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

RESPONSE BRIEF OF THE PLAINTIFF-RESPONDENT-CROSS PETITIONER

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ISSUES PRESENTED

The State submits this brief in response to Kelly James Kloss's appeal regarding the following issues:

1. Can a person solicit first-degree reckless injury?

The circuit court and court of appeals answered, "yes."

This Court should affirm the lower courts.

2. Was there sufficient evidence for the court to find that Kloss unequivocally intended that his wife carry out the acts he solicited?

The circuit court and court of appeals answered, "yes."

This Court should affirm the lower courts.

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

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

INTRODUCTION

Not all inchoate offenses operate in the same way. While a person cannot attempt or conspire to commit a reckless-result crime, a person can solicit a reckless-result crime. Here's why:

Solicitation is the most anticipatory of the inchoate offenses because, unlike attempt or conspiracy, it does not require any act or agreement from anyone to facilitate or undertake the crime solicited. Rather, it is only the solicitor's pre-crime acts that are important: crimes of solicitation require only that the solicitor intends for a crime to be committed and urges someone to commit that crime. And, unlike attempt or conspiracy, the crime of solicitation does not require the solicitor to have participated in the

criminal acts. In other words, the solicitor's intent is unconnected to the mens rea for the act solicited. Because a person can intend for another individual to harm a third party through reckless conduct and urge that individual to commit that crime, it is possible to solicit a reckless-result crime. Accordingly, the lower courts here correctly held that the State could prosecute Kloss for soliciting first-degree reckless injury when he urged his wife Cheryl to shoot a gun at police officers.

And here, there was ample evidence supporting the circuit court's finding that Kloss unequivocally intended that Cheryl commit reckless injury. Kloss viciously abused Cheryl to gain her complete compliance with every demand he made. Those demands included that she shoot a gun through their front door, with no warning; that she shoot "right into the cop" if a police officer came to the house; and that she chase and shoot any other officers if they ran away.

STATEMENT OF THE CASE

The State provided a full statement of the case in its brief-in-chief as cross-petitioner. Accordingly, pursuant to Wis. Stat. § (Rule) 809.19(3)(a)2., the State omits a full statement of the case here. It will incorporate additional facts necessary for the resolution of the issues presented in the argument section.

ARGUMENT

I. The circuit court and court of appeals correctly concluded that a solicitation of first-degree reckless injury is a crime.

A. Standard of review and relevant law.

Whether a person can solicit reckless injury is a matter of statutory interpretation this Court reviews de

novo. *State v. Briggs*, 218 Wis. 2d 61, 65, 579 N.W.2d 783 (Ct. App. 1998).

"[T]he purpose of statutory interpretation is to determine what the statute means so that it may be given its full, proper, and intended effect." *State ex rel. Kalal v. Circuit Court for Dane County*, 2004 WI 58, ¶ 44, 271 Wis. 2d 633, 681 N.W.2d 110. "This Court begins statutory interpretation with the language of [the] statute." *State v. Quintana*, 2008 WI 33, ¶ 13, 308 Wis. 2d 615, 748 N.W.2d 447. "If the meaning of the statute is plain," this Court "ordinarily stop[s] the inquire and give[s] the language it's 'common, ordinary, and accepted meaning . . . .'" *Id.* (citation omitted).

"Context and structure of a statute are important to the meaning of the statute." *Quintana*, 308 Wis. 2d 615, ¶ 14. Statutory language is therefore interpreted in the context in which it is used and in relation to surrounding or closely-related statutes. *Id.*

"The crime of solicitation . . . is committed by one who, with intent that a felony be committed, advises another to commit that crime under circumstances that indicate unequivocally that he or she has that intent." Wis. JI–Criminal 550 (2001). To prove a solicitation charge, the State must therefore satisfy two elements: (1) "the defendant intended that [a particular felony] be committed," and (2) "the defendant advised another person, by the use of words or other expressions to commit [that felony], and did so under circumstances that indicate, unequivocally, that the defendant intended that [felony] be committed." *Id.* "'Unequivocally' means that no other inference or conclusion can reasonably and fairly be drawn from the defendant's acts." *Id.*

B. A person can solicit someone else to commit a reckless-result crime because the elements of solicitation do not depend on the nature of the solicited crime.

