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State of Wisconsin
Supreme Court
Appeal No. 2011AP000691 - CR

State of Wisconsin,

Plaintiff-Respondent,

v.

Matthew Steffes,

Defendant-Appellant-Petitioner.

Review of an opinion of the Wisconsin Court of Appeals, District I, issued March 13, 2012

Defendant-Appellant-Petitioner's Brief and Appendix

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Statement of the Issues

I. Whether the elements of "theft by fraud", contrary to Sec. 943.20(1)(d), Stats., require that the defendant made an affirmative false *promise or representation* that *induced* SBC to provide the telephone service when, had SBC known the truth, they would not have provided the service.

Answered by the trial court: No.

Answered by the Court of Appeals: No**.** The Court of Appeals held that the evidence was sufficient to convict Steffes of theft by fraud, reasoning that Sec. 943.20(1)(d), Stats. does not necessarily require the defendant to make a *false promise*; rather, the statute requires only that the defendant *deceive* the victim with any sort of false representation that is made with intent to defraud. Here, according to the Court of Appeals, the members of the group who set up the "burn-out phone" scheme made a number of false representations to SBC, having primarily to do with the name of the subscriber, and the subscriber's contact information. The question for the Supreme Court is whether such misrepresentations *defrauded* SBC (that is, whether such misrepresentations defrauded SBC in the inducement, as opposed to merely making it more difficult for SBC to collect in the event of non-payment).

II. Whether the electricity used to power a telecommunications service may be considered to be "tangible property" where the defendants' scheme was to steal telephone service.

Answered by the trial court: Yes.

Answered by the Court of Appeals: Yes. The Court of Appeals concluded that the term "electricity" found in § 943.20(2)(b), Stats., is broad enough to encompass the transmission of electricity over telephone lines. The statute does not specifically distinguish the type of electricity being used, or which utility is providing the electricity.

III. Whether the trial court erred in instructing the jury as to the elements of "theft by fraud" as alleged in the criminal complaint where the judge instructed the jury that a "false representation" may be "expressed, or it may be implied from all of the circumstances" and, further, whether defense counsel was ineffective for failing to object to the defective jury instruction.

Answered by the trial court: No

Answered by the Court of Appeals: No. The Court of Appeals gave this issue short shrift, merely remarking that

Steffes had cited no authority for his claim that a false representation may not be implied under Sec. 943.20(1)(d), Stats.

Summary of the Arguments

I. In order to establish theft by fraud, the law requires proof of a promise to pay for the telephone services. Although there was evidence that the women who set up the burn-out phones in this case used fakes business names and phony contact information, there was no evidence that the women ever made a promise to pay for the telephone services. The fake business names, standing alone, do not establish theft by fraud because, in agreeing to provide telephone services, SBC did not rely on the name of the business. Rather, the use of fake business names is relevant only insofar as it is circumstantial evidence of the defendants' intent not to keep any promise to pay for the services. In the absence of such a promise, though, the use of fake names alone does not establish theft by fraud.

II. The definition of "tangible property" cannot possibly include "applied electricity." Steffes argued that, for purposes of the theft by fraud statute, telephone services do not fall within the definition of "tangible property." The

State, though, argued that telephone services are merely an applied form of electricity and, therefore, it is tangible property. The Court of Appeals agreed that the statutory definition tangible property, which specifically includes electricity, is broad enough to include the various forms of applied electricity. The Supreme Court should hold that "applied electricity" is not tangible property. The legislature plainly intended not to include "services" in the definition of "tangible property." To include all the various forms of applied electricity in the definition of "tangible property" would by necessity include every service industry that relies on electricity in some form.

III. The trial court committed plain error in the manner in which it instructed the jury on the elements of theft by fraud. 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.

Statement of the Case

I. Procedural History

The petitioner, Matthew Steffes ("Steffes") was charged in a criminal complaint (R:2) with two counts of conspiracy[1] to commit theft by fraud[2], and with one count of identity theft.[3] 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:

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[1] Sec. 939.31, Stats., provides that, Except as provided in ss. 940.43 (4), 940.45 (4) and 961.41 (1x), whoever, 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 not to exceed the maximum provided for the completed crime; except that for a conspiracy to commit a crime for which the penalty is life imprisonment, the actor is guilty of a Class B felony

[2]Sec. 943.20(1)(d), Stats., provides that 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.

