STATE OF WISCONSIN

I N S U P R E M E C O U R T

Case No. 2018 AP 651-CR

STATE OF WISCONSIN,

Plaintiff-Respondent-Cross Petitioner,

v.

KELLY JAMES KLOSS,

Defendant-Appellant-Petitioner

BRIEF OF DEFENDANT-APPELLANT-PETITIONER

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

On appeal from the Circuit Court
of St. Croix County, Hon. Eugene Harrington,
Circuit Judge, presiding; and the Court of Appeals, Dist. IV.

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ISSUES FOR REVIEW

1. Is Solicitation of First Degree Reckless Injury a crime under Wisconsin law?

The Trial Court Answered: "Yes."

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

The Trial Court Answered: "Yes."

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

Oral argument is requested. Publication is requested as Wisconsin has no case law addressing whether a defendant may solicit a reckless crime which requires a resulting injury.

STATEMENT OF THE CASE

On November 8, 2013, Kloss was serving time in the Marathon County jail for OWI when he was released on a furlough to attend a funeral. (227:43). He absconded. On October 10, 2014, Kloss was arrested at his home in River Falls. Between October 11 and October 22, 2014, Kloss made 52 calls to his wife from the St. Croix and Marathon County jails. The calls were recorded and reviewed by the St. Croix County Sheriff's Department. (208; 209; 226:34, 36; 227:199, 202).

The calls consist primarily of rambling monologues and vulgar ranting covering numerous topics, including health insurance, real estate, selling personal items, changing cellular providers, what to feed the dog, attorneys, and other financial, medical, and legal issues. (225:22-23, 26-27). Kloss had been seriously injured from a beating in the St. Croix County jail after his arrest (227:74-75) and he frequently spoke of his medical, AODA, and mental health ailments. His lack of adequate treatment by jail staff, for example, was a consistent theme. (227:80).

In the midst of these rantings, Kloss told his wife that if the police ever came to the house again, she should shoot the front door. In a call made on October 14, 2014, for example, Kloss ranted and raved for some time about the how the police were liars and had made-up facts supporting probable cause for the October 10th search. He then added:

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

(209:288-289). Kloss continued the conversation by complaining about his probation agent and went on to discuss other matters. Kloss brought up shooting the police through the door on several occasions. (see e.g. 209:335-338; 208:47-48.)

Kloss knew the calls were being monitored and recorded. (see e.g. 209:149, 218, 282, 349-350; 208: 220, 236). At times he made comments directly to law enforcement as if they were listening.[1] Kloss also told his wife to make sure both their lawyers knew what their "plans" were:

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1 "Record all you want to record, you cocksuckers. You did me, you did--my wife, you did us dirty. You're a bunch of criminal slime. Thugs. And now I'm going to enforce the real fucking law." (209:218). "--give them the fucking information. We're on the phone that's being recorded, Cheri." (209:281-282); "For God and the recorders, you don't have to record, I want you to tell your lawyer, write it down, when I get out I'm going to find Joshua Hecht and I'm going to beat his ass to a pulp." (209: 236).

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

(209:336-337).

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

(208:234; see also 225:37, 75, 115).

Kloss insisted it was all just "stupid" talk: "Yep. Well, just, they want to talk stupid and lie and all that, I'll just talk stupid as I want to, too." (209: 340). He added: "Let them take me to court, listen in on everything I have to say and let them try and decide what's satire and what's true. Good luck with that folks." (209: 340-341). In another call he stated: "They are compiling a tape and they are – they are just going to scan this motherfucker and try and find anything on it they can use against me. But if they think I'm that fucking stupid to say anything incriminating, well, then that just goes to show how fucking stupid they are…." (209:342).

Kloss's wife, Cheryl, testified that she did not take him seriously. Kloss was just "talking stupid." She "went along" with his rantings and raving because otherwise he would get upset. (225:30). She knew many of the statements he made were untrue. (225:33-37). Kloss was bi-polar; had PTSD and ADHD; and was an alcoholic. (225:60).

