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

REPLY 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.

TABLE OF CONTENTS

CASES CITED

STATUTES CITED

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

REPLY BRIEF OF DEFENDANT-APPELLANT-PETITIONER

ARGUMENT

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

Kloss argues, among other things, that he cannot solicit reckless injury because he cannot intend reckless conduct and intend great bodily harm at the same time. Criminal recklessness requires conduct creating a risk of harm, *without* an intention to cause harm. One can intend to cause harm or not intend to cause harm, but not both.

The State attempts to overcome this contradiction by drawing a distinction between Kloss' intent and Cheryl's intent. The State argues a "solicitor's intent is unconnected to the *mens rea* for the act solicited." (State's Brief, p. 2). In other words,

Cheryl may intend a reckless act that creates *a risk* of great bodily harm. Kloss, on the other hand, may intend great bodily harm by means of a "reckless" act. Kloss would be guilty of soliciting reckless injury. The State gives an example:

> 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.

(State's Brief, p. 8). The State achieves this result by arguing that only Cheryl's *mens rea* counts for the underlying offense:

> …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. …. *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.*

(emphasis added) (State's Brief, p. 11). Thus, "the requisite intent for solicitation is simply that the solicitor intended a particular crime to result from the conduct urged." The solicitor need not 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. (State's Brief, p. 7). The State thus relies on Cheryl's anticipated conduct and mental state for the "reckless" element of reckless injury, and relies on Kloss' intent to cause great bodily harm for the "causes great bodily harm" element.

The State's argument fails for multiple alternative reasons. First, the State's argument assumes Kloss intended to

cause bodily harm, which is contrary to the circuit court's finding. Second, the State must prove Kloss intended that all the elements of the solicited crime would be met. It cannot rely on Cheryl's intent for one element and Kloss' intent for another. Third, Kloss cannot intend legally inconsistent elements. He cannot intend a result which, by definition, must be unintended. Fourth, the State fails to address the fundamental incompatibility between a reckless injury crime, which is controlled by an actual injury, and inchoate crimes such as conspiracy, attempt, and solicitation.

First, as a threshold matter, the State's argument fails because it's premised on the assumption Kloss intended to cause great bodily harm. By *intending* great bodily harm, the State argues, the "great bodily harm" element of Wis. Stat. § 940.23 is met. (State's Brief, pp. 2, 5, 8, 9, 10, 12). The assumption Kloss intended to cause great bodily harm is not possible, however, as the circuit court made an express finding that Kloss *did not* intend to cause "bodily harm."[1] (225:127 (A:16)). Needless to say, one cannot intend great bodily harm if one does not intend bodily harm. The State does not contest this finding, which is subject to a clearly erroneous standard of review. See Wis. Stat. § 805.17; *Milbauer v. Transport Employes' Mut. Benefit Soc.*, 56 Wis. 2d 860, 865, 203 N.W.2d 135, 138 (1973). Because the circuit court made an express finding Kloss did not intend to cause bodily harm, the State's argument necessarily fails.

---

1 "[solicitation of] aggravated battery,…requires a specific intent to go out and cause bodily harm to another person; and quite frankly, just shooting through the door in and of itself in my view wasn't enough. Mental purpose to cause bodily harm to another human being. Not guilty."

According to the circuit court, the "great bodily harm" element of reckless injury was met because the conduct Kloss solicited created an "unreasonable and substantial *risk* of death or great bodily harm." (emphasis added) (225:128-129 (Appendix of Defendant-Appellant-Petitioner's First Brief (A:) pp. 17-18)).

Second, the State must prove Kloss intended all the elements of the solicited crime. It cannot rely on Cheryl's state of mind for one element and Kloss' state of mind for another. Wisconsin's solicitation statute requires the State to prove a solicitor intended a particular felony be committed. See Wis. Stat. § 939.30. The State agrees it must show that Kloss intended the solicited offense. (State's Brief, p. 11). The State also agrees that the jury instructions for solicitation "link the elements of the crime allegedly solicited to the intent element of solicitation." (State's Brief, p. 6, 8). Indeed, the only practical way to distinguish one felony from another is by relying on a felony's statutory elements. As the State must prove Kloss unequivocally intended that a particular crime be committed, it must prove he intended the elements of that crime would be met if it were completed. The State may not, therefore, divide the elements between the solicitor and solicitant. The only mental state that matters is the solicitor's.[2]

Alternatively, if Cheryl's *mens rea* governed which crime was solicited, and her *mens rea* was consistent with the legal definition of criminal recklessness—i.e. to engage in reckless conduct without an intent to cause great bodily harm—then, according to the State's logic, Kloss could only be guilty of soliciting reckless endangerment. The State can't have it both ways. Kloss cannot be guilty of soliciting reckless injury when Cheryl would only be guilty of reckless endangerment.

---

2 In contrast, the State argues in its first brief that the crime solicited "will depend entirely on what result the circumstances unequivocally show [the solicitor] intended." (State's First Brief, p. 14). If the solicitor "A" tells "B" I'll pay you $5000 to make "C" disappear, the solicited crime depends entirely on the solicitor's intent. If it was the solicitor's intent that B make C a lucrative offer to move abroad, then A solicited nothing. If it was the solicitor's intent that "B" kill "C," then A solicited a first-degree intentional homicide. *Id.* The crime solicited depends entirely on the solicitor's intent. In this case, according to the State, Kloss solicited acts with the intent to cause great bodily harm, yet he was convicted of a crime which requires an unintended harm.

