STATE OF WISCONSIN

IN SUPREME COURT

No. 2011AP691-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

MATTHEW R. STEFFES,

Defendant-Appellant-Petitioner.

ON PETITION TO REVIEW A DECISION OF THE WISCONSIN COURT OF APPEALS, DISTRICT I, AFFIRMING A JUDGMENT OF CONVICTION AND AN ORDER DENYING 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

Assisted by: Jason Gorn
Legal Extern

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

Page

CASES CITED

Page

Page

Page

Page

Page

STATUTES CITED

OTHER AUTHORITIES

Page

STATE OF WISCONSIN

IN SUPREME COURT

No. 2011AP691-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

MATTHEW R. STEFFES,

Defendant-Appellant-Petitioner.

ON PETITION TO REVIEW A DECISION OF THE WISCONSIN COURT OF APPEALS, DISTRICT I, AFFIRMING A JUDGMENT OF CONVICTION AND AN ORDER DENYING POSTCONVICTION RELIEF, ENTERED IN THE CIRCUIT COURT FOR MILWAUKEE COUNTY, HONORABLE THOMAS P. DONEGAN, PRESIDING

BRIEF OF PLAINTIFF-RESPONDENT

ISSUE PRESENTED

When it is viewed most favorably to the state and the conviction, was the evidence sufficient for a rational jury to find beyond a reasonable doubt that Steffes was guilty of conspiracy to commit felony theft when he, his cellmate and his sister intentionally deceived the telephone company into giving up its "property" by a "false representation" that the co-conspirators all knew to be false, resulting in Steffes, his cellmate and others obtaining the use of multiple telephone lines worth

thousands of dollars with no intent of ever paying for this service or for the electricity that powered it?

The jury found Steffes guilty of two counts of conspiracy to commit felony theft. The trial court on postconviction review rejected Steffes' challenge to the sufficiency of the evidence. The court of appeals agreed that the evidence was sufficient to convict.

POSITION ON ORAL ARGUMENT AND PUBLICATION

The state assumes that, in deciding to grant review, this court has deemed this case worthy of both oral argument and publication.

STATEMENT OF THE CASE

A Milwaukee County jury found Steffes guilty of 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; 123:4-5). The jury acquitted Steffes of one count of conspiracy to commit identity theft (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, among other issues, a challenge to the sufficiency of the evidence to prove that he was a member of the conspiracy to steal "property" from the telephone company in the form of access to telephone lines powered by applied electricity with a "false representation" he knew to be false, and the loss to the phone company exceeded the $2,500 felony threshold (93). 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).[1]

Steffes appealed (108). Steffes argued that 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" telephone lines from prison with Steffes' friends and relatives on the outside. Steffes maintained that he was only a beneficiary of the telephone service fraudulently obtained in the conspiracy hatched by his sister and his cellmate. Steffes also argued the state failed to prove that he or any other member of the conspiracy made an express "promise" to pay the telephone company for the "burn out" lines, or that the applied electricity used to transmit voice impulses on those lines was "property" within the contemplation of the theft statute. Finally, Steffes argued the state failed to prove that the fair market value of the loss to the phone company caused by the fraudulent scheme exceeded $2,500, making him guilty of conspiracy to commit only misdemeanor theft.

The Wisconsin Court of Appeals, District I, rejected all of Steffes' challenges in a Decision issued

[1]The brief filed by Milwaukee County Assistant District Attorney Bruce J. Landgraf in opposition to Steffes' postconviction motion (98), adopted by the trial court as providing the rationale for its decision to deny the motion (107), 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 Steffes and Howard to make unlimited unpaid calls worth thousands of dollars to the telephone company from prison (*also see* 45, State's brief filed November 27, 2006).

March 13, 2012. *State v. Matthew R. Steffes,* 2012 WI App 47, 340 Wis. 2d 576, 812 N.W.2d 529 (A-Ap. A).

The court of appeals upheld the jury's verdict and the trial court's order denying postconviction relief. It agreed that the evidence was sufficient to convict Steffes of the two counts of conspiracy to commit felony theft from the telephone company in violation of Wis. Stat. §§ 939.31, and 943.20(1)(d) and (3)(c). *State v. Steffes,* 340 Wis. 2d 576, ¶¶ 11-24.

The court rejected Steffes' argument that the state was required to prove beyond a reasonable doubt that one or more of the conspirators made an express "promise" to pay the telephone company for the "burn out" lines. *Id.* ¶ 17.

