STATE OF WISCONSIN
COURT OF APPEALS
DISTRICT I

Case No. 2011AP691-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

MATTHEW R. STEFFES,

Defendant-Appellant.

ON APPEAL FROM A JUDGMENT OF CONVICTION AND AN ORDER DENYING DIRECT POSTCONVICTION RELIEF, ENTERED IN THE CIRCUIT COURT FOR MILWAUKEE COUNTY, HONORABLE THOMAS P. DONEGAN, PRESIDING

# BRIEF OF PLAINTIFF-RESPONDENT

J.B. VAN HOLLEN
Attorney General

DANIEL J. O'BRIEN
Assistant Attorney General
State Bar #1018324

Attorneys for Plaintiff-Respondent

Wisconsin Department of Justice
Post Office Box 7857
Madison, Wisconsin 53707-7857
(608) 266-9620
(608) 266-9594 (Fax)
obriendj@doj.state.wi.us

TABLE OF CONTENTS

Page



CASES CITED

Page

Page

Page



STATUTES CITED

Page

OTHER AUTHORITIES

STATE OF WISCONSIN

C O U R T  O F  A P P E A L S

DISTRICT I

Case No. 2011AP691-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

MATTHEW R. STEFFES,

Defendant-Appellant.

ON APPEAL FROM A JUDGMENT OF CONVICTION AND AN ORDER DENYING DIRECT POSTCONVICTION RELIEF, ENTERED IN THE CIRCUIT COURT FOR MILWAUKEE COUNTY, HONORABLE THOMAS P. DONEGAN, PRESIDING

# BRIEF OF PLAINTIFF-RESPONDENT

## ISSUES PRESENTED

1. Was the evidence sufficient for a rational jury to find Steffes guilty beyond a reasonable doubt of conspiring with his sister, Rheanna Hoffman, and his prison cellmate, Joshua Howard, to commit felony theft from the telephone company by using many of Steffes' relatives to set up fraudulent "burn out" phone lines enabling Steffes and Howard to make unlimited calls from prison without paying for them?

A jury found Steffes guilty of two counts of conspiracy to commit felony theft. The trial court rejected his postconviction challenge to the sufficiency of the evidence.

2. Did the trial court sentence Steffes based on an inappropriate sentencing factor?

The trial court ruled it did not consider an inappropriate factor when it took into account the undisputed fact that the "burn out" phone scam included using the names of unsuspecting patients obtained by one of the co-conspirators from a health care clinic.

3. Is Steffes entitled to a new trial in the interest of justice under Wis. Stat. § 752.35 on the ground that the real controversy was not tried due to an allegedly erroneous jury instruction?

Steffes did not object to the allegedly erroneous instruction at trial. The trial court concluded that the instruction was not erroneous and the real controversy was fully tried.

## POSITION ON ORAL ARGUMENT AND PUBLICATION

The state requests neither oral argument nor publication. This case involves the application of established principles of law to the unique facts presented. The briefs of the parties should adequately address the legal and factual issues presented.

## STATEMENT OF THE CASE

Steffes appeals (108) from a November 27, 2009 judgment of conviction (88) and a March 9, 2011 order denying Wis. Stat. § (Rule) 809.30 direct postconviction relief, entered in the Circuit Court for Milwaukee County, Honorable Thomas P. Donegan, presiding (107).

Steffes was charged in an amended information filed August 23, 2004, with two counts of conspiracy to commit theft by fraud in excess of $10,000, as an habitual criminal, in violation of Wis. Stat. §§ 943.20(1)(d) and (3)(c), 939.31 and 939.62, between July 1, 2002 and July 1, 2003; and with one count of conspiracy to misappropriate personal identifying information as an habitual criminal (12:2-3).[1]

A Milwaukee County jury found Steffes guilty of the two counts of conspiracy to commit felony theft by fraud in excess of $10,000, after a trial held August 3-6, 2009 (80-81; 123:5). The jury acquitted Steffes of the conspiracy to commit identity theft count (82; 123:6). Steffes was sentenced November 3, 2009, to concurrent terms of two years in prison, followed by two-and-one-half years of extended supervision, consecutive to another prison sentence he was then serving (124:34-35). He was also ordered to pay $28,061.41 in restitution (124:37).

Steffes filed a Wis. Stat. § (Rule) 809.30 motion for direct postconviction relief raising the issues presented here (93). He specifically challenged the sufficiency of the evidence to prove that he was a member of the

[1] The trial court granted the state's motion to file this First Amended Information, charging two counts of conspiracy to commit felony theft and one count of conspiracy to commit identity theft, the same day it was filed, August 23, 2004 (37:2-3; 62:4, 8/23/04 entries). The state eventually filed a Second Amended Information charging only one count of felony theft by fraud, as party to the crime, pursuant to plea negotiations (19; 37:2-3; 47:3 n.3), but the case eventually reverted back to the First Amended Information charging the three counts on which Steffes was eventually tried after Steffes was allowed to withdraw the no-contest plea he had entered on October 11, 2004, to the Second Amended Information (37; 71:7). The trial court granted Steffes' motion to withdraw his plea at a hearing held March 18, 2009 (110:2-3). Steffes decided to withdraw his negotiated plea to one count of theft and risk trial on the three original conspiracy charges even though he received an extremely favorable sentence for the negotiated theft charge of only one year of initial confinement followed by one year of extended supervision consecutive to the sentence he was then serving (38:11).

conspiracy to steal from the telephone company, and to prove that the loss to the phone company exceeded $2,500, the threshold for making the offense a felony. The state filed a brief in opposition (98). Steffes filed a reply brief (103), and a supplemental brief (104), and the state filed a response thereto (105).

