State of Wisconsin
Court of Appeals
District 1
Appeal No. 2011AP000691 - CR

State of Wisconsin,

Plaintiff-Respondent,

v.

Matthew Steffes,

Defendant-Appellant.

On appeal from a judgment and order denying the appellant's postconviction motion entered in the Milwaukee County Circuit Court, The Honorable Thomas Donegan, presiding

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Defendant-Appellant's Brief and Appendix

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Statement on Oral Argument and Publication

The issues presented by this appeal are unique, and are not controlled by well-settled law. Therefore, the appellant does recommends both oral argument and publication.

Statement of the Issues

I. Whether the evidence was sufficient, as a matter of law, to support the jury's verdict finding Steffes guilty of conspiracy (in counts one and two) where:

A. There was no evidence that Steffes was part of the conspiracy at the time the crime of theft by fraud was committed; and,

B. There was no evidence that any member of the alleged conspiracy actually made a false promise to the victim, SBC.

Answered by the trial court: Yes.

II. Whether the evidence was sufficient, as a matter of law, to prove that counts one and two were felonies (i.e. to prove that more than $2,500 worth of property was stolen)

Answered by the trial court: Yes.

III. Whether the trial court erred in instructing the jury as to the elements of "theft by fraud" as alleged in the criminal complaint; and, further, defense counsel was ineffective for failing to object to the defective jury instruction.

Answered by the trial court: No

IV. Whether the trial court abused its sentencing discretion by considering an improper sentencing factor; to wit, the court mentioned as an aggravating factor, that the identities of persons were stolen; and that this affected the lives of these people. In fact, no identities were stolen in either count one or count two.

Answered by the trial court: No.

Summary of the Argument

I. The evidence was insufficient to prove that Steffes was guilty of conspiracy to commit theft by fraud. The evidence presented at trial was to the effect that Josh Howard, who was a prisoner in Waupun Correctional Institution, had friends on the outside who set up “burn-out phones” for him. A burn-out phone is a telephone line set up with the intention of never paying the bill. Prisoners will use the phone to make collect calls, and three-way calls, until the phone “burns out” (that is, the telephone company terminates the service due to

non-payment). There was no evidence presented that Steffes played any role in setting up the burn-out phones. Instead, after the lines were already up and running, Steffes used the telephones to make calls. Likewise, there was no evidence presented that any member of the conspiracy made any promise to SBC in order to induce SBC to set up the lines.

Thus, the evidence was insufficient to prove that Steffes played any role in the initial fraud; rather, in only showed that Steffes received stolen services or property. The evidence was also insufficient to prove that a fraud occurred.

II. The evidence was insufficient to prove that the crimes were felonies. Representatives of SBC (the telephone company) testified that telephone services (which cannot be the subject of a theft by fraud charge), are an applied form of electricity (which can be). Although the SBC representatives presented evidence of the total amount of revenue lost due to the stolen telephone services, there was no evidence as to the value of the "applied electricity" used in providing those services.

Thus, the evidence was insufficient to prove that the crimes were above the felony threshold of $2,500 in loss.

III. The trial court erred in instructing the jury that a fraudulent promise may be implicit. The statute prohibiting theft by fraud requires that some promise be made that, at the

time is made, the promisor intends not to fulfill. Here, the court instructed the jury that such a promise may be implied. This is not the law and, therefore, the court erred in its instructions to the jury.

IV. The trial court abused its sentencing discretion. In sentencing Steffes, the court stated that an aggravating factor was that persons' identities were stolen. Firstly, Steffes was acquitted of the identity theft charge; and, further, in the courts for which Steffes was convicted, the "burn out phones" were not set up with stolen identities. Thus, in sentencing Steffes, the court considered an improper factor.

Statement of the Case

I. Procedural History

The defendant-appellant, Matthew Steffes ("Steffes") was charged in a criminal complaint (R:2) with two counts of conspiracy to commit theft by fraud[1], and with one count of

[1]Sec. 943.20(1)(d), Stats., provides th at whoever does any of the following is guilty: "Obtains title to property of another person by intentionally deceiving the person with a false representation which is known to be false, made with intent to defraud, and which does defraud the person to whom it is made. "False representation" includes a promise made with intent not to perform it if it is a part of a false and fraudulent scheme.

identity theft.[2] Following a preliminary hearing, the court bound Steffes over for trial, and Steffes entered not guilty pleas to all three counts.