The court rejected Steffes' argument that the electricity applied to transmit the telephone signals on the "burn out" lines was only a "service" and not "property" within the contemplation of § 943.20(2)(c). The court went on to hold that the conspiracy resulted in the theft of more than $2,500 worth of applied electricity used to transmit signals on the "burn out" phone lines. *Id.* ¶¶ 21-23.[2]

Steffes filed a petition for review that the state opposed. This court granted review October 16, 2012.

Additional relevant facts will be developed and discussed in the "Argument" to follow.[3]

---

[2]The court also held that the value of the loss to the telephone company was the fair market value of the "burn out" phone lines for the length of time they were in operation. *Id.* ¶¶ 22, 24. Steffes does not challenge that holding here.

[3]Steffes' co-conspirator, Joshua Howard, was convicted of the same offense after he pled guilty. Howard challenged his conviction on both direct and collateral review. The court of appeals rejected his challenges. *State v. Howard,* No. 2007AP1877-CR (Ct. (footnote continued)

ARGUMENT

WHEN IT IS VIEWED MOST FAVORABLY TO THE STATE AND THE CONVICTION, THE EVIDENCE WAS SUFFICIENT TO CONVICT STEFFES OF CONSPIRACY TO COMMIT FELONY THEFT BECAUSE HE AND HIS CO-CONSPIRATORS INTENTIONALLY DECEIVED THE TELEPHONE COMPANY WITH "FALSE REPRESENTATIONS" INTO SETTING UP MULTIPLE TELEPHONE LINES, ENABLING THEM TO OBTAIN ITS "PROPERTY"—THE APPLIED ELECTRICITY USED TO TRANSMIT VOICE SIGNALS—FOR WHICH THE CO-CONSPIRATORS HAD NO INTENTION OF PAYING WHEN THEY ENTERED INTO AGREEMENTS WITH THE TELEPHONE COMPANY TO SET UP THOSE "BURN OUT" LINES.

Both the trial court and the court of appeals properly interpreted the plain language of Wis. Stat. § 943.20(1)(d) and (2)(b) when they ruled the state presented strong circumstantial proof that Steffes intentionally conspired with his lifelong friend and now cellmate, Howard, and his sister, Hoffman, to steal "property" in the form of applied electricity used to transmit telephone signals on the "burn out" lines with "false representations."

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

Steffes' lifelong friend and cellmate, Joshua Howard, was the mastermind from his prison cell, and

---

App., Dist. I, Oct. 15, 2008); *State v. Howard*, No. 2010AP3069, (Ct. App., Dist. I/III, Aug. 7, 2012).

Steffes' sister, Rheanna Hoffman, was the primary actor on the outside, in this elaborate scheme to install numerous fraudulent "burn out" telephone lines registered to false names and fictitious businesses, located in the homes of Hoffman and other willingly participating friends and relatives of Steffes on the outside. These included fraud phone lines registered in the names of unsuspecting individuals whose identification information was stolen from a health care clinic where a friend of Hoffman's worked. It was never anyone's intent to pay for these fraudulent phone lines.

All indications are that this conspiracy was hatched while Steffes and Howard 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 (119:90). This scheme enabled Steffes and Howard to make unlimited free calls from prison. 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).

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 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.[5]

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

[5]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).

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 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).

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 prison 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, 90).

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 expend 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 prison billing service's blocking mechanism by giving the prisoner making the collect call access to many outside 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).

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).[6] She did the same with Jamie Douyette Selthofner, setting up a fictitious typing and 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

[6]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.

care clinic at which her friend and roommate, Angela 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 personal identification 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 identification 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 fraudulent business lines in her name using her social security number (118:101-05).

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

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).[7]

[7]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 (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).

Prison Investigator Muraski testified that records showed Steffes made 322 calls from prison between June 1, 2002 and December 31, 2003, totaling 6,562 minutes on fraud lines. Most of those calls were on lines also used by Howard (120:30-31). The recordings of various calls from prison, involving both Steffes and Howard, and discussing the "burn out" phone scheme, were played for the jury (120:49-69; 121:6-8).[8] 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 tele-communications 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 millions of dollars (119:11). The telephone company

---

and the trial (118:90). And, she told Allie Eisch in a three-way conversation monitored by Steffes that she had no intention of paying (98:7, 12-14).