The trial court issued a decision and order denying the motion March 9, 2011. The court adopted the reasoning presented by the state in its brief (98) as the rationale for its decision to deny the motion (107). Steffes now appeals (108).

Additional relevant facts will be developed and discussed in the Argument to follow.

## ARGUMENT

### I. WHEN IT IS VIEWED MOST FAVORABLY TO THE STATE AND THE CONVICTION, THE EVIDENCE WAS SUFFICIENT FOR A RATIONAL JURY TO FIND BEYOND A REASONABLE DOUBT THAT STEFFES WAS A MEMBER OF THE CONSPIRACY WITH HIS SISTER AND WITH HIS CELLMATE TO STEAL PHONE SERVICES WITH A FAIR MARKET VALUE IN EXCESS OF $10,000.

Steffes contends the state failed to prove he was a member of the conspiracy with his sister (Rheanna Hoffman) and with his cellmate (Joshua Howard) to set up fraudulent "burn out" phone lines from prison with Steffes' friends and relatives on the outside, arguing that he was only a beneficiary of the conspiracy hatched by his sister and his cellmate. Steffes also contends the state failed to prove the fair market value of the loss to the

phone company exceeded $2,500 and, so, he was only guilty of conspiracy to commit misdemeanor theft. His arguments are totally devoid of merit because the circumstantial evidence at trial proved Steffes' extensive involvement in this conspiracy from beginning to end, and proved that the unpaid bills for service on the fraudulent phone lines exceeded $28,000.[2]

### A. The standard for review of a challenge to the sufficiency of the evidence to convict.

The standard for review of a challenge to the sufficiency of the evidence to convict was succinctly discussed by the court in *State v. Poellinger*, 153 Wis. 2d 493, 451 N.W.2d 752 (1990):

> [I]n reviewing the sufficiency of the evidence to support a conviction, an appellate court may not substitute its judgment for that of the trier of fact unless the evidence, viewed most favorably to the state and the conviction, is so lacking in probative value and force that no trier of fact, acting reasonably, could have found guilt beyond a reasonable doubt. If any possibility exists that the trier of fact could have drawn the appropriate inferences from the evidence adduced at trial to find the requisite guilt, an appellate court may not overturn a verdict even if it

[2] The brief filed by Milwaukee County Assistant District Attorney Bruce J. Landgraf in opposition to Steffes' postconviction motion (98; A-Ap. B, State's Brief), adopted by the trial court as providing the rationale for its decision to deny the motion (107; A-Ap. B, Decision and Order), meticulously and accurately reviews the facts and convincingly explains in detail why the evidence was sufficient to convict Steffes of participating in the conspiracy hatched along with his sister, Rheanna Hoffman, and his lifelong friend and prison cellmate, Joshua Howard, to set up fraudulent "burn out" phone lines using false names and fictitious businesses, enabling him and Howard to make unlimited unpaid calls worth thousands of dollars to the telephone company from prison. This court could, as did the trial court, simply rely on trial prosecutor Landgraf's thorough brief to sustain the conviction (*also see* 45, State's brief filed November 27, 2006).

> believes that the trier of fact should not have found guilt based on the evidence before it.

*State v. Poellinger*, 153 Wis. 2d at 507 (citations omitted).

Stated another way: "[t]his court will only substitute its judgment for that of the trier of fact when the fact finder relied upon evidence that was inherently or patently incredible—that kind of evidence which conflicts with the laws of nature or with fully-established or conceded facts." *State v. Tarantino*, 157 Wis. 2d 199, 218, 458 N.W.2d 582 (Ct. App. 1990). Additionally, the trier of fact is the sole arbiter of the credibility of witnesses and alone is charged with the duty of weighing the evidence. *See State v. Poellinger*, 153 Wis. 2d at 506. *Also see State v. Hahn*, 221 Wis. 2d 670, 683, 586 N.W.2d 5 (Ct. App. 1998).

When more than one inference can reasonably be drawn from the evidence, the inference which supports the trier of fact's verdict must be the one followed on review. *See State v. Allbaugh*, 148 Wis. 2d 807, 809, 436 N.W.2d 898 (Ct. App. 1989). It is exclusively within the trier of fact's province to decide which evidence is worthy of belief, which is not, and to resolve any conflicts in the evidence. *State v. Wyss*, 124 Wis. 2d 681, 693, 370 N.W.2d 745 (1985) (citation omitted).

The standard for review is the same whether the verdict is based on direct or circumstantial evidence. *State v. Poellinger*, 153 Wis. 2d at 503.