The State charged Kloss with seven counts of solicitation:[2] Solicitation of First Degree Intentional Homicide, Wis. Stat. § 940.01(1)(a); Solicitation of Resisting an Officer Causing Great Bodily Harm to Officer, Wis. Stat. § 946.41(2t); Solicitation of Failure to comply with Officer's Attempt to Take Person into Custody, Wis. Stat. § 946.415(2); Solicitation of Battery of a Peace Officer, Wis. Stat. § 940.20(2); Solicitation of Aggravated Battery, Wis. Stat. § 940.19(5); Solicitation of First Degree Reckless Injury, Wis. Stat. § 940.23(1)(a); and, Solicitation of First Degree Recklessly Endangering Safety, Wis. Stat. § 941.30(1). (144). All charges were based on the same solicited conduct.

Trial was to the circuit court. Kloss did not testify. The court convicted Kloss on two counts: Soliciting First Degree Reckless Injury (Wis. Stat. § 940.23(1)(a)); and Soliciting First Degree Recklessly Endangering Safety (see Wis. Stat. § 941.30(1)). (225:124-127 (A:13-16)). The court acquitted Kloss on the five other counts because the State failed to prove specific intent to cause harm, among other reasons. (225:124-126 (A:13-15)).

As to both reckless convictions, the court made the following findings of fact:

> First, the defendant unequivocally intended that his wife place firearms in specific locations such that they would be readily available for her if someone, intruder or police officer, came to the door.
>
> Two, he specifically intended that she load the firearms and have them ready upon immediate need, or imminent need.

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

> Three, he intended that she shoot law enforcement officers that might happen to come through or to her door for whatever purpose, questioning, searching, general discussion, perhaps even finding directions.
>
> Four, he intended that she shoot though the door or the wall with a 16-gauge shotgun or a .357 handgun.
>
> Five, he intended that she shoot and then chase law enforcement officers down as they ran away.
>
> Six, specifically, and perhaps most importantly, he told and specifically intended that Mrs. Kloss follow her instructions.
>
> And seven, he specifically told Mrs. Kloss to not harm Officer Hecht as he, on more than one specific instance, told her he wanted to save that fella for himself.

(225: 117-118; A:6-7). As to Solicitation of First Degree Reckless Injury, the Court specifically found as follows:

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

(emphasis added) (225: 128-129; A:17-18). As to Count 18, Solicitation of First Degree Reckless Endangerment, the Court found as follows:

> Count 18, first-degree recklessly endangering safety. Again, let's harken back to the elements of the findings of fact. The defendant endangered the safety of another person. He instructed his wife to take the handgun and shoot through the door. Criminally reckless conduct is the second element. Again, it's created a risk or (sic) death. Great bodily harm was unreasonable and substantial, and the defendant was aware of that. Great bodily harm means injury which creates a substantial risk of death, or which causes serious permanent disfigurement, or which causes a permanent or protracted loss or impairment of the function of any bodily organ or member, or other serious bodily injury. Gunshot wound to the body is going to cause permanent injury.
>
> Three, third element, the circumstances of the defendant's conduct showed utter disregard for human life. Telling one to shoot through the door with a hand gun, a shotgun, or his real intent when he instructed his wife to chase them down and shoot more than satisfies that last requirement.
>
> It isn't just the defendant's words that convict him. It isn't just control. It isn't just Mrs. Kloss' susceptibility. It isn't just the dynamic between the two. Perhaps the most important fact of all, this is not only the dynamic, the instructions, the commands, the demands, the insults, the relationship between them, but when Mr. Nelson said there is no smoking gun, no, but there's a gun, and it's in the location—the precise location where Mr. Kloss instructed his wife to do it. Given the dynamic, the instructions, her various efforts and assertions in the record to do precisely what he told her to do, the fact that the handgun was in the couch, loaded, really are the determining facts whereby one looks at the credibility …and totality of this evidence, convinces me that the defendant is guilty as to Counts 17 and 18, the last two counts.

(225:129-130 (A:18-19)).

Kloss made three arguments in his postconviction motion: 1) he could not be convicted of soliciting First Degree Reckless Injury *and* soliciting First Degree Endangering Safety as the latter is a lesser included of the former; 2) he could not be convicted of soliciting First Degree Reckless Injury as a matter of law for two reasons: a) he cannot intend a crime which requires an unintended consequence, and, b) First Degree Reckless Injury requires proof of an actual injury; and, 3) the evidence was insufficient to convict on either count because the State failed to prove Kloss unequivocally intended that a felony crime be committed. (186). The motion was denied. (199). Kloss appealed. (200).