[8] *See* n.6, above.

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, described 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 unsuspecting patients at 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 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.[9]

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

---

[9]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* Ex. 93, 99:App. 42-44).

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

The court of appeals properly applied the highly deferential standard for review of a challenge to the sufficiency of the evidence to convict. *State v. Steffes*, 340 Wis. 2d 576, ¶ 12. That standard for review was succinctly discussed by this 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 believes that the trier of fact should not have found guilt based on the evidence before it.

Id. at 507 (citation 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.

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. The elements of conspiracy to commit felony theft by fraud.

a. The elements of the inchoate crime of conspiracy.

One is guilty of the inchoate crime of conspiracy under Wis. Stat. § 939.31 when he, "with intent that a crime be committed, agrees or combines with another for

the purpose of committing that crime . . . [and] one or more of the parties to the conspiracy does an act to effect its object." The state must prove the following three elements:

(1) The defendant intends that the crime be committed; (2) the defendant and at least one other person agrees to commit that crime; and (3) one of the conspirators performs an act in furtherance of the conspiracy. *State v. Routon*, 2007 WI App 178, ¶ 18, 304 Wis. 2d 480, 736 N.W.2d 530; Wis. JI-Criminal 570 (2008). *See State v. Peralta*, 2011 WI App 81, ¶ 21, 334 Wis. 2d 159, 800 N.W.2d 512; *State v. West*, 214 Wis. 2d 468, 476, 571 N.W.2d 196 (Ct. App. 1997). This agreement may be proved by circumstantial evidence. *State v. Routon*, 304 Wis. 2d 480, ¶ 21 ("a tacit understanding of a shared goal is sufficient"). *See State v. Copening*, 103 Wis. 2d 564, 579, 309 N.W.2d 850 (Ct. App. 1981). The intent to commit the crime may be inferred from the defendant's conduct. *State v. Routon*, 304 Wis. 2d 480, ¶ 21. While the defendant's "stake in the venture" is not an element of the offense, evidence that the defendant had a "stake in the venture" is circumstantial evidence of his guilt. *Id. See State v. Hecht*, 116 Wis. 2d 605, 626-27, 342 N.W.2d 721 (1984).

b. The elements of felony theft by fraud.

The agreed upon criminal objective here was to obtain valuable 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 in violation of Wis. Stat. § 943.20(1)(d) are the following:

> (1) the defendant made a false representation to the owner of the property; (2) the defendant knew that the representation was false; (3) the defendant made the representation with the intent to deceive and defraud the property's owner; (4) the defendant got title to the property as a result of the false representation; (5) the owner of the property was deceived by the representation; and (6) the owner of the property was thus defrauded. *State v. Kurzawa*, 180 Wis. 2d 502, 525 n.15, 509 N.W.2d 712, 722 n.15 (1994); *see* WIS JI-CRIMINAL 1453.

Malzewski v. Rapkin, 2006 WI App 183, ¶ 21, 296 Wis. 2d 98, 723 N.W.2d 156. *See also State v. Swinson*, 2003 WI App 45, ¶ 20, 261 Wis. 2d 633, 660 N.W.2d 12; *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 their property based on that false 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 for milk caused by a knowingly false representation made by seller to buyer 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)). *Also see* Gordon B. Baldwin, *Criminal Misappropriation in Wisconsin – Part I,* 44 Marq. L. Rev. 253, 281 (Winter 1960-61) ("Language of title is a misleading relic of distinctions no longer significant . . . and the courts could properly concern themselves with the unauthorized control exercised by the defendant").

2. By its plain terms, § 943.20(1)(d) requires only proof of a "false representation," not necessarily an express promise, that payment will be made.

Steffes argues the state was required to prove beyond a reasonable doubt that a false *express promise* was made by at least one member of the conspiracy to pay the telephone company for the "burn out" lines. Steffes' brief at 18-19. In essence, he argues that the term "false

representation" is ambiguous in that its scope is unclear. This requires construction of the terms employed by the legislature in § 943.20(1)(d).

a. Principles of statutory interpretation.

Statutory interpretation presents an issue of law to be reviewed *de novo* by the appellate courts. *State v. Quintana*, 2008 WI 33, ¶ 11, 308 Wis. 2d 615, 748 N.W.2d 447; *State v. Ebersold*, 2007 WI App 232, ¶ 4, 306 Wis. 2d 371, 742 N.W.2d 876. The purpose of statutory interpretation is to determine the meaning of the statute so it may be given its full, intended, effect. *State v. Doss*, 2008 WI 93, ¶ 30, 312 Wis. 2d 570, 754 N.W.2d 150; *State v. Quintana*, 308 Wis. 2d 615, ¶ 13.