Under the *Poellinger* standard for review, this court may overturn the fact finder's verdict "only if the trier of fact could not possibly have drawn the appropriate inferences from the evidence adduced at trial to find the requisite guilt." *State v. Watkins*, 2002 WI 101, ¶ 68, 255 Wis. 2d 265, 647 N.W.2d 244.

> It is vitally important to maintain this standard of review. An appellate court should not sit as a jury making findings of fact and applying the hypothesis

> of innocence rule de novo to the evidence presented at trial. *Poellinger*, 153 Wis. 2d at 505-06. "It is not the role of an appellate court to do that." *Id.* at 506.

*Id.* ¶ 77.

### B. The evidence of conspiracy to commit felony theft adduced at trial.

Joshua Howard was the mastermind from his prison cell, and Steffes' sister Rheanna Hoffman was the primary actor on the outside, in this elaborate scheme to install numerous fraudulent "burn out" phone lines registered to false names and fictitious businesses, located in the homes of Hoffman and other willingly participating friends and relatives of Steffes. These included fraud phone lines registered in the names of unsuspecting individuals whose identifying information was stolen from a health care clinic where a friend of Steffes' sister worked. It was never anyone's intent to pay for these fraudulent phone lines. This scheme enabled Steffes and Howard to make unlimited free calls from prison. The trade-off for those on the outside who agreed to have these fraud lines set up in their homes was that they would receive free phone service on one of the multiple lines they agreed to have installed.[3]

An individual or business intending to open one or more phone lines would contact the telephone company and provide their name, address, date of birth and social security number (120:31).[4] The term "burn out line" means that the phone line is set up by the perpetrator using a personal or business name and social security number

[3] The prosecutor in his closing argument succinctly explained how this all worked and why Steffes was believed to be an active participant in the scheme (122:38-70, 91-95).

[4] The "telephone company" in question is AT&T. At the time of trial, it was under the name "SBC."

other than that of the person ordering the line with no intention of paying for it, and with the advance understanding that the phone company will eventually shut the line down because the phone service is not being paid for; the line eventually, then, "burns out." If that line is blocked by the prison billing system, or burns out when the phone company shuts it down for non-payment of bills, the prisoner just goes on to the next open fraudulent line set up for him by those on the outside hosting the fraud line. This scam allowed Steffes and Howard to make a multitude of collect calls of any length from prison at the telephone company's expense, limited only by the number of fraud lines remaining open after others have been "blocked" by the prison billing service or "burned out" by the phone company (120:31-33).

Division of Corrections and Waupun Correctional Institution Investigative Captain Bruce Muraski explained how the telephone system at Waupun works, how outgoing inmate calls are monitored, and how Corrections Billing Services operates to block the over-use of phone lines (119:78-98; 120:18-42). He described "burn out" phone line scams as a "cottage industry" in the prison (120:31-33).

Investigator Muraski also revealed that Steffes and Joshua Howard were cellmates at Dodge Correctional Institution in May and June of 2002, and again at Waupun from October 25, 2002 until May 22, 2003 (119:85-87, 88-96).

Rheanna Hoffman was the state's primary witness, albeit a hostile one. She is Steffes' sister and had a child with his friend and cellmate Joshua Howard. Hoffman described in great detail at trial her role in setting up six fraud lines in her home and, through her, many more fraud lines in the homes of Steffes' relatives and friends, including his father and two cousins. Each line was in the name of an individual or business other than the person actually setting up the line, unbeknownst to the telephone company. Hoffman explained that these many phone lines

were set up to avoid the prison's Central Billing Service which monitors inmate collect calls to the outside and limits the minutes and dollar amount a prisoner can exhaust on any one phone number. When that amount is exceeded for a given number, all prisoner calls to that number are "blocked" by the billing service until someone on the outside pays the balance due. The multiple "burn out" phone lines allowed prisoners like Steffes and Howard to do an "end run" around the billing service's blocking mechanism by giving the prisoner making the collect call access to many lines so that, when one is blocked, he can simply use another. When that next number, too, is "blocked," or when the telephone company disconnects the line once it realizes the bills for that number are not being paid, the perpetrator just goes on to the next fraud line until that "burns out," and so on (118:66-75, 79-99; 119:75-76). Hoffman also reviewed in her testimony the many phone calls and letters from Joshua Howard to her discussing the conspiracy and what she should do next (119:40-57; *see* 98:9-12; A-Ap. B, State's Brief at 9-12).

One fictitious business account, with multiple phone lines, was "Nick's Heating and Cooling." This was in the name of Steffes' cousin, Nick, who lived with Steffes' father, Ronald. Nick sold his identifying information to Rheanna Hoffman and the fraudulent business lines were set up by her at Ronald Steffes' home (118:80-81; 121:45-46).[5] She did the same with Jamie Douyette Selthofner, setting up a fictitious typing or advertising service at Douyette's home with multiple business lines (118:82-83; 121:44-45).

In addition to using Steffes' relatives and friends to set up fraud lines all over, Rheanna Hoffman set up fraud lines using the names of unsuspecting patients of a health care clinic at which her friend and roommate, Angela

[5] The court reporter put no page numbers on trial transcript No. 121. The state will refer to the pages assuming the cover page is page 1.

