ¶ 28. It then stated that "[t]he State could not [postconviction], and cannot now, change tack and argue that each phone call constituted a separate solicitation . . . ." *Id.* ¶ 30. It found the offenses were therefore the same in fact with no discussion of the facts of Kloss's conduct at all. *Id.* ¶¶ 30–31.

No part of the record supports the court of appeals' determination on either point. The State explicitly explained in the circuit court before trial that its theory of prosecution was that Kloss committed a course of conduct that gave rise to seven separate felonies. (R. 224:60.)

Nor did the State argue on appeal that each phone call or each distinct conversation was a separate solicitation.[5] The State argued that multiple statements from Kloss in the transcripts showed that Kloss urged and intended more than one reckless act over the course of the phone calls and therefore the convictions were different in fact—they were not both based on Kloss urging a single act with one victim, and therefore constituted separate crimes. That is the exact theory of prosecution the State maintained throughout the trial. (R. 224:54–64.)

Even if the State had made the argument on appeal that each separate phone call was a separate solicitation, though, "[r]espondents are not bound to the same constraints of the waiver rule as appellants." *State v. Truax*, 151 Wis. 2d 354, 359, 444 N.W.2d 432 (1989). An appellate court "may sustain the trial court's holding on a theory not presented to it, and it is inconsequential whether [the court does] so *sua sponte* or at the urging of a respondent." *Id.* While the court of appeals would certainly not have been obligated to accept that argument, had the State made it, the court of appeals' claim that the State was somehow

---

[5] Although that also could have been a permissible basis for the separate charges because a solicitation is complete as soon as the act is urged with the requisite intent that it be committed. *See State v. Boehm*, 127 Wis. 2d 351, 355, 379 N.W.2d 874 (Ct. App. 1985). The State alternatively could have charged Kloss with multiple solicitations for each discrete time he urged a particular felony during each phone call. *Id.*

precluded from making it and refusing to consider it, particularly when the standard of review for the issue at hand was de novo, was simply error. *Id.*

Additionally, the State does not, and has not, disputed that the circuit court gave a different rationale for denying Kloss's multiplicity challenge before sentencing. (R. 215:17–22.) Kloss reraised the challenge in a postconviction motion, though, and the circuit court recognized that the offenses were different in fact because there were separate solicitations for separate acts. (R. 230:39.) "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 has long been recognized that even "[w]here the trial court makes the right decision for the wrong reason," an appellate court will affirm the decision. *State v. Rognrud*, 156 Wis. 2d 783, 789, 457 N.W.2d 573 (Ct. App. 1990); *see also State v. Alles*, 106 Wis. 2d 368, 388–89, 316 N.W.2d 378 (1982) (collecting cases); *State v. Holt*, 128 Wis. 2d 110, 124–25, 382 N.W.2d 697 (Ct. App. 1985). Here, the circuit court's errors in the initial analysis should have been deemed irrelevant, because the circuit court ultimately reached the correct conclusion. And the court of appeals was required to undertake the different-in-fact analysis under de novo review, but it refused.

The court of appeals ignored these basic principles of appellate review, did not review the record, and impermissibly searched only for a reason to overturn, rather than uphold, Kloss's convictions. The court of appeals should have reviewed the record to ascertain whether the evidence showed that Kloss solicited two different reckless acts over the course of the phone calls, rather than one. Had it done

so, it could not have come to any other conclusion than to find that Kloss's convictions were different in fact.

D. Kloss's convictions were different in fact.

The record is replete with evidence that Kloss solicited Cheryl to commit both recklessly endangering safety and reckless injury against different victims. He urged two different crimes, therefore his acts of urging different conduct were "'different in nature' even [though] they are the same types of acts." *Multaler*, 252 Wis. 2d 54, ¶ 57 (citation omitted). His repeated urging of these two acts over time also show that he unequivocally intended they be committed.