Ultimately, the case was tried to a jury in August, 2009. At the conclusion of the evidence, the judge instructed the jury:

> A member of the conspiracy must have made a false representation to SBC. What does that mean? This requires that the false representation be one of past or existing fact. It does not include expressions of opinions or representations of law. *A representation may be expressed, or it may be implied from all of the circumstances.*

(R:122-26) . There was no objection by defense counsel to this instruction.

The jury found Steffes guilty of counts one and two (conspiracy to commit theft); but not guilty of count three (identity theft). (R:123-10)

The Court sentenced Steffes to fifty-four months in prison on each count, concurrent to each other, but consecutve to any other sentences; bifurcated as twenty-four months initial confinement, and thirty months extended supervision. (R:88) Significantly, though, in sentencing Steffes, the judge said:

> And somehow you didn't even think, as you said, that once again

[2]Sec. 943.201(2), Stats., provides that: "Whoever, for any of the following purposes, intentionally uses, attempts to use, or possesses with intent to use any personal identifying information or personal identification document of an individual, including a deceased individual, without the authorization or consent of the individual and by representing that he or she is the individual, that he or she is acting with the authorization or consent of the individual, or that the information or document belongs to him or her is guilty of a Class H felony:

> you are harming other people. Why wouldn't that thought come to you that these *identities* that are being used must come from somewhere? And as we saw through the trial, they were people in elderly residential homes, various other people who had done nothing wrong to you, did not deserve harm, and by your choice, you kept up this pattern of not paying attention to the harm suffered by others.

(R:124-30) In reality, Steffes was acquitted of the identity theft count (count three); and counts one and two did not involve identity theft. That is, one count involved Nick Steffes, who set up the account himself, using his own name (R:11-80); and the other account used a phony business name. *Ibid.* p. 82

Steffes then filed a postconviction motion, raising all of the same issues raised in this appeal. (R:93) On March 9, 2011, without conducting a hearing, the trial court denied all of Steffes' motions. (R:107; Appendix B)

Steffes timely filed a notice of appeal

II. Factual Background

The evidence presented at trial established that Joshua Howard, who was an inmate at Waupun Correctional Institution, persuaded two young women, Angela Berger and Rheanan Hoffman, to set up "burn out" phones for him. (R:119-66 to 76) The scheme involved the women setting up telephone line accounts with SBC and, according to the State, the women never intended to pay for the telephone services. (R:121-79)

Howard would then use these burn-out telephones to make numerous collect telephone calls from prison. There was no evidence that, at the time the burn-out phones were being set up, that Steffes, had any knowledge of the scheme. Rather, it was only after Howard and the women had the telephone accounts set up that Steffes began using the phones.

The State presented testimony at trial to the effect that that telephone services are included in the definition of "property" because telephone service is an applied form of electricity, and therefore it falls within the term "electricity" in Sec. 943.20(2)(b). (R:119-9; App. C) In other words, in order to provide telephone service, SBC is required to purchase electricity from a power company to operate the telephone system. Eric Stevens, a representative of AT&T, testified as to the balances on the burn-out phone accounts (R:121-38)-- each of which involved thousands of dollars. A second AT&T employee, Robert Lindsley, testified concerning the application of electricity to the telephone system; however, Lindsley was unable to testify as to the value of the electricity consumed by each account. (R:121-51, et seq.; App. D)

Argument

I. The evidence was insufficient, as a matter of law, to prove that Steffes was part of the conspiracy to commit theft by fraud; rather, the evidence suggested that Steffes was a beneficiary of the theft (i.e. that he received stolen property)

The evidence presented at trial established that Josh Howard, with the assistance of Angela Berger and Rheanan Hoffman, set up a series of "burn-out" phones while Howard was a prisoner at Waupun Correctional Institution.