Berger, worked (118:91-94). Angela Berger, who like Rheanna Hoffman had a child with Joshua Howard and who lived for awhile with Hoffman, confirmed that she obtained for Hoffman identifying information from unsuspecting patients at the health care clinic where she worked to be used in setting up multiple fraudulent personal and business phone lines (119:22-33, 35-37).

Jamie Douyette, whose brother James Rhorer lived with Rheanna Hoffman, testified that she gave her own personal identifying information to her brother to enable him to set up a phone line with Hoffman. Douyette was not paid and did not give Hoffman permission to set up the several fraud lines in her name using her social security number (118:101-05).

Alice Eisch, who dated Steffes' and Rheanna's stepfather, Ronald, described how Rheanna used her to set up fraud phone lines at her home. The recording of a three-way call where she and Rheanna discussed the fraud lines while Steffes remained on the line was played for the jury (121:59-63). During that call, monitored by Steffes, Rheanna confirmed to Eisch that she had no intention of paying for these phone lines (98:7, 12-15; 99:App. 30-33; A-Ap. B, State's Brief at 7, 12-15).

Kelly Milkie, a friend of Steffes' cousin, Thomas Steffes, described how Rheanna Hoffman solicited her to run fraudulent phone lines out of her house (121:65-69).

After her arrest, Rheanna Hoffman gave a statement to Wisconsin Department of Justice, Division of Criminal Investigations Agent Drazkowski on July 16, 2003, admitting she never intended to pay for any of the fraudulent phone lines she helped set up (121:78-79).[6]

[6] Although Hoffman denied in her own testimony giving such a statement to Drazkowski, and insisted she and Joshua Howard intended to pay the bills some time "down the road," no payments were made by her (or anyone else) in the six years between her arrest and the trial (118:90). And, she told Allie Eisch in a three-way (footnote continued)

Hoffman also admitted to setting up all but one of the fraudulent phone lines listed on a spreadsheet (Ex. 93; 99:42-44) prepared by the phone company and shown to her by Drazkowski (121:90-91). That spreadsheet shows the many fraud lines set up by Rheanna Hoffman and the resulting financial loss to the telephone company (121:37-47, 88-91). Exhibit 95 (99:45-53) shows the log of calls made by Steffes to fraud numbers (highlighted in green) (121:91-92, 94; *see* A-Ap. B, State's brief at 19).

Prison Investigator Muraski testified the records showed that Steffes made 322 calls from prison from June 1, 2002 to December 31, 2003, totaling 6,562 minutes, on fraud lines. Most of those calls were on lines also used by Howard, who made many more calls (120:30-31). The recordings of various calls from the prison, involving both Steffes and Howard, and discussing the "burn out" phone scheme, were played for the jury (120:49-69; 121:6-8).[7] DCI Agent Drazkowski also obtained letters written by Joshua Howard to Steffes discussing the phone fraud scheme and instructing Steffes what to do regarding the use of specific fraud lines (121:82-88).

Robert Lindsley, who managed the group at AT&T that planned, engineered and installed the electrical system providing power for the equipment used to deliver telephone service to paying customers (119:8), described how an electric power network supports the telecommunications network set up by AT&T (119:9-11). The electric power network supplies electricity to run the telephone network. When a customer uses the telephone network, therefore, he/she is using an applied form of electricity (119:9). Lindsley testified that the electricity the customer accesses when using the phone line is worth

---

conversation monitored by Steffes that she had no intention of paying (98:7, 12-14; A-Ap. B, State's Brief at 7, 12-14).

[7] *See* n.5, above.

millions of dollars (119:11). The telephone company allows the customer to use that electricity in exchange for the customer's agreement to pay for the telephone service (119:10).

Eric Stevens, an Investigator in AT&T's asset protection department, specifically discussed a number of the fraud lines set up by the co-conspirators. He explained how they used the identification information of Steffes' relatives, as well as identification information of patients stolen from the health care clinic where Angela Berger worked, to set up the lines. Stevens then estimated the fair market value to the telephone company of the service fraudulently obtained for each of those lines (121:35-47, 54). Those figures represented the lost fair market value of the service due to the non-payment of bills by the co-conspirators, from the date of installation to the date of disconnection (i.e., "burn out") of each fraud line (121:54). The total amount unpaid for the fictitious "Nick's Heating and Cooling" and "Douyette Typing Service" multiple business lines exceeded $28,000.[8]

Steffes did not testify at trial (121:102-04).

In his closing argument to the jury, defense counsel conceded the accuracy of the $28,000 figure arrived at by Stevens, but disputed that this represented the actual loss suffered by the phone company for the hundreds of collect calls and many thousands of minutes unpaid for. Counsel did not, however, explain why the figure was wrong or estimate what the actual loss was (122:74-76; *see* 122:91-92; 124:10, 37).