"[T]he crime of solicitation . . . is the most inchoate of the anticipatory offenses." 2 Wayne R. LaFave, *Substantive Criminal Law* § 11.1 at 264–65 (3d ed. 2018). This is so because "[f]or the crime of solicitation to be completed, it is only necessary that the actor with intent that another person commit a crime, have enticed, advised, incited, ordered or otherwise encouraged that person to commit a crime. The crime solicited need not be committed." *Id.* at 264.

In Wisconsin, the two elements of solicitation require only that the State prove that the solicitor: (1) intended to achieve a result that constitutes a particular, statutorily defined felony, and (2) that he advised another to commit acts that would constitute that crime. Wis. Stat. § 939.30. Solicitation is complete at the moment those two elements are met. "[B]ecause the essence of the crime of solicitation is 'asking a person to commit a crime,' it 'requires neither a direction to proceed nor the fulfillment of any conditions,' nor, for that matter, a *quid pro quo*." LaFave, *supra*, 275–76. In short, solicitation is complete as soon as a person urges acts with the intent a crime be committed. It does not matter whether the elements of the solicited felony are later met, attempted, or even whether the solicitee is receptive to the solicitation. *Id.*

Accordingly, "as to those crimes which are defined in terms of certain prohibited results," all that is required is "that the solicitor intend to achieve that result through the participation of another." LaFave, *supra*, 272. The elements of the crime solicited are relevant only to evaluate whether the acts urged and result intended would constitute a

statutorily defined felony. *See id.* at 272–73. And because one can advise someone to engage in reckless conduct with the intent that it result in great bodily harm, one can solicit reckless crimes, including a reckless result. *Id.*

Applying that concept to the facts here, Kloss was convicted of solicitation of first-degree reckless injury. That is a wholly different crime than first-degree reckless injury itself because proof of solicitation does not depend on actually achieving a particular result. Instead, it depends on the result Kloss intended to achieve by the conduct Kloss advised Cheryl to engage in, and whether the acts Kloss urged could constitute the felony alleged. Wis. JI–Criminal 550; LaFave, *supra*, 272.

LaFave provides an example involving criminal negligence that is on point: "if *B* were to engage in criminally negligent conduct which caused the death of *C,* then *B* would be guilty of manslaughter; but it would not be a criminal solicitation to commit murder or manslaughter for *A* to request *B* to engage in such conduct *unless A* did so for the purpose of causing *C*'s death." *Id.*[1] (footnote omitted).

As LaFave's example provides and as the court of appeals concluded here, the language and structure of Wis. Stat. § 939.30 focuses on the result that the solicitor intended.

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[1] LaFave notes that the issue whether a person can solicit a crime for reckless or negligent criminal results "apparently has not arisen in any reported solicitation case" and is therefore an issue of first impression. 2 Wayne R. LaFave, *Substantive Criminal Law* § 11.1 at 272 n.63 (3d ed. 2018). The State, like Kloss (Kloss's Br. 16), was unable to find a case from any jurisdiction dealing directly with this issue.

Wisconsin Stat. § 939.30 provides that "whoever, with intent that a crime be committed, advises another to commit that crime under circumstances that indicate unequivocally that he or she has the intent" is guilty of solicitation. "'With intent that' 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." Wis. Stat. § 939.23(4). Notably, "with intent that" in Wis. Stat. § 939.30 is grammatically and syntactically tied to the solicitor's purpose "that a felony be committed."

Accordingly, the jury instructions for solicitation link the elements of the crime allegedly solicited to the intent element of solicitation. They inform the jury that the State must prove that

> 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.

Wis. JI–Criminal 550.