According to the state, Berger and Hoffman made false promises to SBC to induce SBC to set up the telephone accounts. It was only after the accounts were already set up, though, that Matthew Steffes had any involvement. Steffes' involvement, according to the trial testimony, was limited to using the telephone accounts that had already been set up. A fair inference from the evidence is that Steffes knew these phones were "burn-out" phones. (R:119-73)

As will be set forth in more detail below, the crime of theft by fraud is complete once the false promise is made, and title to some property is obtained. There is no evidence that Steffes played any role in, or even knew about, the false promises that were made by the women to SBC. Wisconsin no longer recognizes the concept of being an accessory after the fact. Therefore, the evidence was insufficient, as a matter of law,

to prove that Steffes was part of this conspiracy. Additionally, there was no evidence presented that any member of the conspiracy ever made an express "promise" of any kind to SBC in order to obtain services. An implicit promise is not sufficient.

A. Standard of Appellate Review

The standard for reviewing an issue of the sufficiency of the evidence in a criminal case is well-known. The Wisconsin Supreme Court has instructed:

> We hold that the standard for reviewing the sufficiency of the evidence to support a conviction is the same in either a direct or circumstantial evidence case. Under that standard, an appellate court may not reverse a conviction unless 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. We believe that this issue is before us today because of confusion concerning the oft-stated rule that circumstantial evidence must be strong enough to exclude every reasonable hypothesis of innocence. We therefore begin our analysis of the first issue presented in this case with a discussion of that rule in circumstantial evidence cases.
>
> In order to overcome the presumption of innocence accorded a defendant in a criminal trial, the state bears the burden of proving each essential element of the crime charged beyond a reasonable doubt. *In re Winship*, 397 U.S. 358, 364 (1970). It is well established that a finding of guilt may rest upon evidence that is entirely circumstantial and that circumstantial evidence is oftentimes stronger and more satisfactory than direct evidence. (internal citations omitted). Regardless of whether the evidence presented at trial to prove guilt is direct or circumstantial, it must be sufficiently strong and convincing to exclude every reasonable hypothesis consistent with the defendant's innocence in order to meet the demanding standard of proof beyond a reasonable doubt. *Schwantes v. State*, 127 Wis. 160, 176, 106 N.W. 237 (1906).

State v. Poellinger, 153 Wis. 2d 493, 501-502 (Wis. 1990)

With regard to conspiracy, Sec. 939.31, Stats., provides, "[W]hoever, with intent that a crime be committed, agrees or combines with another for the purpose of committing that crime may, if one or more of the parties to the conspiracy does an act to effect its object, be fined or imprisoned or both . . . for the completed crime . . . " Significantly, "The mere knowledge, acquiescence or approval of a plan, without cooperation or agreement to cooperate, is not enough to make a person a party to a conspiracy." *Winslow v. Brown*, 125 Wis. 2d 327, 371 N.W.2d 417, 420 (Ct. App. 1985).

B. There was no evidence that Steffes was a member of the conspiracy at the time the services were obtained by allegedly false promises to pay.

The State argued that Steffes became a member of the conspiracy by using the burn-out phones once they had been set up by other members of the conspiracy. Steffes' conduct in sharing in the loot after the fact cannot make him a party to the conspiracy. The State made a similar argument in, *State v. Rundle*, 176 Wis.2d 985, 500 N.W.2d 916, 925 (Wis. 1993), and the court dismissed the argument, saying,

> The state's allegation that the defendant withheld information from medical authorities concerning the 1989 incidents seems more consistent with a theory that the defendant was an accessory after the fact than with a claim that he assisted or encouraged the abuse as it was occurring. It has been recognized that the "accessory after the fact, by virtue of [176 Wis.2d 1007] his

> involvement only after the felony was completed, is not truly an accomplice in the felony. This category has thus remained distinct from others, and today the accessory after the fact is not deemed a participant in the felony but rather one who has obstructed justice...." LaFave and Scott, Substantive Criminal Law sec. 6.6 at 125 (1986).

Here, once the false promise was made to SBC, and once some property was obtained, the crime of theft by fraud was complete. Steffes, then, did not become involved in the scheme until after the crime was complete. As set forth above, an accessory after the fact is not part of the conspiracy. Certainly, Steffes might be guilty of some other crime, such as receiving stolen property, but he certainly is not guilty of being part of a conspiracy to commit theft by fraud.

The State will argue that, under the circumstances of this case, the conspiracy to commit theft by fraud was a continuing offense and, therefore, that Steffes became a member of the conspiracy while the crime was still on-going. This is simply not the case.