Third, the State's argument begs the question of how Kloss can intend Cheryl engage in "reckless" conduct—which, by definition, is conduct without a specific intent to cause harm—if, at the same time, he intended great bodily harm. Both Kloss and the State agree that an essential element of reckless injury is reckless conduct. Criminal recklessness by definition requires conduct which knowingly creates a *risk* of great bodily harm *without* a specific intent to cause bodily harm. Wis. Stat. § 939.24(1); *Werner v. State*, 66 Wis. 2d 736, 748, 226 N.W.2d 402, 407 (1975); *State v. Michels*, 141 Wis. 2d 81, 97, 414 N.W.2d 311, 317 (1987).

If Kloss intended that Cheryl engage in reckless conduct he must intend that she engage in conduct which *creates a risk* of great bodily harm without a specific intent to cause bodily harm. If Kloss intended that Cheryl engage in conduct which he intended *would cause* great bodily harm, as the State insists, the conduct he seeks no longer meets the definition of criminal recklessness. He would no longer intend conduct which *creates a risk* of great bodily harm, but rather, would intend conduct which would *cause* great bodily harm. The State cannot label conduct as "reckless" when there is an intent to cause harm. Once conduct becomes a deliberate means to inflict harm, it ceases being "reckless." Kloss cannot, therefore, intend a resultant harm by Cheryl's "reckless" conduct because her conduct would no longer meet the definition of criminal recklessness.

Fourth, the State's argument does not adequately address the fundamental incompatibility between a reckless crime which requires actual injury and an inchoate crime such as conspiracy, attempt, or solicitation. As Kloss previously argued, appellate decisions are nearly universal in holding that neither conspiracy, attempt, nor felony murder are compatible with a reckless crime requiring injury because they all require intent and one cannot intend an unintended result. See Kloss'

Brief-in-Chief, pp. 16-19. Solicitation is no different. The State tries to distinguish solicitation by arguing it "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." (State's brief, p. 13-14). None of these distinctions are relevant, however, because they don't change the fundamental contradiction shared by all inchoate crimes involving a reckless injury or death: one cannot intend harm that must be unintended. Unintended harm, moreover, will always requires an actual injury. See Kloss' Brief-in-Chief, pp. 18-19.

The State's faulty logic is illustrated by its analogy to accomplice liability. According to the state, a person can be convicted of *aiding and abetting* a reckless injury "even though aiding and abetting requires intent," citing *State v. Howell*, 2007 WI 75, ¶ 1, 301 Wis. 2d 350, 734 N.W.2d 48. This is true, the State argues, "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." (State's Brief, p. 7). The analogy fails, however, because accomplice liability pertains only to a completed crime. At that point, either an injury has occurred, in which case aiding and abetting the reckless conduct creates liability for reckless injury, or no injury has occurred, in which case the accomplice would only be guilty of aiding and abetting reckless endangerment. The charge is controlled by the resulting harm, not the intent.

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.

Kloss knowingly gave the State every statement it used to convict him. This is undisputed. As the State points out, the

standard of review for sufficiency of the evidence is a difficult one to surmount. In this case, however, the intentional revelations Kloss made are simply incompatible with a finding of unequivocal intent. Hearing everything Kloss said, there was no possibility whatsoever that police officers would put themselves in harm's way by appearing at Kloss' front door. More importantly, there's no way Kloss would have expected police officers to do so. He made sure of it. If Kloss were serious about having his wife shoot the police, he would have found another way to communicate his "plan" to Cheryl without telling the alleged target(s) precisely how everything was going to happen. The last thing he would have done was exactly what he did.

The State's argument is almost entirely irrelevant. Kloss' relationship with his wife and whether she would have been willing and able to carry out his "plan," or follow his "commands," make no difference whatsoever when, again, police officers would not knowingly put themselves in a position to be harmed. There was no possibility they would ever do so. More importantly, by speaking openly on a recorded line, *Kloss knew* there was no possibility they would ever do so. He completely self-sabotaged any chance for it to happen.

The State strains to make any argument which addresses this obvious evidentiary problem. It argues Kloss simply didn't care whether the calls were recorded; that his "taunting the police" could reasonably be viewed as an attempt to drive the police to the house; and that it doesn't matter whether he was certain or not the events would unfold. (State's Brief, 20-22). What the State fails to answer is how Kloss could have unequivocally intended a crime be committed which requires the element of surprise when he knowingly removed the element of surprise. At the very least his intent was equivocal.

CONCLUSION

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

Respectfully submitted this 15th day of August 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:

CG Times proportional serif font, printed at a resolution of 300 dots per inch, 14 point body text and 12 point text for quotes and footnotes, with a minimum leading of 2 points and a maximum of 60 characters per line.

This document contains 2902 words.

CERTIFICATE OF COMPLIANCE WITH RULE 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 s. 809.19(12).

I further certify that: This electronic brief is identical in content and format to the printed form of the brief filed as of this date. A copy of this certificate has been served with the paper copies of this brief filed with the court and served on all opposing parties.

~~CERTIFICATION~~

~~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.~~

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

CERTIFICATE OF COMPLIANCE WITH RULE 809.19(13)

I hereby certify that: I have submitted an electronic copy of this appendix, excluding the brief, which complies with the requirements of s. 809.19(13).
I further certify that: This electronic appendix is identical in content and format to the printed form of the appendix filed as of this date. A copy of this certificate has been served with the paper copies of this appendix filed with the court and served on all opposing parties.

CERTIFICATION OF MAILING

I certify that this brief or appendix was deposited in the United States Mail for delivery to the Clerk of the Court of Appeals by First Class Mail on August 15th 2019. I further certify that the brief or appendix was correctly addressed and postage was prepaid.

Dated this 15th day of August 2019.

MILLER APPELLATE PRACTICE, LLC

By_____

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