Thus, once the solicitor intends for a felony to be committed, the only act required is that the solicitor "advise[s] another to commit that crime." Wis. Stat. § 939.30. It therefore does not matter that one cannot know whether the solicitee would have achieved the reckless result if he or she had undertaken the crime. All that matters for solicitation is that the solicitor intended that result to occur

and urged the solicitee to commit that crime. Wis. Stat. § 939.30

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

Similarly, when the crime charged is solicitation, it is the solicitor's intent to direct the conduct of another person that matters, not the solicitee's actual conduct, the particular result of that actual conduct, or the likely outcome had the solicitee attempted to commit the acts urged. *See, e.g., State v. Yee*, 160 Wis. 2d 15, 17, 465 N.W.2d 260 (Ct. App. 1990). And because the solicitor does not have to be involved in the commission of the crime, that solicitation requires intent that a crime be committed does not mean that the solicitor cannot intend and urge the solicitee to commit a reckless act.

Thus, the requisite intent for solicitation is simply that the solicitor intended a particular crime to result from the conduct urged. The solicitor does not have to have the mens rea required for the solicited crime. Nor is the solicitor's intent imputed to the solicitee. The solicitor just has to intend that that crime occur, much like an aider and abetter must do no more than intend to participate in the crime,

regardless whether he or she intended the result. *Howell*, 301 Wis. 2d 350, ¶ 1.

The following example demonstrates how a solicitor can intend to produce a reckless act. If A tells B to throw a rock from a bridge onto a busy highway, he has solicited a reckless act. A intended for B to commit a crime. A person can also solicit a reckless result, then, if he or she intends that a particular harm would result from the solicitee committing reckless acts. LaFave, *supra*, 272. In other words, if A told B to take a machine gun and spray down a crowd and telling B he hopes he hits as many people as possible, A solicited the crime of reckless injury even though A intended people be injured from B's reckless conduct. A had the purpose of producing injury, but intended B to cause that injury through reckless conduct and urged him to commit acts that would constitute that crime.

As applied to the facts here, the elements of first-degree reckless injury are relevant only to Kloss's intent: did Kloss intend and advise Cheryl to commit acts which would constitute first-degree reckless injury, if completed? If Kloss intended that victims suffer great bodily harm by Cheryl's reckless conduct and advised her to commit that crime, the answer is yes; he solicited reckless injury. It does not matter that Cheryl did not commit the acts or what the result of her acts might have been.

C. Solicitation is distinguishable from attempt.

That other inchoate crimes, like attempt, cannot apply to the commission of reckless homicide or injury, does not change the analysis.

A person cannot attempt to commit reckless injury or reckless homicide, because attempt focuses on the actor's involvement in the attempted crime. Attempt requires that

the actor intended "to perform acts and attain a result . . . [and] does acts toward the commission of the crime which demonstrate . . . the actor formed that intent and would commit the crime except for the intervention of another person or some other extraneous factor." Wis. Stat. § 939.32(3). In other words, "[a]n attempt by sec. 939.32(2) requires that the actor have an intent to perform acts and attain a result which if accomplished would constitute the crime." *State v. Melvin*, 49 Wis. 2d 246, 249–50, 181 N.W.2d 490 (1970). "[O]ne individual cannot act with both a specific intent . . . and without a specific intent . . . with respect to the commission of one crime." *Mendez*, 575 S.W.2d at 38; *Briggs*, 218 Wis. 2d at 66.

In contrast, solicitation is all about the actor intending and urging someone else to act in the commission of a particular crime. Wis. Stat. § 939.30. A person can intend that someone's reckless conduct produce a certain result and advise another person to commit the reckless conduct. Attempt is qualitatively different than solicitation because with attempt, the actor is the one attempting the crime. The actor in a solicitation crime is merely urging—not committing—the act. Thus, case law regarding attempts of a reckless result is inapplicable to solicitation.

And applying those principles here, the State soundly charged Kloss with solicitation of first-degree reckless injury. Kloss repeatedly told Cheryl to shoot through the door if the police returned and he clearly intended that she hit them. (*See, e.g.,* R. 209:337–38.) Kloss's words showed that he intended for Cheryl to cause great bodily harm to police by committing conduct that created an unreasonable and substantial risk of death or great bodily harm under circumstances that show utter disregard for human life, and urged her to commit acts that would constitute that crime. Wis. JI–Criminal 1250 (2012).

It is immaterial to the solicitation charge against Kloss that Cheryl might not have hit the officer if she actually shot through the door. Whether Cheryl's completed reckless act actually caused an injury would be relevant to charges against Cheryl for the completed act or charges against Kloss for party-to-a-crime liability for the completed act. *See* Wis. Stat. § 939.05.