First, as relevant here, the circuit court found that Kloss unequivocally intended that Cheryl do the following:

> 1. "[H]e 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." (R. 225:118.)
>
> 2. "[H]e intended that she shoot through the door or the wall with a 16-gauge shotgun or a .357 handgun. (R. 225:118.)
>
> 3. "[H]e intended that she shoot and then chase law enforcement officers down as they ran away." (R. 225:118.)

The court then found that Kloss solicited first-degree recklessly endangering safety and first-degree reckless injury, but conflated the result required for the two. (R. 225:127–30.) That mistake is immaterial, though, because given the court's findings of fact on what Kloss unequivocally intended Cheryl to do, there was ample evidence to support the two convictions.

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." (R. 208:48.) "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 will let them have it. . . . 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." (R. 209:289–90.) In a later phone call he reiterated: "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. 209:337; *see also* 209:377; 208:33–35, 48–49.) He then told her, "You kill them. Dead. . . . at two you shoot right through the door right into the cop, because he's no more welcome on your property than a robber." (R. 209:337–38.) Telling Cheryl to shoot through the door and "right into the cop" with no warning if an officer came to the door was a solicitation for first-degree reckless injury. *See* Wis. Stat. §§ 939.30(1), 940.23.

Later, Kloss advised Cheryl not only to shoot through the door, but to chase the police down and shoot at 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.) 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.)

Telling Cheryl to then chase any officers other than the one who came to the door down and shoot them as they are running away is a separate solicitation of another

reckless act—an act separate from shooting through the door, and with the specific intent that Cheryl shoot at the other, fleeing police. It is a different act than telling Cheryl to shoot through the door with no warning at the officer who comes to the door, and it contemplated different victims than the act of shooting the police officer who would come to the door. It was a solicitation for first-degree recklessly endangering safety. *See* Wis. Stat. §§ 939.30(1), 941.30.

Kloss's convictions are not identical in fact. *See Austin*, 86 Wis. 2d at 224–25.

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.)

As shown, Kloss advised Cheryl to commit more than one reckless act against more than one victim. His offenses are therefore different in fact. *See, e.g.*, *Rabe*, 96 Wis. 2d at 66–67 (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 though these solicitations arose out of a single course of conduct, his convictions are not multiplicitous. *Cf. Jackson*, 276 Wis. 2d 697, ¶ 9.

E. The court of appeals impermissibly shifted the burden to the State to prove that the Legislature intended cumulative punishments, and failed to undertake any actual analysis of Legislative intent.

Because the court of appeals did not properly apply the first prong of the multiplicity test, it erroneously shifted the

burden to the State to prove a contrary Legislative intent. *Kloss*, 386 Wis. 2d 314, ¶ 31. It then ignored the State's discussion of the structure and language of the statute, claimed that the State did "not develop any argument as to what factors might indicate a contrary legislative intent," and declared Kloss's convictions multiplicitous. *Id.* ¶ 31.

But as explained, the record unequivocally shows that Kloss's convictions are different in fact. The court of appeals should therefore have presumed, as this Court must, that the Legislature intended cumulative punishments for multiple acts of solicitation. *Ziegler*, 342 Wis. 2d 256, ¶ 62. The burden is thus on Kloss to show "a clear legislative intent that cumulative punishments are not authorized." *Davison*, 263 Wis. 2d 145, ¶ 45. This Court uses four factors to assess legislative intent under this prong of the test: "'(1) all applicable statutory language'; (2) 'the legislative history and context of the statutes'; (3) 'the nature of the proscribed conduct'; and (4) 'the appropriateness of multiple punishments for the conduct.'" *Steinhardt*, 375 Wis. 2d 712, ¶ 25 (citation omitted). Kloss cannot do so because all of those factors show that the Legislature intended cumulative punishments.

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.

Additionally, and again like the conspiracy statute, Wisconsin's solicitation statute speaks in singular terms:

"whoever, with intent that *a* felony be committed, advises another to commit *that crime*" with the requisite intent is guilty of solicitation. Wis. Stat. § 939.30. Accordingly, it is possible for a person to commit multiple violations of the solicitation statute even if they are urging the solicitee to commit a single course of conduct, if they advise and intend the solicitee to commit multiple crimes. *Cf. Jackson*, 276 Wis. 2d 697, ¶¶ 6–8.