[3]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:

> 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 consecutive to any other sentences; bifurcated as twenty-four months initial confinement, and thirty months extended supervision. (R:88)

Steffes then filed a postconviction motion, raising numerous issues, including each of the 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 then appealed to the Wisconsin Court of Appeals. In an opinion dated March 13, 2012, the Court of Appeals affirmed Steffes' conviction in all respects.

Steffes then petitioned the Supreme Court to review the

matter, and the petition was granted.

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 SBC, testified as to

the balances on the burn-out phone accounts (R:121-38)-- each of which involved thousands of dollars. A second SBC 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 to convict Steffes of conspiracy to commit theft by fraud because there was no evidence that any member of the conspiracy made a false representation of present fact that *induced* SBC to enter into the agreement.

Steffes was charged with and convicted of, among other things, conspiracy to commit theft by fraud. Before the Court of Appeals, Steffes argued that the evidence was insufficient in two respects: (1) there was no evidence that he joined the conspiracy prior to the crime being completed; and, (2) that there was no evidence presented that any member of the conspiracy made a promise to SBC-- such as a promise to pay for the services-- that induced the telephone company to provide the services. Only the second argument is before the Supreme Court.

In finding that the evidence was sufficient, the Court of

Appeals held that, "[T]here is no legal requirement under WIS. STAT. § 943.20(1)(d) that at least one of the co-conspirators expressly promise the phone company that it would pay for the fraudulently obtained phone lines." Court of Appeals opinion, p. 8; Appendix A. Rather, according to the Court of Appeals, it is sufficient if the defendants made some sort of false representation; and, in this case, the Court of Appeals found that the use of fake business names was sufficient.

As will be set forth in more detail below, The use of a fake business name in applying for SBC telephone services is not theft by fraud. There was no evidence that, in agreeing to provide services, SBC relied upon the name of the business. Rather, the fake business name is relevant only insofar as it is circumstantial evidence that the defendants intended not to keep any promise to pay for the services. In the absence of an express promise to pay for the services, though, there is no fraud.

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

> [T]hat 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.

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

Here, the crux of the issue before the Supreme Court is whether the crime of theft by fraud, as it is presented by this case, requires proof that some member of the conspiracy made a false promise to pay for the telephone services that induced SBC to provide the telephone services.

The last time that the Supreme Court addressed this specific issue was in 1973 in, *Schneider v. State,* 60 Wis. 2d 765 (Wis. 1973), where the facts were very similar to the facts here. In *Schneider*:

> [T]he [defendant-appellant] purchased merchandise on credit by presenting what appeared to be a purchase order form from an established business. The jury was entitled to believe that his purpose in doing this was to obtain credit when he supposed it would not otherwise be available. . . . . [The defendant-appellant] argues that the store manager who extended credit to the plaintiff in error did not rely on the identity of the company named in the purchase order, and therefore the store manager was not deceived by the scheme. Under sec. 943.20 (1) (d), Stats., it is not necessary that the person who parts with property be induced to do so by a false and fraudulent scheme. Rather, he must be deceived by a false representation which is part of such a scheme. The false representation which the state claims in this case *is the promise to pay for the merchandise with intent not to perform the promise*.

(emphasis provided). *Schneider,* 60 Wis. 2d at 766. Thus,

the Supreme Court concluded, "The jury was entitled to believe that the [defendant-appellant] intentionally deceived the store manager into parting with the merchandise by *promising to pay for it with intent not to perform the promise*." (emphasis provided) *Id.*

It appears, then, contrary to the holding of the Court of Appeals, that the law *does require* that, under the facts of the present case, at least one member of the conspiracy made a promise to pay for the telephone services with the intention that the promise not be kept. As the Supreme Court explained in *Schneider*, the use of a fake business name was not the essence of the fraudulent scheme; rather, the fake business name and the phony contact information were merely circumstantial evidence that the defendant in that case did not intend to keep his express promise to pay for the merchandise on credit.