The court of appeals agreed that soliciting First Degree Endangering Safety is a lesser included of soliciting First Degree Reckless Injury and reversed the Endangering Safety related conviction. (COA Decision, ¶31 (A:50-51)).[3] The court rejected Kloss' other arguments and affirmed his conviction for Solicitation of First Degree Reckless Injury. (COA Decision, ¶37 (A:52-53))

ARGUMENT

I. SOLICITATION OF FIRST DEGREE RECKLESS INJURY IS NOT A COGNIZABLE CRIME UNDER WISCONSIN LAW.

Wis. Stat. § 939.30[4] provides that a person is guilty of solicitation when, "with intent that a felony be committed,

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3 The reversal of Kloss' Solicitation of First Degree Endangering Safety conviction is the subject of the State's Cross-Petition and therefore will not be addressed in this brief.

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

advises another to commit that crime under circumstances that indicate unequivocally that he or she has the intent…." To prove solicitation of a felony, the State must show the defendant intended the elements of the solicited offense. WIS JI-CRIMINAL 550; *State v. Jackson*, 2004 WI App 190, ¶8, 276 Wis.2d 697, 688 N.W.2d 688. See e.g. Ira P. Robbins, *Double Inchoate Crimes*, 26 Harv. J. on Legis. 1, 116, p. 29 (1989) (the "mens rea of solicitation is a specific intent to have someone commit a completed crime.")

According to the State, Kloss *intended* that his wife commit First Degree Reckless Injury contrary to Wis. Stat. § 940.23(1).[5] In other words, he intended not only that his wife engage in reckless conduct "under circumstances which show utter disregard for human life," but that her reckless conduct would "*cause* great bodily harm…." (emphasis added). WIS JI-CRIMINAL 1250; *State v. Weso*, 60 Wis.2d 404, 408, 210 N.W.2d 442 (1973). The question in this case is whether its possible for Kloss to intend a reckless crime which requires a specified injury. The answer is "no."

Solicitation of First Degree Reckless Injury[6] is not a cognizable crime for two related reasons. First, one cannot, by definition, solicit reckless injury if one's intent is to cause great bodily harm. Second, reckless injury is not a cognizable crime until reckless conduct actually results in great bodily harm and therefore can't ever be the subject of an inchoate crime, including solicitation. Each of these will be addressed in turn.

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5 **940.23. Reckless injury.**
(1) First-degree reckless injury. (a) Whoever recklessly causes great bodily harm to another human being under circumstances which show utter disregard for human life is guilty of a Class D felony.

6 Kloss will alternatively refer to First Degree Reckless Injury as "reckless injury" for the sake of brevity.

Criminal recklessness is defined by a gross indifference to *the risk* of injury rather than an intent to cause a specific harm. See Wis. Stat. § 939.24(1)[7] & Wis. Stat. § 939.23(4).[8] If an injury results, it *must be* unintended. See e.g. *Werner v. State*, 66 Wis. 2d 736, 748, 226 N.W.2d 402, 407 (1975) (trial court properly refused to instruct the jury on homicide by reckless conduct when defendant had clear intent to cause harm.); *State v. Michels*, 141 Wis. 2d 81, 97, 414 N.W.2d 311, 317 (1987) (defendant not entitled to reckless homicide instruction when his actions "do not reasonably admit a high probability of substantial bodily harm" but rather "evince an intent to cause death.").

Solicitation requires intent to commit a completed crime. Reckless injury requires that reckless conduct cause great bodily harm *unintentionally*. As one cannot intend an unintended result, one cannot intentionally solicit a crime which requires an unintended result. Stated another way, if Kloss intended great bodily harm, he is no longer soliciting a crime within the statutory definition of reckless injury. Rather, he is soliciting a crime of specific intent.

Alternatively, Kloss can't solicit reckless injury because it requires an actual injury. See *Martin v. State*, 57 Wis. 2d 499, 505, 204 N.W.2d 499, 501 (1973) (reckless injury requires evidence of resultant harm). Without an injury the crime is, at worst, reckless endangerment. Reckless endangerment and reckless injury "are identical in their elements…with the exception of…the *resultant harm*." (emphasis added). *Weso*, at 408. Two defendants may engage in the same reckless conduct

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7 Wis. Stat. § 939.23(4):"'With intent to'…means that the actor either has a purpose to do the thing or cause the result specified, or is aware that his or her conduct is practically certain to cause that result.")

