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 AN ORDER DENYING A POSTCONVICTION MOTION ENTERED IN THE ST. CROIX COUNY CIRCUIT COURT, THE HONORABLE EUGENE D. HARRINGTON, PRESIDING

REPLY BRIEF OF 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

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I. Solicitation is a uniquely anticipatory offense that is defined by the result the solicitor intends to achieve.

A. The judicial estoppel doctrine does not apply here.

Kloss complains that the State's argument here "directly contradicts it's argument to the trial court" and therefore asks this Court to apply "judicial estoppel" against the State and refuse to review the merits of its argument on interpretation of the solicitation statute. (Kloss's Response Br. 8–10.) He fails to recognize, however, two important points that preclude the judicial estoppel doctrine from applying.

First, the State was the respondent in the court of appeals, and was therefore not bound by the arguments the A.D.A. made in the trial court. "It is well-established that if a trial court reaches the proper result for the wrong reason, it will be affirmed." *State v. Holt*, 128 Wis. 2d 110, 124, 382 N.W.2d 679 (Ct. App. 1985). Because "a respondent on appeal seeks to uphold rather than reverse the result reached at trial," the policies of judicial efficiency are not served by "deny[ing] the respondent the right to assert a ground for upholding the trial court's decision." *Id.* Accordingly, "[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 (Ct. App. 1989). The State, as respondent on appeal, was free to argue any rationale for upholding the convictions.

The State lost on this ground in the court of appeals, and is therefore petitioner on this issue in this Court. But the State raises the same statutory interpretation argument here that it made as respondent in the court of appeals. The

judicial estoppel doctrine simply does not apply in this circumstance.

Second, the State petitioned this Court for review of this issue, specifically asking this Court "to clarify whether the statutory felony itself or the elements of the underlying felony solicited constitute the elements of a solicitation charge." (State's Cross Petition 3.) This Court granted the petition. Kloss fails to explain how the principles of judicial efficiency and fairness—the purposes behind the estoppel doctrine—would be served by granting a party's request for review of a question and then holding that the petitioning party was precluded from advancing its position. It is particularly inappropriate when the petitioning party was respondent on appeal.

The State should not be judicially estopped from advancing the argument it raised in the court of appeals.

B. Solicitation simply operates differently than other crimes because of the highly anticipatory nature of solicitation.

Kloss claims that the State fails to "come to grips with" the "core lesser included offense test" because, according to Kloss, the State necessarily must prove that the solicitor intends each element of the solicited felony be committed, therefore "[w]hether the solicited felony is characterized as one element of solicitation or multiple elements makes little difference" as the elements of reckless injury are the same as the elements of reckless endangerment. (Kloss's Response Br. 11 (citation omitted).)

But that analysis: (1) assumes that the two solicitation charges are for urging a single act against a single victim, (2) does not account for what Wis. Stat. § 939.30 lists as the elements of solicitation, and (3) does not account for the fact that "[t]he 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." 5 Wisconsin Legislative Council, *Judiciary Committee Report on the Criminal Code* at 25 (1953). As explained in the State's brief-in-chief, solicitation focuses primarily on the result the solicitor intends to achieve: what result did the solicitor intend, and did the solicitor urge acts which if completed would result in a particular statutorily prohibited felony. *See* Wis. JI–Criminal 550 (2001). If the solicitor's words and the circumstances show that the solicitor intended that the solicitee commit an injury, he cannot have intended that the person fall short of the injury and commit reckless endangerment.

Kloss is correct that *State v. Jackson*, 2004 WI App 190, 276 Wis. 2d 697, 688 N.W.2d 688, deals with conspiracy, and the charges there dealt with two felonies that do not have a lesser and greater relationship. (Kloss's Response Br. 11–12.) But he again focuses on what the result of a completed act would be, and essentially claims that solicitation simply means tacking "solicits" onto the front of the elements underlying felony. (*See* Kloss's Response Br. 10–11.) That fails to appreciate the inchoate nature of solicitation and the fact that no act to effectuate the underlying crime is required for solicitation to be complete. The crime of solicitation only requires that the solicitor intend that a statutorily prohibited felony be committed and urge acts that would constitute that crime.

But even assuming that a charge for solicitation of reckless injury and a charge for solicitation of reckless endangerment are the same in law, here, as further explained below, they are not the same in fact.