Perhaps the best way to analyze this issue is to determine whether “theft by fraud” is, in fact, a continuing offense. If it is, then Steffes might have become a party to the conspiracy even after the fraudulent representations had been made. If it is not a continuing offense, though, then Steffes could *not* have become a party to the conspiracy by later using the fraudulently obtained telephone service.

> The question whether a particular criminal offense is continuing in nature is primarily one of statutory interpretation. (internal citation omitted) The continuing offense doctrine is well established, and has been applied to encompass a wide variety of criminal activity including embezzlement, see *State v. Thang,* 188 Minn. 224, 246 N.W. 891 (1933); conspiracy, see *United States v. Kissel*, 218 U.S. 601 (1910); repeated failure to file reports, see, *Hanf v. United States,* 235 F.2d 710, 715 (8th Cir.), cert. denied, 352 U.S. 880 (1956); failure to report for induction, *United States v. Robinson,* 485 F.2d 1157 (3d Cir. 1973); theft by receiving, *State v. Reeves*, 574 S.W.2d 647 (Ark. 1978), cert. denied, 99 S. Ct. 2412 (1979), and the failure to make and keep records of controlled substances, *People v. Griffiths,* 67 Ill. App.3d 16, 384 N.E.2d 528 (1978), as well as others. n4
>
> In *Toussie v. United States*, 397 U.S. 112 (1970), it was held that a federal statute providing for the failure to register for the draft did not create a continuing offense. The Supreme Court recognized that it had in prior decisions applied the continuing offense doctrine in situations where the legislative purpose to create such an offense was clear. n5 The Supreme Court proposed the following criteria for determining whether the particular statute before the court creates a continuing offense.
>
> "These considerations do not mean that a particular offense should never be construed as a continuing one. They do, however, require that such a result should not be reached unless the explicit language of the substantive criminal statute compels such a conclusion or the nature of the crime involved is such that . . . [the legislature] must assuredly have intended that it be treated as a continuing one." *Toussie v. United States,* 397 U.S. at 115.

John v. State, 96 Wis. 2d 183, 188-190 (Wis. 1980). Thus, the test for whether an offense is continuing in nature is: (1) whether the statute expressly provides that it is continuing in nature; or, (2) whether, given the nature of the behavior that is prohibited, the legislature must surely have intended that the crime be continuing in nature.

Sec. 943.20(1)(d), Stats., provides:

> (d) Obtains title to property of another person by intentionally deceiving the person with a false representation which is known to be false, made with intent to defraud, and which does defraud the person to whom it is made. "False representation" includes a promise made with intent not to perform it if it is a part of a false and fraudulent scheme.

Plainly, the statute does not explicitly provide that the offense is continuing in nature. Thus, we must now consider the nature of the behavior that is prohibited, and decide whether the legislature must surely have intended the offense to be continuing. Most striking about the language of the statute is that it reads, “a false representation”, which clearly contemplates a singular representation rather than a continuing course of fraud. Additionally, the statute reads, “obtains title to property”, which also contemplates the singular event of “obtaining title to property.” This language, of course, seems to contemplate the singular event of transferring legal title, usually by a legal document, to property. This subsection of the statute is different than all of the other subsections in that it uses the phrase “obtains title to”, whereas all of the other sections use the conventional theft language of “obtains the property of another.” The Court of Appeals has found this phrase in the statute to ambiguous. *State v. O'Neil,* 141 Wis. 2d 535, 541 (Wis. Ct. App. 1987). The court held that there need not be proof that a document creating legal title be passed. Rather, the court noted that the purpose of the statute

is to protect the public from swindlers who obtain property by non-violent means. Significantly, though, the court wrote, "We conclude, therefore, that if a person induces another to part with title to property by fraudulent misrepresentations, then title to that property has been obtained within the meaning of the statute. *The crime is complete when title has been misappropriated.*" (emphasis provided). *See, also, State v. Meado*, 163 Wis. 2d 789, 798 (Wis. Ct. App. 1991)

Thus, the court of appeals has interpreted this very statute, and has found that it was the intent of the legislature that the offense is complete once property has been misappropriated.

For these reasons, Steffes did not become a party to the crime by later using the stolen telephone service.