The jury found Steffes guilty of two counts of conspiracy to commit felony fraud in excess of $10,000

[8] The prosecutor explained in closing argument that the total value of all services lost, i.e., not paid for, on all the "Nick's Heating and Cooling" and "Douyette Typing" fraud lines Hoffman admitted to setting up was slightly over $28,000 (122:47-48, 53-54; *see* 99:App. 42-44).

(123:4-5), but not guilty of conspiracy to commit identity theft (123:6).

### C. The state provided powerful circumstantial proof that Steffes conspired with his sister (Hoffman) and his cellmate (Howard) to set up the fraudulent "burn out" phone lines.

#### 1. Steffes was a key member of the conspiracy.

One is guilty of conspiracy to commit theft by fraud when the following two elements are proven:

(1) There is an agreement among two or more persons to direct their conduct toward the realization of a particular criminal objective; and (2) each member of the conspiracy must individually and consciously intend the realization of the criminal objective. This agreement may be proved by circumstantial evidence. *State v. Copening*, 103 Wis. 2d 564, 579, 309 N.W.2d 850 (Ct. App. 1981). *See* Wis. JI-Criminal 570 (2008).

The agreed upon criminal objective here was to commit theft of telephone services by fraud. One is guilty of felony theft by fraud under Wis. Stat. § 943.20(1)(d) if he does the following:

> 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.

The elements of theft by fraud are the following:

(1) The defendant made a false representation to the owner of the property;

(2) The defendant knew the representation to the owner was false;

(3) The defendant made the representation with the intent to deceive and defraud the owner of the property;

(4) The defendant obtained title to the property by virtue of the false representation;

(5) The property's owner was deceived by the false representation;

(6) The property's owner was defrauded by the false representation.

*See State v. Kennedy*, 105 Wis. 2d 625, 630-31, 314 N.W.2d 884 (Ct. App. 1981); Wis. JI-Criminal 1453A (2006).

The term "property" is defined at § 943.20(2)(b) as follows:

> "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.

*Also see* Wis. Stat. § 943.20(2)(ag) ("'Movable property' is property whose physical location can be changed, without limitation including electricity and gas"). The theft becomes a Class G felony if the value of the property obtained by false representation exceeds $10,000. Wis. Stat. § 943.20(3)(c).

One obtains "title to property" even without the technical physical transfer of a written title so long as the

false representation was made and another was thereby defrauded into giving up the property based on that representation. *State v. Meado,* 163 Wis. 2d 789, 796-98, 472 N.W.2d 567 (Ct. App. 1991). *See State v. Ploeckelman*, 2007 WI App 31, ¶ 24, 299 Wis. 2d 251, 729 N.W.2d 784 (overpayment of money for milk due to knowingly false representation as to its quality satisfies the transfer of "title to property" element).

> The purpose of sec. 943.20(1)(d) is to protect unsuspecting citizens from swindlers who, realizing that the crimes of larceny and embezzlement required that property be taken without the owner's consent, obtain the property of others with their consent but by means of willful misrepresentation. . . . The statute's intention is to prohibit the wrongful appropriation of another's property by non-violent means. . . . The legislature's focus is not on the ultimate beneficiary of the theft, but on the method of misappropriation. . . . The court held that *the person perpetrating a fraud does not have to receive title;* it is sufficient if the property is delivered either for the benefit of the swindler or for another.

*State v. Meado,* 163 Wis. 2d at 797-98 (emphasis added) (citing *State v. O'Neil,* 141 Wis. 2d 535, 539-42, 416 N.W.2d 77 (Ct. App. 1987)).

Steffes argues the state was required to prove beyond a reasonable doubt that a false *promise* was made by a member of the conspiracy to the telephone company in exchange for the phone service. Steffes' brief at 18-19. No. The state had to only prove that a "false representation" was made; a false representation that, "*includes* a promise made with intent not to perform it if it is a part of a false and fraudulent scheme." Wis. Stat. § 943.20(1)(d). Obviously, by the plain language of the statute, a promise is a sufficient but not necessary form of a false representation. Intentionally deceiving by silence using unauthorized individual identifying information and fictitious businesses, and intentionally setting up "burn out" phone lines which, by definition, are established with the intent not to pay for them knowing they will "burn

out" for that reason, satisfies the "false representation" requirement even if the "promise" to pay for those services was only implied. *See State v. Ploeckelman*, 299 Wis. 2d 251, ¶¶ 15-20 (failure to disclose to another what the perpetrator knows to be material information is a "false representation" within the contemplation of the theft by fraud statute).[9]

As should now be apparent from the summary of the trial evidence, above, Steffes was a key component of this conspiracy from beginning to end. He shared the same objective with his sister, Rheanna, and with his cellmate, Howard, to set up and then use the "burn out" phone lines so that he and Howard could make unlimited collect calls from prison without anyone paying for them. The circumstantial evidence shows that he shared with his sister and with Howard the specific intent to set this fraudulent scheme up and to see it through.