The analysis begins with the language of the statute. *State v. Quintana*, 308 Wis. 2d 615, ¶ 13. If the meaning of the language is plain, the inquiry normally stops at that point. *Id.* If the language is plain and unambiguous, the court simply applies the "ordinary and accepted meaning of the language to the facts" presented. *State v. Kittilstad*, 231 Wis. 2d 245, 256, 603 N.W.2d 732 (1999). *See* Wis. Stat. § 990.01(1) (providing that all words and phrases should be construed according to their common and approved usage). A court may use a dictionary to determine the ordinary and accepted meaning of terms in a statute; the use of the dictionary does not render the statute's terms ambiguous. *State v. Whistleman*, 2001 WI App 189, ¶ 6, 247 Wis. 2d 337, 633 N.W.2d 249.

Strict construction of a criminal statute is not appropriate "when the legislature's intent is unambiguous, or when strict construction goes against the legislature's purpose." *State v. Kittilstad*, 231 Wis. 2d at 262. Strict construction is not appropriate if the commonsense view of the statute as a whole, giving effect to the intent of the

legislature, reasonably leads to a broad application. *Id*. at 267.

> If the language of a statute is clear on its face, we need not look any further than the statutory text to determine the statute's meaning. *See Bruno v. Milwaukee County*, 2003 WI 28, ¶¶ 18-22, 260 Wis. 2d 633, 660 N.W.2d 656. "When a statute unambiguously expresses the intent of the legislature, we apply that meaning without resorting to extrinsic sources" of legislative intent. *State ex rel. Cramer v. Wis. Ct. App.*, 2000 WI 86, ¶ 18, 236 Wis. 2d 473, 613 N.W.2d 591. Statutory language is given its common, ordinary and accepted meaning. *Bruno*, 260 Wis. 2d 633, ¶ 20; *State v. Engler*, 80 Wis. 2d 402, 406, 259 N.W.2d 97 (1977). Rules of statutory construction are inapplicable if the language of the statute has a plain and reasonable meaning on its face. *Id.* at 406-09 (holding that canons of construction, including *ejusdem generis*, are inapplicable when the statute is clear on its face).

State v. Peters, 2003 WI 88, ¶ 14, 263 Wis. 2d 475, 665 N.W.2d 171.

> But a disagreement between judges and lawyers about the plain meaning of a statute or ordinance does not always or even generally mean that the statute or ordinance is ambiguous. If it did, then no statute or ordinance disputed in the courts could ever be given its plain meaning, because all statutory or ordinance language would be considered ambiguous. This is not the law.

Bruno v. Milwaukee County, 2003 WI 28, ¶ 18, 260 Wis. 2d 633, 660 N.W.2d 656. *Also see State v. Moran*, 2005 WI 115, ¶ 40, 284 Wis. 2d 24, 700 N.W.2d 884; *State v. Johnson*, 2007 WI App 41, ¶ 4, 299 Wis. 2d 785, 730 N.W.2d 661 (courts are not at liberty to disregard the plain words of the statute).

Only after it determines that the statutory language is ambiguous, may a court utilize other aids in construing the statute such as legislative history, scope, context, and subject matter. *State ex rel. Kalal v. Circuit Court*,

2004 WI 58, ¶ 48, 271 Wis. 2d 633, 681 N.W.2d 110; *State v. Maxey*, 2003 WI App 94, ¶ 6, 264 Wis. 2d 878, 663 N.W.2d 811.

> The test for ambiguity generally keeps the focus on the statutory language: a statute is ambiguous if it is capable of being understood by reasonably well-informed persons in two or more senses. *Bruno*, 260 Wis. 2d 633, ¶ 19; *Martin*, 162 Wis. 2d at 894. It is not enough that there is a disagreement about the statutory meaning; the test for ambiguity examines the language of the statute "to determine whether 'well-informed persons *should have* become confused,' that is, whether the statutory . . . language *reasonably* gives rise to different meanings." *Bruno*, 260 Wis. 2d 633, ¶ 21 (second emphasis added). "Statutory interpretation involves the ascertainment of meaning, not a search for ambiguity." *Id.*, ¶ 25.