All that matters is that Kloss intended that Cheryl injure a police officer through the reckless act of shooting through the door and advised her to commit that crime. The State properly charged Kloss with solicitation of first-degree reckless injury.

D. Kloss's arguments to the contrary erroneously conflate the mens rea for a completed reckless act with the required mens rea for solicitation.

Kloss first contends that "one cannot, by definition, solicit reckless injury if one's intent is to cause great bodily harm." (Kloss's Br. 14.) He claims this is so because "[s]olicitation requires intent to commit a completed crime," but "[r]eckless injury requires that reckless conduct cause great bodily harm *unintentionally*." (Kloss's Br. 15.) Accordingly, Kloss says, 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." (Kloss's Br. 15.)

Kloss's analysis supplants the mens rea for the acts solicited with the required mens rea for the solicitor to commit solicitation. That is wrong. Solicitation does not require that the solicitor intend to commit a completed crime; it requires that the solicitor intend to achieve a particular criminal result by urging *the solicitee* to commit a crime. LaFave, *supra*, 272. Accordingly, if the solicitor

intends to produce a particular result but urges the solicitee to commit reckless acts to achieve it, he has not solicited a specific intent crime. *Id.*

For example, if Kloss told Cheryl to cut the brakes on the officer's car and intended that the officer die, he would not have solicited intentional homicide even though he intended that the officer die. It would only be solicitation of intentional homicide if he solicited acts that would require Cheryl to intend that the officer die. *See* Wis. Stat. § 940.01. That is why it is "solicitation of first-degree intentional homicide" for someone to hire a hitman: the solicitor is urging the hitman to (1) cause the death of another human being (2) with intent to kill that person. Wis. Stat. § 940.01. But if the solicitor intends to achieve a person's death by urging acts that would not require the solicitee to intend the person's death, the solicitor has not solicited an intentional homicide.

Alternatively, Kloss contends that he cannot solicit a reckless injury "because it requires an actual injury." (Kloss's Br. 15.) That, again, erroneously conflates the requirements for a completed crime with the requirements for an inchoate one. Indeed, the cases he invokes for support address whether completed acts of recklessly endangering safety and reckless injury were lesser-included offenses of completed acts of reckless injury and second-degree murder. *See Martin v. State*, 57 Wis. 2d 499, 504–05, 204 N.W.2d 499 (1973); *State v. Weso*, 60 Wis. 2d 404, 408, 210 N.W.2d 442 (1973).

Again, unlike completed crimes, a solicitation is not defined by the harm that resulted from an act because solicitation does not require a completed criminal act. Wis. Stat. § 939.30. Solicitation is defined by the acts the solicitor advised and intended and whether they would constitute a particular felony if completed. Indeed, Kloss recognizes "[t]o

prove solicitation of a felony, the State must show that the defendant intended the elements of the solicited offense" and that the "mens rea of solicitation is a specific intent to have someone commit a completed crime." (Kloss's Br. 14 (citations omitted).) If a solicitor intends for someone to commit reckless acts that result in injury, he solicits reckless injury.

Kloss cites several foreign jurisdictions holding that a person cannot enter into a conspiracy to commit a reckless result, but those cases are not persuasive. (Kloss's Br. 16–17.) Conspiracy and solicitation are different. Conspiracy requires that two or more people construct a plan to actually commit a crime, and that someone carries out "an act to effect [the crime's] object." Wis. Stat. § 939.31. By definition, then, the conspirator is agreeing to participate in the criminal act and by agreeing necessarily intends the crime. *See* Part I.B, *supra*. In that way, conspiracy is much more like attempt, which requires "that the actor have an intent to perform acts and attain a result which, if accomplished, would constitute such crime and that the actor does acts toward the commission of the crime which demonstrate unequivocally, under all the circumstances, that the actor formed that intent and would commit the crime except for the intervention of another person or some other extraneous factor." Wis. Stat. § 939.32(3).