C. There was no evidence that any member of the conspiracy made an express promise to SBC in order to induce SBC to provide the services.

In the information, the State specifically alleged that a false promise to pay for telephone service was made to SBC. Accordingly, the State had the burden to prove that some member of the conspiracy made a false promise to pay for telephone services in the name of Nick Steffes or Jamie Douyette. Pursuant to 1453A Wis. JI-Criminal, the second element of Theft by Fraud is that:

> A member of the conspiracy made a false representation to SBC.
>
> A false representation in this case means a promise to pay for telephone service accounts in the name of Nick Steffes and Jamie Douyette, made with intent not to perform it, if the promise is part of a false and fraudulent scheme.

At trial, the State presented no evidence that any promise was ever made to SBC by any member of the conspiracy. There was not even any evidence that a discussion took place with any representative of SBC concerning either the ability or the intent to pay for the services that were being provided.

There was no evidence, and it does not appear to be the fact, that when one applies for telephone services, one is asked to declare his or her intention to pay for the services or not.

In order for the crime of theft by fraud to be committed, there must be a false promise expressly made. The crime is not committed by an unspoken understanding or an inference. Here, there was no evidence that a false promise was ever made and, therefore, for this additional reason, the evidence was insufficient to support the jury's verdict finding Steffes guilty of conspiracy to commit theft by fraud.

II. The evidence was insufficient, as a matter of law, to prove that the members of the conspiracy stole more than $2,500 worth of electricity; and, therefore, the evidence was insufficient, as a matter of law, to prove that the offense was a felony.

In order for a violation of Sec. 941.20, Stats., to be a felony, the amount of loss is required to be in excess of $2,500. *See,* 943.20(3)(a), Stats. Here, the state presented testimony concerning the value of the *telephone services* that were stolen; however, under the statute, services are not property. It was the "applied electricity" that was the property that was stolen. Robert Lindsley was utterly unable to testify as to the value of the electricity that was involved in the burn-out accounts. Thus, the evidence was insufficient, as a matter of law, to support Steffes' conviction for felony theft by fraud.

The State will nonetheless maintain that the correct measure of the loss was the value of the telephone services provided. As mentioned, telephone services are not within the definition of "property" listed in 943.20(2)(b), Stats., which provides that, "Property" means all forms of *tangible* property, whether real or personal, without limitation including electricity, gas and documents which represent or embody a chose in action or other intangible rights." A *service* is not tangible property.

The jury did not hear any testimony about the value of the

applied electricity used to provide the phone service. In fact, when defense counsel asked Lindsley how much electricity is used during a phone call, he responded, "[s]omething like that I can't quantify because every circuit is different." (R:119-9)

Even if one were to assume that telephone service somehow fits under the "without limitation" clause of the definition of tangible property, the evidence was still insufficient to establish the value of any loss to SBC.

Where there is a limit to a victim's ability to provide services, it is possible to quantify the economic loss where services are stolen. For example, there is a fairly concrete limit to the amount of time that a lawyer is able to work per week. Thus, when a client fraudulently induces a lawyer to provide legal services, the lawyer suffers a true economic *loss* because he cannot replace the lost time. The lawyer's economic loss is the amount that the lawyer could have earned by spending his limited time working on the case of a paying client.

Where there is no practical limit to a victim's ability to provide a service, though, there is no economic *loss* where a customer fraudulently obtains service. In the case of SBC, there was no testimony as to the limits of its network to provide telephone service. In other words, there was no evidence that the telephone calls of paying customers were unable to be completed due to the fraudulent calls being placed from the Waupun Correctional Institution. Truly, the only "loss" that SBC suffered, then, was the (probably minuscule) amount it

paid to an electricity provider for the additional electricity needed to provide the fraudulently obtained telephone service. SBC's bottom line was not appreciably affected by being fraudulently induced to provide telephone service to those at the Waupun Correctional Institution. Economically speaking, SBC's bottom line would have been no different even if the burn-out phones had never been set up.

Therefore, if the court does not dismiss counts one and two, then the court should amend the convictions to misdemeanors.

III. Steffes is entitled to resentencing on the grounds that the trial court relied upon an inappropriate factor in sentences Steffes (i.e. that someone's identity was stolen).