The "property" obtained by the installation and use of the fraud telephone lines by false representation were valuable telephone services which involve an "applied form" of electricity and, as such, is "property" within the scope of the statute (119:8-9). Steffes offered no proof that the land-line service obtained by the conspiracy involved anything other than an applied form of electricity. Those calls simply could not be completed without electricity (unless the co-conspirators used tin cans and miles of string to transmit voice impulses). Electricity is an essential component of telephone service, as the Wisconsin Supreme Court long ago recognized. *Wisconsin Telephone Co. v. City of Oshkosh*, 62 Wis. 32, 37, 21 N.W. 828, 830 (1884). *See* Webster's Third New International Dictionary 2350 (unabr. 1986) (defining a

[9] Steffes argues, at page 19 of his brief, that "for the crime of theft by fraud to be committed, there must be a false promise expressly made." He cites no authority for that naked assertion. The law is directly to the contrary. *State v. Ploekelman*, 299 Wis. 2d 251, ¶¶ 15-20. The state need only prove a "false representation" which might "include[]" an express promise. Wis. Stat. § 943.20(1)(d).

"telephone" as "an apparatus consisting of a transmitter . . . for converting sound esp. of the human voice into electrical impulses or varying electrical current for transmission by wire"). The evidence adduced at trial was, therefore, sufficient for a rational jury to find that the theft was of an applied form of electricity which, as a matter of law, is one form of property within the contemplation of the theft statute.

Steffes' relatives and friends on the outside were used to further the conspiracy. These included not only his sister – the primary actor on the outside - but his father, his father's girlfriend and two of his cousins. Moreover, the primary actor on the inside, Joshua Howard, was Steffes' lifelong friend and his cellmate at two separate institutions for roughly nine months during 2002-03, including the relevant times when the conspiracy was hatched and furthered. All indications are that this conspiracy was hatched while they were cellmates together at Dodge Correctional in May and June of 2002 (119:85-87); and was furthered while they were cellmates together again at Waupun from October of 2002 until May of 2003 (119:88-96).

Steffes engaged in several recorded phone conversations where the conspiracy was discussed, albeit obliquely at times, including a three-way call monitored by Steffes during which Rheanna Hoffman and Allie Eisch discussed the fraudulent phone scheme and Hoffman confirmed she had no intention of paying for any of the lines being set up by her (121:59-63; 98:7, 12-15; 99:App. 30-33; A-Ap. B, State's Brief at 7, 12-15). When they were no longer cellmates, Joshua Howard sent letters to Steffes discussing the fraud phone line scheme and instructing Steffes what to do regarding specific phone lines (121:82-88).

Steffes made 322 calls, totaling 6,562 minutes, on fraud lines June 1, 2002 to December 31, 2003; most of those fraud lines were also called repeatedly by his cellmate during much of that time frame, Howard

(120:30-31). Steffes never asked his sister why, when he made calls to his father, the phone number kept changing every few weeks so that he had to call sixteen different numbers to reach his father; and never asked why he was being directed to make calls to the homes of strangers in order to speak with his friends and relatives (119:73-74; *see* 98:16-17; A-Ap. B, State's Brief at 16-17).

Most of the people willingly participating in the phone line scam on the outside were Steffes' close relatives. If he is to be believed, however, Steffes was the only one in his family who knew nothing of the scam, even though he was one of its two primary beneficiaries and shared a cell with the conspiracy's mastermind who also happened to be working directly with Steffes' sister, and who happened to be Steffes' long-time friend. It strains credulity to the breaking point to think that Steffes would allow his cellmate and friend to expose Steffes' own sister, father and cousins to criminal liability, and would himself repeatedly use those stolen services without any knowledge they were fraudulently obtained by his cellmate and his relatives.

Joshua Howard did not trust others with information about the scam, telling Angela Berger in one call to "never involve people who are unnecessary" because they will eventually be asked about it (121:97-98). Howard felt free, however, to discuss the conspiracy with Steffes and make phone calls in his presence when they shared a prison cell, felt free to send letters to Steffes discussing the fraud lines, and felt free to give instructions to Steffes through his sister, Rheanna, about the fraud lines. This proves circumstantially that Steffes must have been a "necessary" member deeply involved in this conspiracy who Howard trusted from the outset.

It is reasonable to infer from all of the above that Steffes was far more than an "accessory after the fact." Steffe's brief at 14-15. The entire purpose of the conspiracy when it was hatched (probably when they were housed together at Dodge Correctional in May and June of

2002), after all, was to provide both Steffes and Howard unlimited and free phone access to their friends and relatives on the outside. The jury could reasonably infer that Steffes was involved from the beginning: coordinating with his sister and with Howard the setting up and implementation of the conspiracy by providing names and numbers of friends and relatives; discussing the conspiracy with Howard while they were cellmates; and coordinating the use of the fraud lines both before and after they "burned out."

Unbeknownst to the phone company, those fraud lines were set up by the co-conspirators with no intention of ever paying for them. The telephone company would not have provided these services if it knew that those who ordered them had no intention of paying for them (121:47). These fraud lines were, indeed, set up by the co-conspirators with the knowledge and understanding that those lines would "burn out" at some point precisely because they would not be paid for and the phone company would eventually shut them down for that reason. These were material misrepresentations to the phone company made by the co-conspirators with the specific intent to deceive the phone company into entering into these fraud contracts, and with the specific intent to defraud the phone company out of thousands of dollars worth of services.