Kalal v. Circuit Court, 271 Wis. 2d 633, ¶ 47.

b. Use of the broad term "includes" plainly shows that a "false representation" is not limited to an express promise to pay.

The statute is unambiguous. The state had to only prove that a "false representation" was made; a "[f]alse representation *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).

The legislature's use of the term "includes" after the broader term "false representation," and immediately preceding the more specific term "promise," unequivocally shows its intent to provide that an express false promise is but one form of a "false representation," but it is not the exclusive form. *See United States v. Burgess*, 553 U.S. 124, 131 n.3 (2008) (the word "includes" is a term of "enlargement," not limitation, in a

statute). If the legislature intended to make an express promise the only form of "false representation" contemplated by the theft statute, it would have employed the restrictive term "means," rather than the expansive term "includes" to describe it. *Id.* *See State v. Popenhagen*, 2008 WI 55, ¶¶ 41, 77-79, 309 Wis. 2d 601, 749 N.W.2d 611; *State v. Evans*, 171 Wis. 2d 471, 480, 492 N.W.2d 141 (1992); *State v. Kaster*, 2003 WI App 105, ¶ 14, 264 Wis. 2d 751, 663 N.W.2d 390; *State v. Dismuke*, 2000 WI App 198, ¶ 16, 238 Wis. 2d 577, 617 N.W.2d 862; *State v. Caldwell*, 154 Wis. 2d 683, 688, 454 N.W.2d 13 (Ct. App. 1990).[10]

c. Legislative history confirms that the legislature intended a broad interpretation of "false representation" that "includes" a promise, either express or implied.

Although it is not necessary to go beyond the plain language, legislative history confirms that it was the legislature's intent to include a false promise as but one form of an actionable "false representation" within the scope of § 943.20(1)(d).

[10]As further proof that the legislature intended a broad interpretation of "false representation" by employing the term "includes" before "promise," it employed *both* the terms "means" and "including" when it expansively defined the term "property" at § 943.20(2)(b) ("'Property' *means* all forms of tangible property, whether real or personal, without limitation *including* electricity"). Obviously, the legislature used the word "including" before "electricity" to provide that electricity is not the exclusive form of property within the scope of the statute; it is but one of many types of property. *See* discussion at "3.," below. For the same reasons, its use of the term "includes" before the term "promise" was intended to provide that a promise is one form, but not the only form, of "false representation" within the statute's scope.

The common law of larceny did not cover either (a) embezzlement or (b) the acquisition of property by fraudulent means. The former involves the unlawful appropriation of another's property by a person who has lawful possession of it. The latter involves obtaining property with the owner's consent but under false pretenses or pursuant to a confidence game. Legislation was necessary to address these two situations, neither of which involved the unlawful taking and carrying away of property without the owner's consent. Baldwin, 44 Marq. L. Rev. at 255. The early drafts of the Wisconsin Criminal Code set about to address these gaps in the law.

This case concerns the acquisition of property by fraudulent means; obtaining the owner's consent to turn over property under false pretenses. "[F]alse pretenses was theft by fraudulently inducing another to part with his property." Marygold Shire Melli and Frank J. Remington, *Theft – A Comparative Analysis of the Present Law and the Proposed Criminal Code,* 1954 Wis. L. Rev. 253, 254-55 (Mar. 1954).

In 1950, the Legislative Council was charged with the task of creating a new Criminal Code in Wisconsin. This included clarifying and simplifying Wisconsin law regarding misappropriation of property. Those efforts culminated in the enactment of the Code by Ch. 696, Laws of 1955, effective July 1, 1956. William A. Platz, *The Criminal Code, Thumbnail History of the Code,* 1956 Wis. L. Rev. 350, 350-53 (May 1956). Out of those efforts was born the predecessor to current Wis. Stat. § 943.20, which greatly simplified the law by collecting into one statute many criminal statutes that addressed several forms of property misappropriation in Wisconsin:

> Section 943.20 brings into a single statute the contents of some twenty-three statutes which once plagued the law against misappropriation in Wisconsin. It embodies crimes heretofore known as larceny, larceny by bailee, embezzlement, obtaining

> property by false pretenses and confidence game and calls them "theft."

Baldwin, 44 Marq. L. Rev. at 253-54.