8 Wis. Stat. § 939.24(1): "'criminal recklessness' means that the actor creates an unreasonable and substantial risk of death or great bodily harm to another human being and the actor is aware of that risk,…."

under the same circumstances, but only a defendant whose reckless conduct causes great bodily harm may be charged with reckless injury. *Martin*, at 550.

There are no appellate cases addressing whether one may solicit reckless injury. Nonetheless, appellate courts are nearly unanimous in holding that one can neither conspire nor attempt to commit a reckless act that requires a resultant harm.

In *State v. Donohue*, 834 A.2d 253, 257-258 (N.H. 2003), the issue was whether a defendant could be convicted of conspiracy to commit reckless second-degree assault. A person is guilty of reckless second-degree assault if he "recklessly causes serious bodily injury to another." *Id*., at 255. The court first distinguished a conspiracy charge from accomplice liability. Conspiracy "is an inchoate crime that does not require the commission of the substantive offense that is the object of the conspiracy but rather fixes the point of legal intervention at the time of the agreement…." By contrast, "accomplice liability is not a separate and distinct crime, but rather holds an individual criminally liable for actions done by another. *Id*., at 257. The court concluded that a person cannot be guilty of a conspiracy to commit a reckless assault because the offense is "controlled by the resulting harm." *Id*., at 257. In other words: "a person cannot agree, in advance, to commit a reckless assault, because, by definition, a reckless assault only arises once a future harm results from reckless behavior." *Id*. The complaint failed to allege a cognizable crime. *Id*. at 258. See also e.g.: *People v. Swain*, 909 P.2d 994, 997-1001 (Cal. 1996) (conspiracy to commit reckless murder not a crime); *Palmer v. People*, 964 P.2d 524, 528-30 (Colo. 1998) (conspiracy to commit reckless manslaughter not a crime); *State v. Beccia*, 505 A.2d 683, 684-85 (Conn. 1986) (conspiracy to commit reckless arson not a crime); *Conley v. State*, 247 S.E.2d 562, 565 (Ga. Ct. App. 1978) ("One cannot conspire to kill another in the heat of passion."); *Mitchell v. State*, 767 A.2d 844, 847, 854-55 (Md. 2001) (conspiracy to commit a "non-premeditated" murder not a crime); *People v. Hammond*, 466 N.W.2d 335, 336-37 (Mich.

Ct. App. 1991) (conspiracy to commit second-degree murder not a crime); *State v. Baca*, 950 P.2d 776, 787-88, 124 N.M. 333 (N.M. 1997) (conspiracy to commit reckless murder not a crime).

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

The court of appeals rejects this body of law without any analysis: "We decline to lengthen this opinion by discussing law that is so easily distinguished. It is sufficient to say that conspiracy laws operate differently than solicitation laws." (COA ¶10, n. 3 (A:41)). Rather, the court of appeals saw the question as whether Kloss could intend a result that may not happen: "no level of certainty is required to form a purpose to cause a particular result—that is, an intent that a result take place." (COA Decision, ¶10 (A:40-41)). While it may be true "a solicitor cannot know with certainty at the time of the solicitation whether an injury will in fact result from the solicitee's conduct[,]" "such uncertainty is inescapable in an inchoate crime such as solicitation." *Id*.

This "uncertainty" analysis offers no meaningful distinction between conspiracy and solicitation. Both solicitation and conspiracy involve an "inchoate" crime where the offense is in the planning. The court's assertion that a solicitor "cannot know with certainty at the time of the solicitation whether an injury will in fact result from the solicitor's conduct" applies with equal force to a co-conspirator.

(COA Decision, ¶10 (A:40-41)). There is no conceptional distinction. See *State v. Jensen*, 195 P.3d 512, ¶18 (Wash. 2008) See also *Robbins*, at p. 29 (solicitation has often been described as an "attempted conspiracy").

More importantly, the court of appeals does not explain how conspiracy differs from solicitation to the extent that a solicitor can intend an unintended harm while a co-conspirator cannot. The elements of conspiracy and solicitation may differ in other respects,[9] but the intent elements are nearly indistinguishable. To prove conspiracy, the State must prove "intent that a crime be committed,…." Wis. Stat. § 939.31. To prove solicitation, the State must prove "intent that a felony be committed,…." Wis. Stat. § 939.30. As reckless injury requires that a specific harm unintentionally result from reckless conduct, the same problem arises with both. Neither a solicitor nor a co-conspirator can intend a result which, by definition, must be unintended, regardless of the probability great bodily harm would have occurred.