Therefore, the state successfully proved to the jury's satisfaction beyond a reasonable doubt that the co-conspirators obtained "property" (the applied form of electricity consisting of telephone line services); by falsely representing to the phone company who was contracting for the services (i.e., setting up phone service at various homes in the names of patients of a health care clinic who did not live there, did not desire the phone service and did not consent to having someone else order the service in their names; setting up multiple business lines at various homes in the names of businesses that did not exist); and by obtaining phone services because of those false

representations with no intention of ever paying for those services.

> 2. The market value lost by the phone company for the service provided to the fraud lines far exceeded $2,500.

As provided at Wis. Stat. § 943.20(2)(d), the property's value is, "the market value at the time of the theft or the cost to the victim of replacing the property within a reasonable time after the theft, whichever is less."

The undisputed evidence is that the phone company lost over $28,000 in billable services on the Nick Steffes and Jamie Douyette fraudulent business phone lines alone (122:47-49, 53-54, 74-75).

AT&T Investigator Stevens testified in detail about the market value of the services provided on several of the fraud lines (121:35-47, 54). The losses were in the tens of thousands of dollars for the hundreds of collect calls totaling tens of thousands of minutes of service. The figures represented the actual loss to AT&T and the market value of the service to the fraud lines from the date of installation to the date they were disconnected (121:54). Steffes offered no proof to counter those figures or to call the market value of the services into question.[10] There

[10] Steffes argues, at page 22 of his brief, that "SBC's bottom line would have been no different even if the burn-out phones had never been set up." Again, Steffes offers nothing to support that naked assertion. More important, Steffes offered no such proof at trial to counter the state's proof that the company lost more than $10,000 because of the "burn out" phone line scheme. The jury could, therefore, rely on that uncontradicted testimony to find a loss of greater than $10,000. Moreover, at sentencing, the state argued that the total loss was $42,000, of which $28,000 could be attributed to the two theft counts for which Steffes was convicted (124:10). Steffes did not challenge those figures at sentencing.

was, then, sufficient evidence for the jury to rely on in determining that the market value to the telephone company of the services it was defrauded out of exceeded $10,000. The evidence was sufficient for a rational jury to find beyond a reasonable doubt that Steffes conspired with his sister and with his cellmate to commit felony theft by fraud in violation of Wis. Stat. §§ 939.31 and 943.20(1)(d).[11]

## II. THE TRIAL COURT PROPERLY HELD THAT IT DID NOT RELY ON AN INAPPROPRIATE SENTENCING FACTOR WHEN IT REFERRED TO THE FACT THAT THE CONSPIRACY INVOLVED IN PART THE USE OF PERSONAL IDENTIFYING INFORMATION OF UNSUSPECTING HEALTH CLINIC PATIENTS.

The jury acquitted Steffes of conspiracy to commit the theft of personal identification information (82). That does not change the fact that Rheanna Hoffman used Angela Berger to obtain personal identification information of patients at the health care clinic where Berger worked to set up some of the fraud lines. The verdict simply shows the jury was not convinced beyond a reasonable doubt that Steffes knew that the theft of this information from the health care clinic was a component of this conspiracy, or that he approved of it. The jury could reasonably have found that Steffes only knew and approved of the use of the names of his friends and relatives to further the conspiracy.

[11] While Steffes could also have been charged under the more specific Wis. Stat. § 943.45, *see State v. Davis*, 171 Wis. 2d 711, 492 N.W.2d 174 (Ct. App. 1992), the state was free to charge Steffes under §§ 939.31 and 943.20(1)(d) instead. Wis. Stat. § 939.65; *State v. Ploeckelman*, 299 Wis. 2d 251, ¶¶ 9-14.

The defendant is entitled to be sentenced based on accurate information. *State v. Leitner*, 2002 WI 77, ¶ 42, 253 Wis. 2d 449, 646 N.W.2d 341. The sentencing court is not, however, bound by the jury's view of the facts so long as the jury returned a guilty verdict on any charge. *State v. Haywood*, 2009 WI App 178, ¶ 18, 322 Wis. 2d 691, 777 N.W.2d 921. The sentencing court may consider unproven offenses and charges for which the defendant was acquitted in order to obtain full knowledge of the defendant's character and behavior patterns. *State v. Leitner*, 253 Wis. 2d 449, ¶ 45. *See State v. Prineas*, 2009 WI App 28, ¶¶ 26-28, 316 Wis. 2d 414, 766 N.W.2d 206; *State v. Arredondo*, 2004 WI App 7, ¶ 53, 269 Wis. 2d 369, 674 N.W.2d 647 (Ct. App. 2003).

The prosecutor reminded the court at sentencing that Steffes was acquitted of the conspiracy to commit theft of identifying information count, but explained that this was an important part of the theft by fraud conspiracy, enabling the co-conspirators to open up some of the fraud lines using that stolen information, making the overall conspiracy more serious (124:11-12).