Unlike an attempt or conspiracy, a solicitor need not take some step to undertake the substantive crime himself—he simply urges someone else to commit criminal acts. That distinction matters, because one person "cannot *act* with both a specific intent . . . and without a specific intent . . . with respect to the commission of *one crime*." *Mendez*, 575 S.W.2d at 38 (emphasis added). Solicitation only requires the solicitor's specific intent that someone else commit a particular crime and act of urging that person to commit acts

that would constitute the elements of that crime. It does not matter what the mens rea of the solicited crime would be, because the solicitor is not the one who would be committing that crime. Wis. Stat. § 939.30. A person can intend that someone else commit a reckless act.

As explained, conspiracy is a qualitatively different crime than solicitation; how other states have interpreted their conspiracy statutes says nothing about solicitation in Wisconsin. Additionally, many states have defined and interpreted their inchoate crimes differently than Wisconsin has. *Compare Palmer v. People*, 964 P.2d 524, 527–28 (Colo. 1998) (explaining that under Colorado law, a person can be charged with attempt of reckless crimes, because attempt requires only that "the accused knowingly engages in the risk producing conduct that could lead to the result") *with Briggs*, 218 Wis. 2d at 66 ("[U]nder Wisconsin law, one cannot attempt to commit a crime which does not itself include an element of specific intent."). California, for example, has limited solicitation to specific crimes listed in the statute. Cal. Penal Code § 653f. And Connecticut does not even have a solicitation statute—the closest criminalized act is "inciting injury to persons or property," CT. Stat. § 53a–179a, and it requires that the speech at issue be likely to produce the action and the action must be imminent. *State v. Ryan*, 709 A.2d 21, 26–27 (Conn. App. 1998). Without some showing that other states have a solicitation statute that is substantially similar to Wisconsin's and that they have interpreted it in the way Kloss urges, there is no persuasive value in these out-of-state conspiracy and attempt cases.

Unlike attempt or conspiracy, solicitation does not depend on the solicitee's intent, does not require the solicitor to make any attempt to commit any act, and does not depend on what might have actually happened had the solicitee

carried out the acts urged. It requires only that the solicitor intended that someone else commit a crime. Accordingly, a person can solicit reckless injury. The lower courts correctly so concluded, and this Court should affirm.

II. There was sufficient evidence for the circuit court to find that Kloss unequivocally intended Cheryl commit the crimes he urged.

Kloss focuses his sufficiency-of-the-evidence argument on intent. He claims that the State failed its burden to prove that he unequivocally intended for Cheryl to commit a felony. (Kloss's Br. 22.) For the reasons below, he is wrong.

A. Appellate review of sufficiency of the evidence requires the Court to draw all reasonable inferences in favor of the conviction.

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

When determining whether evidence at trial was sufficient to support a conviction, an appellate court "consider[s] the evidence in the light most favorable to the State and reverse[s] the conviction only where the evidence 'is so lacking in probative value and force that no trier of

fact, acting reasonably, could have found guilt beyond a reasonable doubt.'" *Smith*, 342 Wis. 2d 710, ¶ 24 (quoting *Poellinger*, 153 Wis. 2d at 507). "Therefore, this court will uphold the conviction if there is any reasonable hypothesis that supports it." *Id.* "[A]n appellate court must consider the totality of the evidence when conducting a sufficiency of the evidence inquiry." *Id.* ¶ 36. "[A] reviewing court 'faced with a record of historical facts that supports conflicting inferences must presume—even if it does not affirmatively appear in the record—that the trier of fact resolved any such conflicts in favor of the prosecution, and must defer to that resolution.'" *Cavazos v. Smith*, 565 U.S. 1, 7 (2011) (per curiam) (citation omitted). The State is not required to prove a defendant's guilt beyond a reasonable doubt on appeal. *Poellinger*, 153 Wis. 2d at 503.

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

B. Kloss's vicious verbal abuse of Cheryl when she did not do what Kloss asked of her was sufficient for the court to find that Kloss unequivocally intended she follow his commands to shoot at and injure the police if they returned.

Again, a person commits solicitation when, "with intent that a felony be committed, [he or she] advises another to commit that crime under circumstances that indicate unequivocally that he or she has the intent." Wis. Stat. § 939.30. "'Unequivocally' means that no other

inference or conclusion can reasonably and fairly be drawn from the defendant's acts." Wis. JI–Criminal 550.