> This subsection [943.20(1)(d)] embodies the common law crime of obtaining by false pretenses, although in one respect the new statute covers behavior not within the common law definition . . . [§] 943.20(1)(d) deals with theft by deceit, as distinguished from theft by stealth."

Id. at 279-80.

The effort was arduous. The Legislative Council began work after the 1949 legislative session with an eye toward enactment of the new code by the end of the 1951 session. A draft of a partial code bill was put before that 1951 legislature for initial approval but not for final approval until the 1953 session. It was not approved in the 1951 session. In the interim between the 1951 and 1953 sessions, with the help of a state bar committee, the Legislative Council succeeded in drafting another complete bill for approval. That complete draft of the code was eventually approved at the end of the 1953 session but, for various political reasons, its approval was put over to the 1955 session. The 1953 bill was allowed to die for lack of enactment and an entirely new bill was finally approved with amendments in the 1955 session. As noted above, the new bill was enacted as Ch. 696, Laws of 1955, effective July 1, 1956. Platz, 1956 Wis. L. Rev. at 350-53.

Both the 1950 and 1953 Legislative Council drafts included comments or revisor's notes as aids to construction of the code's provisions, but the 1955 bill did not include any comments or notes. Platz, 1956 Wis. L. Rev. at 353. "The 1953 comments are still, of course, a part of the legislative history of the code and will be of some value in understanding its provisions, but their usefulness is greatly impaired by the multitudinous changes in the text of the law." *Id.*

Despite the "multitudinous changes," both the 1950 and 1953 Legislative Council comments are instructive in deciphering whether, as Steffes argues, the legislature intended for a "false representation" to "mean" nothing more than an express promise to pay or to perform an act in exchange for goods or services. That is because all three drafts of what is now § 943.20(1)(d) included the concept of "false representation."

Proposed § 343.15(1) in the 1950 draft outlawed "stealing," making it a crime for anyone to intentionally appropriate the "property of another . . . by means of deceit." 1950 Report of Wisconsin Legislative Council, Vol. VII, p. 87. The term "deceit" was defined at 1950 draft § 339.03(19) as follows: "'Deceit' is the intentional misleading of another by: (a) Falsely representing past or existing facts; or (b) Making any promise, express or implied, which at the time it is made the actor intends not to perform." *Id.* at 4.

The Legislative Council Comment to that definitional section reveals that the concept of "deceit" was intended to encompass "three different types of conduct: (1) false pretenses; (2) false promise; (3) confidence game." 1950 Report of Wisconsin Legislative Council, Legislative Council Comment at 7. The concept of "false pretenses" was defined as "a false representation of past or existing fact." *Id.* That "false representation could be oral or in writing, or "it may be made by conduct alone," or a combination thereof, "which amount to an assertion which is not true." *Id.*

In discussing "false promise," the Comment noted that the existing "civil law of deceit includes a false promise as well as a false representation of fact." *Id.* The comment noted further that, at the time of the 1950 draft, "most courts have held that a false promise is not criminal."[11] The drafters opted to make a false promise

[11]This court was among those courts holding that a failed "naked promise" of future action was only a civilly actionable breach (footnote continued)

criminal in the new code because, under its definition of "deceit," the state must also prove "that the actor intended not to perform his promise at the time he made it." *Id.*

The Legislative Council Comment to 1950 draft § 343.15(1) is particularly instructive in determining where within the term "deceit" an express promise falls:

> "Deceit" is defined in chapter 339 as the intentional misleading of another by (a) falsely representing any past or existing facts; or (b) making any promise, express or implied, which at the time it is made the actor intends not to perform. This definition retains the former requirements for a false representation with one exception. The subject matter of the misrepresentation has been broadened in paragraph (b) to include a promise. This is a considerable change from the old rule which did not regard a promise as a criminal misrepresentation. As pointed out in the comment to the definition, the distinction between past or existing facts and promises is groundless and, therefore, has been eliminated.

1950 Legislative Council Comment to draft § 343.15(1), at 89-90. *See id.* Comment to draft § 339.03(19) at 7.

Proposed § 343.20(1)(b) in the 1953 draft outlawed "stealing" by "intentionally obtain[ing] the property of another by misleading him with a false representation of past or existing fact or with a promise made with an intent not to perform it." 1953 Report of Wisconsin Legislative Council Judiciary Committee on the Criminal Code, Vol. V, § 343.20, p. 109. The Comment thereto provided: "He must make a representation which he knows is false or a promise which he intends not to perform at the time it is made. . . . He must make the promise or representation either desiring to mislead or with the belief that it will mislead another." *Id.*, Comment at 113.