In its sentencing remarks, the trial court referred to the victims of the health clinic identity theft; but also to the women Howard and Steffes knowingly used to further this scheme, resulting in their own criminal prosecutions. The court reasoned from all of this that the conspiracy not only caused substantial economic harm to the telephone company, but to others brought into the conspiracy (124:30-32). The court found to be just as aggravating the fact that Steffes allowed himself to be led around by Howard and chose to commit ongoing sophisticated crimes while in prison, causing substantial harm on the outside (124:31-32). The trial court properly considered the overall nature and impact of the conspiracy Steffes helped hatch, even the component part for which he was acquitted, because it gave complete insight into his overall character and behavior patterns. The sentencing court did not rely on an inappropriate factor.

## III. STEFFES IS NOT ENTITLED TO DISCRETIONARY REVERSAL BECAUSE THE REAL CONTROVERSY WAS FULLY TRIED.

The real controversy at trial was whether Steffes conspired with his sister and with his cellmate to set up fraudulent "burn out" phone lines; or was just an innocent dupe of Joshua Howard and a mere beneficiary of the conspiracy hatched by Howard and Rheanna Hoffman (122:71-91).

Steffes *now* argues that the "real controversy" at trial was whether any member of the conspiracy made a "promise" to the phone company. Steffes' brief at 25.

Steffes did not, however, argue this theory to the jury, and concedes that he never objected to the pattern jury instruction defining "false representation" which merely and correctly "includes" a false promise as one possible form of false representation. *Id.*[12] Wis. JI-Criminal 1453A. *See* discussion at 15, above.

Steffes is not entitled to a new trial in the interest of justice under Wis. Stat. § 752.35 because the real controversy was fully and fairly tried with the able assistance of competent defense counsel before a properly

[12] Steffes' failure to object waives his right to appellate review of any alleged error in the instructions. Wis. Stat. § 805.13(3); *State v. McBride*, 187 Wis. 2d 409, 420, 523 N.W.2d 106 (Ct. App. 1994). More to the point, Steffes does not argue his attorney was ineffective for deciding not to object to this instruction. The law, therefore, presumes that counsel reasonably chose not to object for sound strategic reasons. *Strickland v. Washington*, 466 U.S. 668, 690 (1984); *State v. Balliette*, 2011 WI 79, ¶¶ 25-27, 78, __Wis. 2d__, __N.W.2d__ (July 19, 2011); *State v. Maloney*, 2005 WI 74, ¶ 43, 281 Wis. 2d 595, 698 N.W.2d 583. *See Eckstein v. Kingston*, 460 F.3d 844, 848-49 (7th Cir. 2006). Steffes offers nothing to overcome that presumption. He is, accordingly, bound by his waiver of objection.

instructed jury. This is not one of those "exceptional cases" that merits granting a new trial in the interest of justice. *See Vollmer v. Luety*, 156 Wis. 2d 1, 11, 456 N.W.2d 797 (1990). The jury was not prevented from hearing "'important testimony that bore on an important issue.'" *State v. Williams*, 2000 WI App 123, ¶ 17, 237 Wis. 2d 591, 614 N.W.2d 11 (citation omitted). Nor has Steffes shown that justice miscarried in any respect. *See id*. *Also see State v. Jones*, 2010 WI App 133, ¶ 43, 329 Wis. 2d 498, 791 N.W.2d 390.

The Wisconsin Supreme Court was no doubt speaking of this case when it stated: "Zero plus zero equals zero." *Mentek v. State*, 71 Wis. 2d 799, 809, 238 N.W.2d 752 (1976). *See State v. Marhal*, 172 Wis. 2d 491, 507, 493 N.W.2d 758 (Ct. App. 1992).

The state proved to the jury's satisfaction that Steffes was an active participant with the other two prime actors in this conspiracy, his sister Rheanna and his cellmate Howard, to deceive and defraud the phone company of its services using false individual identifying information and fictitious business accounts to consume the valuable electricity needed to provide the land-line phone service with no intention of paying for it. This controversy was fully and fairly tried. Steffes argues the jury instruction on the element of "false representation" was erroneous, but did not object to it and made no issue of it before the jury. It was not any part of the real controversy. Therefore, it would be contrary to the interests of justice for this court to award Steffes a new trial on an issue that simply did not matter to him at trial.

## CONCLUSION

Therefore, the State of Wisconsin respectfully requests that the judgment of conviction and order denying postconviction relief be AFFIRMED.

Dated at Madison, Wisconsin this 9th day of September, 2011.

Respectfully submitted,

J.B. VAN HOLLEN
Attorney General

DANIEL J. O'BRIEN
Assistant Attorney General
State Bar #1018324

Attorneys for Plaintiff-Respondent

Wisconsin Department of Justice
Post Office Box 7857
Madison, Wisconsin 53707-7857
(608) 266-9620
(608) 266-9594 (Fax)
obriendj@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 6,250 words.

Dated this 9th day of September, 2011.

_____
DANIEL J. O'BRIEN
Assistant Attorney General

## CERTIFICATE OF COMPLIANCE WITH WIS. STAT. § (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 Wis. Stat. § (Rule) 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 9th day of September, 2011.

_____
DANIEL J. O'BRIEN
Assistant Attorney General