Kloss's attempt to construct a different definition of "unequivocal" and change the State's burden of proof to "mathematical certainty" rather than beyond a reasonable doubt was already rejected in *State v. Hauk*, 2002 WI App 226, ¶¶ 28–29, 257 Wis. 2d 579, 652 N.W.2d 393. (Kloss's Br. 22.) The jury instructions define unequivocal in relation to this statute, and that definition is considerably different than "mathematical certainty." *Id.*

Further, Kloss's newly constructed definition and burden of proof fail to account for the highly deferential standard of review for sufficiency of the evidence on appeal, which requires a reviewing court to affirm a conviction if there is "any reasonable hypothesis that supports it." *Smith*, 342 Wis. 2d 710, ¶ 24. Like the defendant in *Hauk*, Kloss appears to contend that the standard for the factfinder to find unequivocal intent changes the standard of review on appeal and requires this Court to draw all reasonable inferences in his favor. (Kloss's Br. 22.) *See Hauk*, 257 Wis. 2d 579, ¶ 28.

But, as the court of appeals aptly noted in *Hauk*, that "confuses the standard for the [factfinder] and the standard of appellate review." *Hauk*, 257 Wis. 2d 579, ¶ 29. "The [factfinder] must draw all reasonable inferences in favor of the defendant, but [the appellate court] must make all reasonable inferences in favor of the [factfinder's] decision." *Id.* Neither the court of appeals then, nor the State now, could find any "Wisconsin case that has applied [Kloss's] proposed standard of review," and, like the defendant in *Hauk*, Kloss "has not cited to any." *Id.* ¶ 29; (Kloss's Br. 22.) Rather, when "reviewing whether the State sufficiently proved the defendant acted unequivocally under the solicitation and attempt statutes, courts have not deviated

from the general standard of review." *Id.* ¶ 29 (footnote omitted) (collecting cases).

And because the State is not required to prove a defendant's guilt beyond a reasonable doubt on appeal under the proper sufficiency of the evidence standard, this Court's review is limited to whether there was any reasonable view of the evidence that allowed the circuit court to find that Kloss intended that Cheryl commit first-degree reckless injury and first-degree recklessly endangering safety if police officers returned to the house. *Poellinger*, 153 Wis. 2d at 503; *Hauk*, 257 Wis. 2d 579, ¶ 29. That burden is easily met here.

The circuit court found that Kloss "told and specifically intended that [Cheryl] follow [his] instructions." (R. 225:118.) In finding that Kloss unequivocally intended Cheryl to follow his directions, it noted that "it's important to understand the relationship between Kelly Kloss and Cheryl Kloss." (R. 225:118.) The court observed that Cheryl was extremely submissive to Kloss and "caved in" and agreed with whatever he said when he abused her. (R. 225:120.) It found that Kloss controlled Cheryl by "degradation, numerous insults, attempts to alienate her from her family and other loved ones. He professed love for her, but then demanded things in return for his professed affection." (R. 225:119.) The court stated that "[v]ery few times in 38 and a half years in this business have I ever seen anyone that exercised the power and control of a domestic abuser to the extent that Mr. Kloss did in this instance," (R. 225:121–22), and that "the telephone calls themselves were his effort to exert control over his wife" (R. 225:119–22). The court found that "his specific intent that she follow his instructions about firearms and shooting is found in the transcripts in his words. Let's not forget the context I just talked about." (R. 225:122.)

The court recited numerous instances where Kloss demanded that Cheryl "do what [she was] told or we're done," that she "[p]ut [herself] in the line" for Kloss, that her "husband asked [her] to do something, and either you do what your husband says or get the F out," and to "[j]ust shut your mouth and do the F you're told." (R. 225:122–24.) Kloss further told her, "You better start doing the things you promise me you're going to do and quit lying to me. It's time, Cheryl. You want to save this relationship, it's in your hands right now. It's time to go to work." (R. 208:221.) "You have given me nothing to hang onto. Promises aren't enough anymore. Not where I'm at. I need something real." (R. 208:247.) Kloss further berated Cheryl for "not standing up" for him, saying that her declaring his innocence was not the same thing. He also told her to commit suicide and made her repeat that she was useless. (R. 209:83–128, 157, 160–61, 279.) At another point, he told her he was giving her "an order" not to speak to certain people again and said that if she did not follow it, "you're divorced. Clear?" (R. 209:226–27.) Kloss then said, "Your husband asked you to do something, and either you do what your husband says, or get the fuck out. . . . Love, honor, obey. Obey, motherfucker. Obey." (R. 209:227.)