To overturn a sentence, the defendant must show some unreasonable or unjustified basis for the sentence in the record. *See State v. Harris*, 119 Wis. 2d 612, 622, 350 N.W.2d 633, 638 (1984). In, *State v. Taylor*, 2006 WI 22 ¶18 (Wis. 2006) the Wisconsin Supreme Court court reaffirmed the traditional sentencing factors but, in the light of "Truth in Sentencing", emphasized the need for trial courts to do more than simply recite the facts, invoke the sentencing factors, and to then decide the sentence. Rather, the trial court must *explain* what factors are being considered and *why* those factors require the sentence being imposed (i.e. to provide the "linkage" between the sentencing factors and the sentence imposed). In a concurring opinion in *Taylor*, Justice Bradley wrote, "Merely uttering the facts involved, invoking sentencing

factors, and pronouncing a sentence is not a sufficient demonstration of the proper exercise of discretion." *Taylor,* 2006 WI 22, ¶54 (Wis. 2006). Rather, as the court explained in *State v. Gallion***,** 2004 WI 42, ¶46 (Wis. 2004)*,* "[W]e require that the court, by reference to the relevant facts and factors, explain how the sentence's component parts promote the sentencing objectives. By stating this linkage on the record, courts will produce sentences that can be more easily reviewed for a proper exercise of discretion." *Gallion*, 2004 WI 42, ¶46 (Wis. 2004)

Further, in, *Gallion***,** 2004 WI 42, ¶23 (Wis. 2004), the court made clear that:

> McCleary further recognized that 'the sentence imposed in each case should call for the minimum amount of custody or confinement which is consistent with the protection of the public, the gravity of the offense and the rehabilitative needs of the defendant.' Id. at 276. This principle has been reiterated in subsequent cases.

Where evidence is relevant to either guilt or to sentencing- even if the evidence is inculpatory- the defendant has a due process right to review the evidence and to prepare to rebut the evidence. This is a fundamental precept of due process. More importantly, a defendant has a due process right to be sentenced based on accurate information. *State v. Tiepelman*, 291 Wis. 2d 179, 717 N.W.2d 1 (2006). Part and parcel of this rule is that the defendant be given notice of the information that will be presented against him at sentencing and that he also be

given a reasonable opportunity to rebut the information.

Additionally, matters a sentencing court properly considers need not be "restricted to evidence given in open court by witnesses subject to cross-examination," but the defendant must have the opportunity to rebut the evidence. *State v. Damaske*, 212 Wis. 2d 169, 196, 567 N.W.2d 905, 917 (Ct. App. 1997) (quoting *Williams v. New York*, 337 U.S. 241, 250, 93 L. Ed. 1337, 69 S. Ct. 1079 (1949))

Here, in sentencing Steffes, specifically mentioned that Steffes was involved in a scheme in which the identities of vulnerable people were stolen, and that this crime affected the lives of these people. In fact, Steffes was acquitted of count three, which alleged identity theft. In counts one and two, alleging theft by fraud, no identities were stolen. In one count, the phony line was set up in the name of Nick Steffes, who was a witting participant. In the other count, the line was set up in the name of a non-existent business.

What, though, is the difference? The difference is that if identities were actually stolen there would be two victims in addition to SBC. Undoubtedly, SBC was a victim of the crimes; however, SBC was the *only* victim. Thus, in sentencing Steffes, the court inaccurately believed that the crime was more serious than it actually was. For this reason, Steffes must be resentenced.

IV. In the alternative, Steffes should be granted a new trial on the grounds that the real controversy was not tried because the court improperly instructed the jury as to the elements of theft by fraud, and defense counsel was ineffective for failing to object.

In counts one and two, Steffes was charged with being part of a conspiracy to commit theft by fraud. Specifically, it was alleged that promises to pay for the telephone services ordered from SBC when, in fact, the group never intended to pay for the services. At the close of evidence, the court failed to instruct the jury concerning the "false promise" theory. Wis. JI-1453A (theft by fraud) reads, in part, "A false representation (also includes) (in this case means) a promise made with intent not to perform it, if the promise is a part of a false and fraudulent scheme." The form instruction does not include the statement that a representation "may be implied from all of the circumstances." Thus, the court did not instruct the jury as to the central issue in the case.