The State takes a different approach, arguing that conspiracy is distinguishable from solicitation because it's more like an attempt. Conspiracy requires that two or more people construct a plan to actually commit a crime, and someone carries out 'an act to effect [the crime's] object.' Wis. Stat. § 939.31. (State's Court of Appeals Response Brief, pp. 26, 27). In contrast, 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." *Id*.

Comparing solicitation to attempt does not help the State but rather illustrates Kloss' point. No doubt attempt, like conspiracy, includes elements solicitation does not. Nonetheless

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9 All it takes for a "solicitation" to become a "conspiracy" in this context is for the solicitee to agree to the solicitation, and do "an act to effect its object,…." (emphasis added). Wis. Stat. § 939.31.

attempt, like conspiracy and solicitation, is an inchoate crime based primarily on an *intent* to perform future acts and attain a result which if accomplished, would constitute the crime. See *State v. Melvin*, 49 Wis. 2d 246, 249-250, 181 N.W.2d 490, 492 (1970). In *Melvin*, the circuit court refused to instruct the jury on attempted homicide by reckless conduct because no such crime exists. This Court agreed. With reasoning similar to *Donohue*, this Court held that one cannot attempt homicide by reckless conduct because one "cannot attempt to commit a crime which only requires reckless conduct and not a specific intent." *Id*. In other words, one cannot intend to cause a death which, by definition, must be unintended. See also *State v. Sanders*, 827 S.E.2d 214, 219-220 (WV 2019) and cases cited therein (no such crime as attempted reckless aggravated assault because one "cannot intend to accomplish the unintended."); *State v. Smith*, 534 P.2d 1180, 1184 (Ore. App. 1975) (no such crime as attempted reckless murder). The same rationale applies to felony murder. *State v. Briggs*, 218 Wis. 2d 61, 66-67, 579 N.W.2d 783, 785-786 (Ct. App. 1998) (felony murder "is not reconcilable with the concept of attempt" because the crime does not require a specific intent to kill).

Rather than distinguish solicitation, these cases show a clear commonality. Attempt, conspiracy, felony murder, and solicitation are all, for the same reason, incompatible with a reckless crime requiring a resultant harm. One cannot intend a result that must be unintended. One cannot intend an unintended result that will never occur. 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." *Donohue*, at 257. A reckless crime is "controlled by the resulting harm." *Id*.

For the same reasons Kloss cannot, as a matter of law, solicit reckless injury. He cannot intend a fortuitous result that must be unintended and will never occur.

Both the State and the court of appeals rely on a single comment from *LaFave* which suggests one may solicit criminally negligent conduct to cause harm:

> [i]f B were to engage in criminally negligent conduct which caused the death of C, then B would be guilty of manslaughter; but it would not be 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.

W. La Fave, *Substantive Criminal Law* § 11.1(c) (3d ed. 2017 (COA Decision, ¶10 (A:40-41)).

The first problem with LaFave's comment is that it does not describe solicitation. Rather, it assumes the solicited crime was carried out and a resultant harm occurred: "[i]f B were to engage in criminally negligent conduct which caused the death of C,…." This is not an inchoate crime but accomplice liability. See *Robbins*, at p. 29 ("[a] necessary element of solicitation is the solicitant's rejection of the solicitor's request."). With an inchoate crime, criminal liability attaches at the point the crime is solicited. LaFave concedes no "solicitation case" supports his proposition.

Second, the comment begs the question of whether one can solicit a reckless crime which requires a specified result. LaFave suggests the solicitor could be guilty of soliciting either "manslaughter" or "murder," with no discussion of which would apply. Murder, of course, would presumably require an intent to kill. If the solicitor's intent was to kill C by asking B to engage in criminally negligent conduct, he would be guilty of soliciting an intentional homicide rather than criminally negligent manslaughter. When viewed as soliciting an intentional crime, LaFave's comment is consistent with his comment regarding conspiracy: "[t]here is no such thing as a conspiracy to commit which is defined in terms of recklessly or negligently causing a

result…." See W. LaFave, *Substantive Criminal Law* § 12.2(c) at 278 (2d ed. 2003).