In soliciting the two crimes, Kloss told Cheryl, "I want you to get your handgun out and get your shotgun out and if a River Falls cop comes to your door again, you open fire. No warnings. You will let them have it." (R. 209:289.) Kloss said he was in a good mood that day, but "[t]hat doesn't let you off the hook for what I expect, you know." (R. 209:293.) Kloss reiterated this demand several times in various ways, including telling Cheryl repeatedly "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. 209:337–39, 377, 412; 208:31–32.) Each time Cheryl said she would do what Kloss told her. (*See, e.g.,* R. 209:337.)

Kloss interrogated Cheryl, asking "Are you ready? Is somebody coming in that door? Are you ready if somebody was coming into the door right now? Were you ready to defend yourself right this minute? . . . Right by your side right there, you could pick it up right now and unload right now?" (R. 208:33–34.) Cheryl said "No," and Kloss told her "[t]hen you are not ready." (R. 208:34.)

Those are just a small fraction of the commands Kloss gave Cheryl while simultaneously abusing, degrading, and insulting her if she did not do what he told her to do. In every single call, Kloss viciously berated and lambasted her if he believed she was not following the demands he was making of her to the letter, not only regarding preparing to shoot the police, but about every other demand he was making of her as well. (R. 208; 209.) There was more than sufficient evidence for the court to find unequivocal intent on this record.

C. Kloss's arguments to the contrary fail.

Kloss contends that he could not have unequivocally intended that Cheryl carry out the acts he solicited because: (1) he knew the police were monitoring and therefore knew about the content of his phone calls, and (2) the acts he solicited were allegedly "contingent on a series of events that Kloss knew were never likely to occur." (Kloss's Br. 21–23.) These arguments miss the mark. Neither Kloss's knowledge that the police were monitoring the calls nor any belief Kloss may have had that police were unlikely to return to the house or that Cheryl was incapable of doing what he demanded show that there was no reasonable view of the

evidence that would have allowed the circuit court to find Kloss unequivocally intended that Cheryl follow his commands if the police came back. *Smith*, 342 Wis. 2d 710, ¶ 24.

First, the fact that the police were listening to the calls and therefore were necessarily warned of Kloss's plan that Cheryl shoot them does not mean Kloss cannot have unequivocally intended that Cheryl do so if they returned. (Kloss's Br. 23.) To the contrary, the content of Kloss's statements on which he relies for this proposition shows that the reasonable inference to be drawn from those statements—and the one the circuit court clearly did draw—is that Kloss simply did not care that the calls were recorded. (Kloss's Br. 23–25.) Kloss claims that he was merely "expressing his anger and taunting the police," but whether that was true was a question of fact for the trial court. *Poellinger*, 153 Wis. 2d at 506. The trial court clearly determined that was not a reasonable inference given the record. (Kloss's Br. 25.) Indeed, "taunting the police" could reasonably be viewed as an attempt to drive the police to the house. (Kloss's Br. 23–25.)

Second, and perhaps more importantly, a solicitor does not have to be certain the acts will occur or even know that the solicitee will have the opportunity to commit them to be guilty of solicitation. The solicitor merely has to advise someone to commit a crime "with intent that" it be committed at the time the advice occurs. Wis. Stat. § 939.30. "'With intent that' 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." Wis. Stat. § 939.23(4).