Just as significantly, the court did instruct the jury that a "promise" may be express or *implied.* This is simply not the law.

Defense counsel failed to object to these two errors in the jury instructions; and, therefore, she was ineffective.

A trial court has wide discretion in determining which instructions to give to the jury, both as to language and emphasis, and the court should seek to "fully and fairly inform

the jury of the rules of law applicable to the case." *State v. Turner*, 114 Wis. 2d 544, 551, 339 N.W.2d 134 (Ct. App. 1983).

Here, the trial court did not *fully* instruct the jury on the crime of theft by fraud because the court failed to instruct the jury on the element that was the central issue of the case-- that a promise was made to SBC to pay for the services when, in fact, the parties had no intention of paying. The trial court failed to *accurately* instruct the jury because the court told the jury that a promise may be "express or implied." This is not the law. The statute in question does allow a "promise" to be made by implication. There is no case law, either, that recognizes an implied promise as a basis for a conviction for theft by fraud. Common sense dictates that a crime cannot be committed by "implication". If the promise was not expressly made to the victim, the victim could not have been defrauded by it. If the terms of the agreement were left unspoken, or unwritten, then it is the victim who made an *assumption*. It is not the defendant who committed a crime.

Although it is true that the court has “wide discretion” in how it instructs the jury the instructions here were not appropriately tailored to the facts of the case and were not a *correct statement of the law*. The law does not provide that theft by fraud may be committed by making an *implied promise*. Sec. 943.20, Stats does not provide for this; and neither do the jury instructions. Common sense dictates that a crime cannot be committed by implication.

Likewise, the error here is prejudicial. Any harmless error discussion is beside the point unless it is true that, under the law, the crime of theft by fraud may be committed by one who makes an *implied* promise. Otherwise, there exists the possibility that Steffes was convicted of a crime that does not exist (i.e. theft by fraud, implied promise). Such an error cannot be harmless no matter how much evidence was presented to suggest that the conspirators, from the outset, did not intend to pay for the telephone services. Unless there was either a false promise expressly made, or the law truly does criminalize an *implied promise,* the error cannot be harmless.

Conclusion

For these reasons, it is respectfully requested that the court order that acquittals be entered on counts one and two for the reason that the evidence was insufficient, as a matter of law, to prove that Steffes was part of a conspiracy to commit theft by fraud. In the alternative, the court should order that counts one and two be amended to misdemeanor convictions because the evidence failed to establish that at least $2500 worth of property was stolen. If the court grants any relief under this paragraph, resentencing is required.

If the court does not grant the relief requested in the preceding paragraph, then the court should order resentencing because the court considered an improper sentencing factor.

Finally, if the court does not grant the relief requested to

this point, then the court should order a new trial because the jury was not properly instructed.

Dated at Milwaukee, Wisconsin, this _____ day of June, 2011.

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Certification as to Length and E-Filing

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Dated this _____ day of June, 2011:

_____

Jeffrey W. Jensen

State of Wisconsin
Court of Appeals
District 1
Appeal No. 2011AP000691 - CR

State of Wisconsin,

Plaintiff-Respondent,

v.

Matthew Steffes,

Defendant-Appellant.

Defendant-Appellant's Appendix

A. Record on Appeal

B. Court's memorandum decision denying postconviction motions (including State's brief, which was incorporated by the court)

C. Excerpt of testimony concerning telephone services as a form of "applied electricity" (R:119-9 et seq.)

D. Excerpt of testimony that SBC does not know the amount of electricity consumed to provide the telephone services (R:121-51 et seq)

E. Excerpt of jury instruction on "implied promise" (R:122-26

F. Excerpt of court's sentencing remarks (R:124-30)

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, at a minimum: (1) a table of contents; (2) the findings or opinion of the circuit court; and (3) portions of the record essential to an understanding of the issues raised, including oral or written rulings or decisions showing the circuit court's reasoning regarding those issues.

I further certify that if this appeal is taken from a circuit court order or judgment entered in a judicial review of an administrative decision, the appendix contains the findings of fact and conclusions of law, if any, and final decision of the administrative agency.

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

Dated this ____ day of June, 2011

_____

Jeffrey W. Jensen