In the present case, then, the fact that the women who set up the burn-out phones used fake business names does not establish theft by fraud. Theft by fraud occurred only if an express promise was made to pay for the telephone services, with an intention that the promise not be kept. If such a promise had been made, the use of the fake business name is circumstantial evidence that the women did not intend to ever pay for the services. The use of a fake business name,

though, standing alone, does not establish theft by fraud because, plainly, SBC did not rely upon the name of the business in its decision to provide telephone service.

For these reasons, the evidence was insufficient as a matter of law to support Steffes' conviction for conspiracy to commit theft by fraud.

II. "Electricity" is not tangible property for purposes of the theft by fraud statute.

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.[4] Here, the state presented testimony concerning the value of the *telephone services* that were stolen; however, under the statute, "services" are not property. To get around this seemingly insurmountable hurdle, the State argued before the trial court that what was stolen here was not telephone *services* but, instead, "applied electricity"[5].

As will be set forth in more detail below, if the definition of "tangible property" includes "applied electricity", then

[4] Sec. 943.20(3)(a), 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." Plainly, "property" does not include services.

[5] This is because "electricity" is specifically mentioned in the statute as being tangible property.

virtually every form of service must also be “tangible property.”. Nearly every service industry uses electricity in some way. This cannot be what the legislature intended.

The Court of Appeals held that:

> [T]he term “electricity” found in WIS. STAT. § 943.20(2)(b) is broad enough to encompass the transmission of electricity over telephone lines. The statute does not specifically distinguish the type of electricity being used, or which utility is providing the electricity. The lack of such specificity convinces us that the legislature intended the term “electricity” to be interpreted broadly, and that electricity used to transmit the human voice via telephone lines falls within the term electricity” used in the statute

Court of Appeals opinion p. 12; Appendix A.

The Supreme Court should hold, almost as a matter of public policy, that the term “electricity”, as used in the definition of “tangible property” in Sec. 943.20(2)(b), Stats., does not include all of the various forms of “applied electricity.” To include “applied electricity” as tangible property will, by necessity, include in the definition all of the various service industries that use electricity in some form.

Attorneys frequently consult with clients by telephone or through the internet. Does this mean that legal services provided in this manner are “tangible 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.

Therefore, the Supreme Court should hold that "applied electricity" is not "tangible property" and, therefore, the evidence was insufficient as a matter of law to convict Steffes of theft by fraud. The object of the scheme was to steal *telephone services*.

III. One cannot commit a crime "by implication" and, therefore, the trial court abused its discretion in instructing the jury that a "false promise" may be made by "implication."

As was mentioned in preceding sections of this brief, there was no evidence that any member of the conspiracy ever expressly made a representation to SBC to pay for the telephone services. Consequently, the State was forced to argue at the trial court level that a representation that the applicant will pay for the telephone services is "implicit" in the act of applying for an account. The State persuaded the trial judge that this was the case.

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) . The italicized sentence which instructed the jury that a promise may be "implied" is not contained in the form instruction Wis. JI-Criminal 1453A. There was no objection by defense counsel to this instruction.

“However, a defendant's waiver of the right to object to jury instructions does not preclude . . . review of claimed errors in the instructions. [The appellate court] may choose to review challenges to jury instructions which raise federal constitutional questions going to the integrity of the fact-finding process.” *State v. Zelenka*, 130 Wis. 2d 34, 44 (Wis. 1986).

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 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 not 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.

For these reasons, the trial court committed plain error in the manner in which it instructed the jury on the elements of theft by fraud.

Conclusion

For the foregoing reasons, it is respectfully requested that the Supreme Court find that the evidence was insufficient as a matter of law to sustain Steffes' conviction for conspiracy to commit theft by fraud; and, thereafter, order the trial court to enter a judgment of acquittal. In the alternative, it is requested that the Supreme Court order a new trial on the grounds that the trial court committed plain error in the manner in which it instructed the jury on the elements of theft by fraud.

Dated at Milwaukee, Wisconsin, this _____ day of November , 2012.

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Jeffrey W. Jensen

State of Wisconsin
Supreme Court
Appeal No. 2011AP000691 - CR

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Matthew Steffes,

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Petitioner's Appendix

A. Opinion of the Court of Appeals

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

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

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

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 November, 2012.

_____

Jeffrey W. Jensen