The solicitor does not have to be certain the solicited events will unfold or even believe they are likely to unfold to commit solicitation—that is inimical to the entire concept of

an inchoate crime. *Cf. State v. Routon*, 2007 WI App 178, ¶ 19, 304 Wis. 2d 480, 736 N.W.2d 530 (stating that a defendant commits the inchoate crime of conspiracy if the defendant intends and agrees to commit a crime even if the other conspirator is an undercover agent with no intent to commit the crime). The defendant simply has to intend the solicited crime occur. Wis. Stat. § 939.30. But the crime of solicitation is complete even if the act will necessarily never occur, because solicitation does not require the solicitee to agree to commit the crime. LaFave, *Substantive Criminal Law* § 11.1 at 264; *see also State v. Boehm*, 127 Wis. 2d 351, 355, 379 N.W.2d 874 (Ct. App. 1985) (renunciation is not a defense to solicitation because it "cannot undo that which has been done and therefore has no effect on the elements of solicitation, once completed.").

Ergo, the requisite intent under Wis. Stat. § 939.30 is that the solicitor intends, at the time the acts are urged, that the solicitee commit the acts urged if the opportunity arises. For example, if A tells B, "I want you to shoot C in the head and kill him if you ever see him walking down the street again" and circumstances show that A earnestly wanted B to kill C, A has committed solicitation even though it's possible B may never see C again or may refuse to commit the crime. It is only the defendant's intent that a crime be committed that matters—a defendant who urges a crime with the requisite intent that it be committed commits solicitation even if he does not know whether the solicitee will even be *receptive* to the solicitation, let alone know that the solicited act will take place. *See Routon*, 304 Wis. 2d 480, ¶ 19.

Accordingly, Kloss's observations that there was no anticipated need for police to return to the house, that they might return when Cheryl was not home, or that Cheryl "was a highly unlikely cop-killer" are of no import. (Kloss's Br. 24–25.) The question is whether there was sufficient

evidence for the circuit court to find that Kloss intended Cheryl to shoot through the door and shoot at the police as they were running away if they did return, not whether there was evidence that the police would return or evidence that Cheryl would follow his commands.[2]

And here, the record shows that Kloss intended that Cheryl follow his commands without question—all of his commands, no matter how trivial. (*See, e.g.,* R. 208:59–60 (Kloss berating Cheryl for telling him from memory about the contents of a letter instead of reading the letter over the phone).) Kloss's vicious degradation, threats, and demands of Cheryl are sufficient to show that Kloss unequivocally intended that Cheryl do exactly what he told her to do about everything: including to shoot through the door to injure any

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[2] Although here, Kloss's argument fails for another reason: there was plentiful evidence contained both in the phone calls themselves and in the house that Cheryl would follow his commands. Kloss specifically asked Cheryl if she had the guns ready, loaded, and placed where he told her to, and she said she had "the hand[gun]" ready. (R. 208:34.) Kloss told her to get a rifle or a shotgun out and have them ready too. (R. 208:34–38.) Cheryl later reaffirmed that she had a gun at the ready and would "leave one warning shot" in case the police returned. (R. 208:48.) Kloss demanded, "No. No. No warning shot. Take them out." (R. 208:48.) After the police arrested Cheryl and searched the Kloss house a third time, they found a loaded shotgun, rifle, and Cheryl's handgun in the places Kloss told her to stash them so she could quickly access them if the police returned. (R. 226:40–48, 57–59.) Further, they were placed in a location where Cheryl would have line-of-sight access to the front door. (R. 226:40–48, 57–59.)

Kloss cannot credibly maintain that he did not believe that Cheryl would carry out his commands and therefore cannot have intended she do so, when she specifically told him that she was preparing to do so and did prepare to do so.

police officer who came to the door, and to chase any other officers through the yard and shoot at them as they were running away, if the police returned. Both of those acts would be felonies, and the record supports the circuit court's finding that Kloss unequivocally intended them to occur if the opportunity arose for Cheryl to commit them—which is all that solicitation requires.

The trier of fact easily could find unequivocal intent on this record.

CONCLUSION

This Court should affirm the portions of the court of appeals' decision affirming the judgment of conviction.

Dated this 31st day of July, 2019.

Respectfully submitted,

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CERTIFICATION

I hereby certify that this brief conforms to the rules contained in Wis. Stat. § 809.19(8)(b) and (c) for a brief produced with a proportional serif font. The length of this brief is 6,692 words.

Dated this 31st day of July, 2019.

_____
LISA E.F. KUMFER
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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 31st day of July, 2019.

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