RECEIVED
09-23-2011
CLERK OF COURT OF APPEALS
OF WISCONSIN

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

---

Defendant-Appellant's Reply Brief

Law Offices of Jeffrey W. Jensen
735 W. Wisconsin Avenue, Suite 1200
Milwaukee, WI 53233

414.671.9484

Attorneys for the Appellant

Table of Authority

Table of Contents

Argument

I. The State fails to identify any evidence in the record which permits a reasonable inference that Steffes agreed with the others to set up burn-out phones, except to repeatedly state that Rheannon Hoffmann was Steffes' sister, and that John Howard was Steffes' "life-long friend and cell-mate."

In an attempt to demonstrate that Steffes was involved in the conspiracy from the start, the State writes:

> 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.

(State's brief p. 16). Unfortunately, it is not apparent from the summary of the trial evidence that Steffes was a key component of setting up the burn-out phones. A large part of the problem is that the State fails to identify any evidence-- circumstantial or otherwise-- that Steffes was involved in any way at the time the phones were set up. Steffes' later involvement in using the burn-out phone is not disputed.

Apparently, the State believes that a wink-and-nod is the

same thing as circumstantial evidence. The State writes:

> 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.

(State's brief p. 18).

First off, the state's argument is a leap of faith, it is not a reasonable inference. It is true that the principals involved in actually setting up the burn-out phones were close friends and relatives of Steffes. This fact alone, of course, does not demand the inference that Steffes must have had knowledge of all of their activities, including the set up of the burn-out phones. There is simply no reason for such an inference. No one knows of all of the activities of one's friends and family members. This is particularly true where the activities are criminal in nature.

Nonetheless, let us assume that Steffes knew what Howard and Hoffman were up to at the time they were busy setting up the burn-out phones. Proof of conspiracy requires

more than mere knowledge that a crime is being committed. It requires an *agreement to help commit the crime.* To be sure, the agreement required may be demonstrated by circumstantial evidence, and it need not be an express agreement; rather, a mere tacit understanding of a shared goal is sufficient. *State v. Hecht*, 116 Wis. 2d 605, 625, 342 N.W.2d 721 (1984)

What is missing here, though, is any evidence that at the time the burn-out phones were actually being set up by Hoffmann and Howard, that there was even a tacit understanding on the part of Steffes that, once the phone were set up, he would use them (i.e. that Steffes, at the time the phones were being set, intended to use the phones one they were in place). Much less is there any evidence that Steffes assistend Hoffmann and Howard in any way to set up the phones.

There simply is no such evidence in this record.

II. The State fails to address Steffes' core argument concerning the value of the loss: that the legislature did not intend to include theft of services-- especially theft of services from a utility with no practical limit on its ability to provide services-- in the definition of "property" in Sec. 943.20(2), Stats.

In his opening brief, Steffes challenged the sufficiency of the evidence to prove the amount of any loss to SBC. Specifically, Steffes argued that: (1) telephone *services* are not included in the definition of "property"; and, (2) because SBC has a virtually unlimited ability to provide telephone services, Steffes' use of SBC's services did not cause a loss to SBC.

In response to this argument, the State merely reiterates the evidence and the arguments that were presented at trial. (State's brief p. 20-21). The State makes no effort to address Steffes' arguments. The closest the State's brief comes to addressing the issue is in the preceding section, where the State writes, "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)." (State's brief p. 19)

Thus, Steffes reiterates: Sec. 943.20, Stats requires that the defendant steal the "property" of another. Plainly, it was the legislature's intent that the statute not apply to the theft of *services*.

To be sure, the statute does include "electricity" within the definition of property. Moreover, "When the legislature does

not use words in a restricted manner, the general terms should be interpreted broadly to give effect to the legislature's intent." *State v. Quintana*, 2008 WI 33, P32 (Wis. 2008).

Here, the legislature did not restrict the definition of "electricity" and, therefore, the term must be interpreted broadly, so long as any broad interpretation *is consistent with the legislature's intent.*

Recall that the legislature intended to exclude the theft of services from the statute. Only the theft of property is prohibited. Virtually every *service* that can be provided, though, will-- to a lesser or to a greater extent-- involve electricity. Attorneys frequently consult with clients by telephone or through the internet. Does this mean that legal services provided in this manner are "property" (i.e. an applied form of electricity)? Dentists use electric drills to repair cavities in teeth. Is this service also an applied form of electricity, subject to the theft by fraud statute? Barbers use electric powered clippers to provide hair-cutting services. Again, an applied form of electricity? It is impossible to know where to draw the line. What is the conceptual difference between using electricity to transmit sound impulses, and using electricity to cut hair?

If we accept the fact that the legislature did not intend to include services within the definition of "property" in Sec. 943.20, Stats., how, then, can it be consistent with the legislature's intent to define electricity so broadly that it includes

any service that uses electricity? Virtually every service uses, in some form or another, electricity.

Finally, the State includes within the loss figure, the value of SBC's *services*. The State writes:

> 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

(State's brief p. 20).

Plainly, the state's figures include the value of SBC's services in addition to the value of the electricity that was consumed.

In a footnote, the State also criticizes Steffes' argument on this point by writing, "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." FN 20, p. 20, State's brief.

Of course, it is the State's obligation, not Steffes', to show that SBC's bottom line was in some way affected by Steffes' behavior (i.e. the value of any "property" lost by SBC). Here, there was no evidence presented that, due to Steffes' use of the burn-out lines, other paying customers of SBC could not complete their calls (in which case SBC would have actually lost the right to bill a paying customer). Thus, if we suppose that Howard and the others decided not to attempt their

scheme, and no burn-out phone were ever installed, under the evidence in this record, SBC's profit would be no different. That is, the burn-out phones would not have been installed, and SBC would still not have been paid for their services.

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

Law Offices of Jeffrey W. Jensen
Attorneys for Appellant

By:_____
Jeffrey W. Jensen
State Bar No. 01012529

735 W. Wisconsin Avenue
Suite 1200
Milwaukee, WI 53233

414.671.9484

Certification as to Length and E-Filing

I hereby certify that this brief conforms to the rules contained in §809.19(8)(b) and (c) for a brief and appendix produced with a proportional serif font. The length of the brief is 2035 words.

This brief was prepared using *Google Docs* word processing software.The length of the brief was obtained by use of the Word Count function of the software

I hereby certify that the text of the electronic copy of the brief is identical to the text of the paper copy of the brief.

Dated this _____ day of _____, 2011:

_____

Jeffrey W. Jensen