If the Legislature did not intend to permit multiple punishments for a single episode in which the defendant intended and urged more than one felony, it would have worded the statute differently.

Consequently, Wis. Stat. § 939.30 itself "expresses the Wisconsin Legislature's intent to permit multiple punishments." *Jackson*, 276 Wis. 2d 697, ¶ 8. But so does the legislative history.

The Judiciary Committee Report on the Criminal Code Revision that occurred in 1955 identifies the purpose and effect of the solicitation statute. It states that "the act required is the advising, inciting, commanding, or soliciting of another to commit a crime. This is sufficiently broad to cover all types of verbal conduct which may be used to induce another to commit a crime. The verbal statement of the actor must, under the circumstances, indicate unequivocally that a crime be committed." *Judiciary Committee Report* at 25. This shows that the legislators who wrote the revised statute believed it created a separate offense for each act urged—the report speaks in singular terms about "the act," and "the verbal statement" that are required to convey that the actor intends "a crime." *Id.*

When assessing the nature of the conduct, a court confronted with a multiplicity challenge "refer[s] back to its inquiry into identity in fact" and looks to whether the

conduct was separated in time or different in nature. *Steinhardt*, 375 Wis. 2d 712, ¶ 33. As explained above, Kloss's conduct in soliciting Cheryl to shoot through the door at whatever officer was waiting outside was different in nature from his conduct in soliciting her to chase down any other police officers and shoot at them as they ran away because it advised her to take different actions against different victims, potentially at different times.

The final factor, the appropriateness of multiple punishments, also typically looks to whether there were multiple acts. *Steinhardt*, 375 Wis. 2d 712, ¶ 34. Kloss committed several acts of solicitation over the course of the phone calls.

Kloss's convictions were not multiplicitous. This Court should reverse the court of appeals on this point.

CONCLUSION

This Court should reverse the portion of the court of appeals' decision finding that Kloss's two convictions were multiplicitous.

Dated this 11th day of July, 2019.

Respectfully submitted,

JOSHUA L. KAUL
Attorney General of Wisconsin

LISA E.F. KUMFER
Assistant Attorney General
State Bar #1099788

Attorneys for Plaintiff-
Respondent-Cross Petitioner

Wisconsin Department of Justice
Post Office Box 7857
Madison, Wisconsin 53707-7857
(608) 267-2796
(608) 266-9594 (Fax)
kumferle@doj.state.wi.us

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 10,812 words.

Dated this 11th day of July, 2019.

_____
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 11th day of July, 2019.

_____
LISA E.F. KUMFER
Assistant Attorney General

Index to the Appendix
State of Wisconsin v. Kelly James Kloss
Case No. 2018AP651-CR

APPENDIX CERTIFICATION

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 Wis. Stat. § 809.19(2)(a) and that contains, at a minimum: (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 circuit 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.

I further certify that if the record is required by law to be confidential, the portions of the record included in the appendix are reproduced using first names and last initials instead of full names of persons, specifically including juveniles and parents of juveniles, with a notation that the portions of the record have been so reproduced to preserve confidentiality and with appropriate references to the record.

Dated this 11th day of July, 2019.

_____

LISA E.F. KUMFER
Assistant Attorney General

CERTIFICATE OF COMPLIANCE
WITH WIS. STAT. § 809.19(13)

I hereby certify that:

I have submitted an electronic copy of this appendix, which complies with the requirements of Wis. Stat. § 809.19(13).

I further certify that:

This electronic appendix is identical in content to the printed form of the appendix filed as of this date.

A copy of this certificate has been served with the paper copies of this appendix filed with the court and served on all opposing parties.

Dated this 11th day of July, 2019.

_____

LISA E.F. KUMFER
Assistant Attorney General