---

of contract, not a criminally actionable "false pretense." *State ex rel. Labuwi v. Hathaway*, 168 Wis. 518, 522, 170 N.W. 654 (1919).

> [T]he inclusion of "promissory" fraud will make it possible to deal with a class of swindles which have heretofore gone unpunished because a promise made with intent not to perform it was not a "false pretense" under the old law. The code sentence changing the rule is[,] "'False representation' includes a promise made with intent not to perform it *if it is a part of a false and fraudulent scheme."* The italicized clause will prevent any tendency to prosecute ordinary breaches of contract.

Platz, 1956 Wis. L. Rev. at 374-75 (emphasis in original, footnote omitted). The statute, "includes a promise made with intent not to perform it *if it is part of a false and fraudulent scheme*" (*id.*) and eliminates the "old dogma . . . that a promise of future action did not constitute false representation. Baldwin, 44 Marq. L. Rev. at 282. It serves to "punish[ ] those who acquire property of another by a promise made with intent not to perform." *Id.* at 283. *Also see id.*, at 284-85 (discussing *Durland v. United States*, 161 U.S. 306, 313 (1896), which broadly interpreted the concept of "scheme or artifice to defraud" in the federal mail fraud statute as including "everything designed to defraud by representations as to the past or present, or suggestions and promises as to the future. The significant fact is the intent and purpose").

This history of the code's several drafts confirms what the statutory language unambiguously provides: an express promise to pay with no intention of doing so is a sufficient but not necessary form of "false representation." It is but one of many forms of false representation within the contemplation of the statute. Intentionally deceiving the telephone company either expressly or implicitly into providing telephone lines to businesses that did not exist and to individuals who neither knew nor wanted to purchase them; into believing it would be paid for providing those lines to those "customers" (and for the elaborate electrical system that powered those lines); and causing the telephone company to set up what it did not know would become "burn out" phone lines that, by definition, were obtained by the co-conspirators with the specific intent not to pay for them, satisfies the "false

representation" element even if the "promise" to pay for those phone lines was only implied from the co-conspirators' actions. *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).

The only legal authority Steffes can muster to support his contrary view is this court's *per curiam* decision in *Schneider v. State*, 60 Wis. 2d 765, 211 N.W.2d 511 (1973). There, the defendant purchased merchandise on credit "by presenting what appeared to be a purchase order form from an established business." This was a false representation to obtain credit that would not otherwise have been made available by the merchant to the defendant, amounting to the defendant's "promise to pay for the merchandise with intent not to perform the promise." *Id.* at 766. This court explained that the elements of theft by fraud under § 943.20(1)(d), "include obtaining property of another by deceiving him with a promise made with intent not to perform which is part of a false and fraudulent scheme." *Id.* at 765-66. This court held that the evidence was sufficient to convict.

The *Schneider* decision does nothing to help Steffes or to undermine the state's position here. There was no discussion of statutory language and intent. No one presented for resolution the issue whether a "false representation" is limited to only an express false "promise." This court paraphrased the statutory language providing that actionable fraud "include[s]" a false promise. Indeed, it appears from the sparse facts discussed in that short opinion that the "promise" to pay may have only been implicit. Regardless, nothing in that opinion supports the notion that the legislature intended anything more than to *include* an express false promise as but one of many forms of "false representation" within the scope of the theft statute.

The court of appeals properly held there was sufficient evidence "that members of the burn-out scam intentionally deceived the phone company with numerous false representations made with the express purpose to defraud the company." *State v. Steffes*, 340 Wis. 2d 576, ¶ 17.[12]

3. By its plain terms, § 943.20(2)(b) treats electricity in its applied form as "property" that can be fraudulently obtained.

a. The statutory definition of "property" plainly includes electricity.

Steffes insists that the legislature did not intend to include electricity when it is applied to power telephone systems within the theft statute's scope because telephone "services" are not "tangible property." This argument flies in the face of the statute's plain language.

The statute specifically provides, in its definitional section at sub. (2)(b): "'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."