Third, the comment fails to address incompatible mental states between the solicitor and the solicitant. Wisconsin requires the State to prove a solicitor intended the elements of the crime solicited. See e.g. WIS JI-CRIMINAL 550 and *Jackson*, at ¶8. Case law suggests the solicitant would have to be guilty of the same crime the solicitor intended to solicit. See e.g. *People v. Nelson*, 240 Cal. App. 4th 488, 496, 192 Cal. Rptr. 3d 760, 766 (Cal. App. 2015) ("The essence of criminal solicitation is an attempt to induce another to commit a criminal offense. Consistent with this conception, a defendant can ordinarily be convicted under a general solicitation statute only if, had the solicitation been successful, the person solicited would have been guilty of the underlying offense."). Even if the solicitant would have been guilty of a different crime than the one intended by the solicitor, the solicitor can only be guilty of soliciting the crime he intends.

In summary, Kloss cannot solicit reckless injury. He cannot solicit reckless injury because he cannot intend an injury that by definition must result fortuitously and unintentionally. If, as the State contends, he intended his wife to cause great bodily harm, he is no longer soliciting a crime based on criminal recklessness but specific intent. Alternatively, Kloss cannot solicit reckless injury because reckless injury cannot exist without an actual injury. Without an injury there is only reckless endangerment.

II. KLOSS COULD NOT HAVE UNEQUIVOCALLY INTENDED A FELONY BE COMMITTED WHEN THE UNDISPUTED FACTS SHOW HE KNOWINGLY AND REPEATEDLY COMMUNICATED HIS "PLAN" TO LAW ENFORCEMENT.

A defendant is guilty of solicitation if he "unequivocally" intended "that a felony be committed…." Wis. Stat. § 939.30(1). "Unequivocal" means "Not ambiguous; plain, clear." (*Webster's New World College Dictionary, 4th Ed.,* 1999). When used "with reference to the burden of proof" the term "unequivocal" "implies proof of the highest possible character and it imports proof of the nature of mathematical certainty." (*Black's Law Dictionary, 5th Ed.* 1983). In the context of an "unequivocal intent" to possess a firearm, the term "unequivocally" means that "no other inference or conclusion can reasonably and fairly be drawn from the defendant's acts, under the circumstances." WIS JI—CRIMINAL 580; *State v. Henning*, 2013 WI App 15, ¶17, 346 Wis. 2d 246, 828 N.W.2d 235.

The test for sufficiency of the evidence "is whether, considering the state's evidence in the most favorable light, the evidence adduced, believed and rationally considered, is sufficient to prove the defendant's guilt beyond a reasonable doubt." *State v. Duda*, 60 Wis.2d 431, 439, 210 N.W.2d 763 (1973); *State v. Poellinger*, 153 Wis.2d 493, 501, 451 N.W.2d 752 (1990). A verdict cannot be based on an unreasonable inference. *Ford v. Kenosha County*, 160 Wis.2d 485, 492 n. 5, 466 N.W.2d 646 (1991). Whether an inference is reasonably drawn is a question of law. *Groom v. Professionals Ins. Co.*, 179 Wis.2d 241, 249, 507 N.W.2d 121 (Ct. App. 1993).

Kloss did not advise another to commit a felony "*under circumstances that indicate unequivocally* that he or she has the intent" that a "felony be committed" for the following reasons: 1) Kloss knowingly informed the intended victims of his alleged "plan," thus eliminating any possibility it would succeed; and, 2)

the crime Kloss allegedly solicited was contingent on a series of events that Kloss knew were never likely to occur. In other words, Kloss could not have unequivocally intended his wife commit the crime of reckless injury because he knew it would never happen.

The undisputed evidence not only fails to support a finding of unequivocal intent, it shows the exact opposite. See e.g. *State v. Miller*, 2009 WI App 111, ¶40, 320 Wis. 2d 724, 772 N.W.2d 188 (Insufficient evidence to convict on First Degree Reckless Injury when the undisputed reason for shooting was "inconsistent" with "utter disregard for human life" element).

There is no dispute Kloss knew jailers were listening to his phone calls. (135:2-4; 209:149, 218, 282, 349-350; 208: 220, 236; 225:75). In some instances, Kloss spoke as if he was communicating with law enforcement directly:

> Record all you want to record, you cocksuckers. You did me, you did--my wife, you did us dirty. You're a bunch of criminal slime. Thugs. And now I'm going to enforce the real fucking law.