II. Kloss's convictions are not multiplicitous.

A. This case should have been analyzed as a continuous offense challenge.

Kloss does not refute the State's assertion that the court of appeals should have analyzed this case as a continuous offense challenge, and has therefore conceded it. *Charolais Breeding Ranches, Ltd. v. FPC Securities Corp.*, 90 Wis. 2d 97, 109, 279 N.W.2d 493 (Ct. App. 1979). And contrary to Kloss's contention, that distinction mattered, because the court of appeals specifically framed its analysis around the distinction. (*See* State's Pet-App. 194 ("Generally, '[i]n 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.").) But in a continuous offense challenge, "our focus is not on statutory definitions but on the facts of a given defendant's criminal activity." *State v. Anderson,* 219 Wis. 2d 739, 747, 580 N.W.2d 329 (1998) (citation omitted).

Had the court of appeals correctly identified the issue, perhaps it would have undertaken the required review of the facts of Kloss's criminal activity. But, as explained, it summarily disposed of that portion of the test—which, as Kloss has also conceded, was required regardless of the type of challenge at issue—without so much as discussing any of the facts of Kloss's criminal activity. (*See* State's Pet-App. 198–200.)

B. Kloss's offenses were different in fact.

Kloss claims that reviewing *de novo* whether the offenses were different in fact "fails to apply the standard of review to the circuit court's findings." (Kloss's Response Br. 13.) That is wrong. The different in fact test does not ask the court to make its own findings of fact. Rather, the different

in fact analysis looks simply to whether the established facts of the case showed that the defendant committed two separate acts, which is a question of law. *State v. Ziegler*, 2012 WI 73, ¶ 60, 342 Wis. 2d 256, 816 N.W.2d 238. The circuit court explicitly found that Kloss committed two separate acts constituting separate solicitations: one for telling Cheryl to shoot through the door, and one for telling her to shoot at any officers running away. (R. 230:39–40.) The question for the different in fact analysis is whether the record shows that his two acts were "sufficiently different in fact to demonstrate that separate crimes have been committed." *Ziegler*, 342 Wis. 2d 256, ¶ 60. That does not require this Court to find facts.

Kloss contends that those two solicitations were not separated in time or significantly different in nature because Kloss contemplated Cheryl taking the two actions in short succession and frequently urged her to commit both crimes within a short span of the conversation, but that does not matter. Each decision Kloss made to urge a separate crime constitutes a "a new volitional departure" in his course of conduct. *State v. Multaler*, 2002 WI 35, ¶ 57, 252 Wis. 2d 54, 643 N.W.2d 437.

Nor does Kloss's long discussion of the circuit court's initial discussion when rendering its verdict make any difference. (Kloss's Response Br. 13–17.) The facts found by the circuit court were these:

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.)

Those show that the circuit court found he intended and urged two different acts as a finding of fact. Kloss's real contention is that the circuit court erroneously related those facts to the elements of the offenses. (Kloss's Response Br. 13–16.) The circuit court relating the facts it found to the elements of the offense is a conclusion of law, which would be reviewed *de novo* in any event, bench trial or not. And again, it is well settled that "if a trial court reaches the proper result for the wrong reason, it will be affirmed." *Holt*, 128 Wis. 2d at 124. When assessing whether the convictions were different in fact, a reviewing court looks to the actual facts to determine whether the defendant's conduct required "a new volitional departure" for each conviction. *Multaler*, 252 Wis. 2d 54, ¶ 57. The facts here show that Kloss revised his plan and told Cheryl to commit a separate crime of chasing down the officers and shooting at them after he had already concocted his plan for her to shoot through the door to injure any officer who knocked. The offenses were different in fact.

C. The solicitation statute states clearly that a person commits a separate solicitation for each separate crime urged with the intent that it be committed.