(209:218).

> --give them the fucking information. We're on the phone that's being recorded, Cheri.

(209:281-282).

> For God and the recorders, you don't have to record, I want you to tell your lawyer, write it down, when I get out I'm going to find Joshua Hecht and I'm going to beat his ass to a pulp.

(209: 236).

If that wasn't enough, Kloss also directed his wife to inform both their lawyers of the "plan," information the attorneys would have been ethically bound to report. See SCR 20:1.6(b) & (c)(1):

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

(209:336-337).

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

(208:234). See also 225:37, 75, 115. Kloss had every reason to believe law enforcement was fully informed of his alleged "plan." Without the element of surprise, his "plan" had no chance of succeeding.

In addition, the sequence of events necessary for a "shooting" to occur was highly improbable. Kloss did not solicit his wife to go out and shoot police officers. According to the circuit court, the crime would only occur *if the police came to the front door* of the Kloss residence. (225:118; 128 (A:7, 17)). There was, moreover, no reason to expect that would happen anytime soon: "there was no anticipated need for any officer to go back to Mrs. Kloss' house, particularly after the second or third search." (225: 125, 126 (A:14, 15)). The police searches on September 5 and October 10, 2014 were meant to find and arrest Kloss. At the time the "solicitation" occurred, Kloss was in custody.

Even if by some remote chance the police did go back to Kloss' house and stand in front of the door, they would have to

come at the fortuitous moment when Cheryl was home,[10] *and* was ready, willing and able to shoot. This 59-year old woman, with no criminal record, no history of violence, and no experience with firearms,[11] was a highly unlikely cop-killer. (227: 74, 84, 109; 208:36).

Under these circumstances, no trier of fact could reasonably find Kloss *unequivocally* intended that a felony be committed. Kloss had no reason to expect the police would return to his house. No one, Kloss included, would expect police officers to knowingly put themselves in danger when they knew exactly what Kloss told his wife. Indeed, the police easily avoided any risk by simply arresting Cheryl at work.

Rather, Kloss was expressing his anger and taunting the police, which only succeeded *if they heard* what he had to say. Directing his comments at law enforcement, he stated that if "they want to talk stupid and lie" then "I'll just talk stupid as I want to, too." (209:340). They could listen to everything he said and "let them try and decide what's satire and what's true. Good luck with that folks." (209:340-341). He knew the cops would "scan" the tape and "find anything on it they can use against me." (209:342). In another call he stated: "They are compiling a tape and they are – they are just going to scan this motherfucker and try and find anything on it they can use against me. But if they think I'm that fucking stupid to say anything incriminating, well, then that just goes to show how fucking stupid they are…." (209:342).

The logistical improbability, Kloss' knowing and repeated revelation to the intended victims, his taunting, and indeed, his

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

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

express statements that he was “talking stupid” and using “satire,” clearly show the lack of unequivocal intent under the circumstances.

CONCLUSION

WHEREFORE, for the reasons stated, this Court should reverse the conviction for Solicitation of First Degree Reckless Injury.

Respectfully submitted this 11th day of July, 2019.

MILLER APPELLATE PRACTICE, LLC

By_____
Steven L. Miller #01005582
Attorney for the Defendant-Appellant-Petitioner
P.O. Box 655
River Falls, WI 54022
715-425-9780

CERTIFICATIONS

I certify that this brief meets the form and length requirements of Rule 809.19(8)(b)&(c), and that the text is:

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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).

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As to Compliance with Rule 809.19(2)(b)

I hereby certify that filed with this brief, either as a separate document or as a part of this brief, is an appendix that complies with s. 809.19(2)(a) and that contains: (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.

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Dated this 11th day of July, 2019.

MILLER APPELLATE PRACTICE, LLC

By_____
Steven L. Miller #01005582
Attorney for the Appellant-Defendant-Petitioner
P.O. Box 655
River Falls, WI 54022

APPENDIX OF DEFENDANT-APPELLANT-PETITIONER

INDEX TO APPENDIX

CERTIFICATE OF COMPLIANCE WITH RULE 809.19(13)

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Dated this 11th day of July, 2019

MILLER APPELLATE PRACTICE, LLC

By_____

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