Kloss's contention that the Legislature intended only one charge for solicitation per no matter how many crimes the person urged nor how many times the person urged them is unsupportable. The plain language of the solicitation statute speaks in singular terms and says a person commits a separate crime of solicitation every time they urge a person to commit "a felony" with the intent that it be committed. Wis. Stat. § 939.30. As explained in the State's brief-in-chief,

that language shows that a person can solicit multiple crimes in the course of a single sentence, and if so, the person has committed multiple solicitations. As Kloss admits, "[t]he act required is the advising, inciting, commanding, or soliciting of another to commit *a crime*." (Kloss's Response Br. 24–25 (citation omitted).) That means that each time the solicitor advises someone to commit a separate crime, they commit a separate solicitation. Again, had Kloss urged Cheryl to shoot through the door into the police officer that came to the door and set his squad car on fire with the intent that Cheryl commit both, he would have solicited two crimes even though he uttered a single sentence: reckless injury and arson. *Cf. Jackson*, 276 Wis. 2d 697, ¶ 8.

Kloss's only support for his argument consists of cases from three foreign jurisdictions that have different solicitation statutes and have interpreted them differently than Wisconsin and therefore are not persuasive. (Kloss's Response Br. 21–24.)

He primarily relies on *State v. Jensen*, 195 P.3d 512 (Wash. 2008), where the Supreme Court of Washington determined that the defendant could only be convicted of a single solicitation charge for his enticement for a fellow inmate to kill three victims. *Id.* ¶ 31. But for multiple reasons, *Jensen* is not persuasive.

First, Washington applies a different test for legislative intent than Wisconsin, which focuses primarily on the legislative history of the statute. *Jensen*, 195 P.3d 512, ¶ 11. The Washington court further relied on its interpretation of its own conspiracy statute for its analysis, and Washington has interpreted its conspiracy statute in the opposite way than Wisconsin has. *Id.* at ¶¶ 14–17; *compare with Jackson*, 276 Wis. 2d 697, ¶ 8. Washington's solicitation statute also postdates Wisconsin's by nearly two decades and

was based on the Model Penal Code. *Jensen*, 195 P.3d 512, ¶¶ 17–19. The Washington Supreme Court therefore interpreted their statute in accordance with the rationale articulated behind the Model Penal Code. *Id.* ¶¶ 19–20. Wisconsin's solicitation statute was enacted in 1955 and has a significantly different legislative history and stated purpose than that in the Model Penal Code. *See Judiciary Committee Report* at 25–26. And finally, the *Jensen* court based its decision on the rule of lenity after concluding that the legislative history was not illustrative of the legislative intent. *Jensen*, 195 P.3d 512, ¶ 11. *Jensen* is simply too far afield both legally and factually to inform the interpretation of Wisconsin's solicitation statute.

The other two cases on which Kloss relies fare no better. (Kloss's Response Br. 20–24.) Connecticut has no solicitation statute, but determined that solicitation was nevertheless a common law crime, and interpreted the offense accordingly. *State v. Schleifer*, 121 A. 805, 806–10 (Conn. 1923). Wisconsin abolished common law crimes with the revision of the criminal code in 1955 with the express purpose of prohibiting the judiciary from finding and punishing crimes "not defined by legislative authority." *See Judiciary Committee Report* at 8–9. And as noted in the State's response brief, Colorado has interpreted all of its inchoate offenses 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 State v. Briggs*, 218 Wis. 2d 61, 66, 579 N.W.2d 783 (Ct. App. 1998) ("[U]nder Wisconsin law, one cannot attempt to commit a crime which does not itself include an element of specific intent.").

Finally, Kloss's "continuous offense" analysis fails. (Kloss's Response Br. 23–24.) The solicitation statute in Wisconsin criminalizes the act of urging a crime with the intent that it be committed. Wis. Stat. § 939.30. That means a person commits a separate solicitation each time they take that action with the intent that a different crime be committed. It is well-established in Wisconsin that "[i]f the defendant's actions in committing the separate offenses may properly be viewed as one continuing offense, it is within the state's discretion to elect whether to charge 'one continuous offense or a single offense or a series of single offenses.'" *State v. Lomagro*, 113 Wis. 2d 582, 587, 335 N.W.2d 583 (1983) (citation omitted). The State could have charged Kloss with a single count of solicitation for the course of the phone calls, but it did not. It instead charged him with single offenses for each of the many crimes he solicited over the course of the calls. Under the plain language, history, and purpose of Wis. Stat. § 939.30, there was nothing improper about doing so.

CONCLUSION

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

Dated this 15th day of August, 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 2,546 words.

Dated this 15th day of August, 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 15th day of August, 2019.

_____
LISA E.F. KUMFER
Assistant Attorney General