The language is unambiguous and the intent is unmistakably clear: the legislature determined that electricity is "property" that can be stolen by a thief. Its

[12]For the reasons discussed in this section, Steffes' challenge to the jury instruction (and to the effectiveness of counsel for not objecting) presented at "III" of his brief – the theft instruction improperly allowed the jury to find guilt based on an express or implied "false representation" - is without merit. Trial counsel is not ineffective for failing to raise meritless objections. *State v. Wheat*, 2002 WI App 153, ¶ 14, 256 Wis. 2d 270, 647 N.W.2d 441.

misappropriation by fraud is, therefore, actionable under § 943.20(1)(d).

The "property" obtained with the installation and use of the "burn out" telephone lines by false representation was the applied form of electricity that powered those telephone lines. This applied form of electricity 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 the use of an applied form of electricity, or that those lines could function without electricity. The evidence showed that the elaborate electrical system engineered and installed by the telephone company was what powered those phone lines (119:8-11). Phone calls on those "burn out" lines simply could not be made without applied electricity (unless the co-conspirators used tin cans and miles of string to transmit voice impulses). The electricity and the telephone system to which it was applied were inextricably linked.[13]

Electricity is an essential component of telephone service, as this 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 "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").[14]

---

[13]*Cf. O'Reilly v. Morse*, 56 U.S. 62, 87 (1853) (in patent application to reissue a telegraph patent, Samuel F. B. Morse stated that "I have *applied electricity* in two distinct ways. 1st. I have applied, by a novel process, the motive power of electro-magnetism, or magnetism produced by electricity, to operate machinery for printing signals at any distance. 2dly. I have applied the chemical effects of electricity to print signals at any distance." (emphasis added)).

[14]Other cases that hold electricity is "property" within the contemplation of criminal theft statutes include: *Commonwealth v.* (footnote continued)

Moreover, Steffes offers nothing to show that the legislature intended to differentiate among purveyors of electricity. It matters not under the statute's broad definition of "property" whether a separate utility company provided the electricity to the telephone company. What matters under the statute is that the electricity was owned by the telephone company when the fraud lines were set up. The statute outlaws fraudulently obtaining the "property of another person." Wis. Stat. § 943.20(1)(d). Even assuming a public utility was at one point that "another person" who owned the electricity, the telephone company eventually became that "another person" – the "owner" -- when it purchased the electricity from the public utility and converted it into a telephone system capable of transmitting voice impulses over its phone lines. The court of appeals properly determined that the legislature intended the term "electricity" to be "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." *State v. Steffes,* 340 Wis. 2d 576, ¶ 23. As another court phrased it: "Electricity, the same as gas, is a valuable article of merchandise, bought and sold like other personal property and is capable of appropriation by another." *People v. Menagas*, 367 Ill. 330, 11 N.E.2d 403, 407 (1937).

The telephone company may have provided a "service" to the conspirators, but that service consisted of providing its "customers" with "property" - the electricity

---

Catalano, 74 Mass. App. Ct. 580, 908 N.E.2d 842, 845-46 (2009) ("[I]t is a well-established legal principle that electricity and gas are personal property that may be the subject of larceny." *Id.* at 845). *Also see Ashwander v. Tennessee Valley Authority,* 297 U.S. 288, 333-34 (1936) (electricity is "property"); *GFI Wisconsin, Inc. v. Reedsburg Utility Com'n,* 440 B.R. 791, 800 (W.D. Wis. 2010) (wherein District Judge Crabb reasoned: "I agree with those courts concluding that electricity is movable, tangible and consumable, that it has physical properties, that it is bought and sold in the marketplace and thus, that it qualifies as a good for purposes of the UCC and the Bankruptcy Code").

applied to power the telephone lines fraudulently obtained. The evidence adduced at trial was, therefore, sufficient for a rational jury to find that Steffes entered into a conspiracy to steal an applied form of electricity that was inextricably linked to the multiple telephone lines, from the owner of that electricity, the telephone company.

b. Legislative history confirms the legislature's intent to treat electricity as "property" within the contemplation of the theft statute.

Once again, legislative history only confirms what the legislature intended. In so defining "property," the Wisconsin legislature, "specifically indicates that matter such as electricity and gas may be the subject of theft thus avoiding a gap in the law found by decisions in some other jurisdictions." Baldwin, 44 Marq. L. Rev. at 262. The theft statute's definition of "property" that may be misappropriated by fraud encompasses, "[a]ll tangible things including gas, electricity, commercial paper and even contraband." Melli and Remington, 1954 Wis. L. Rev. at 256. This is so even though electricity was not considered "property" at common law. *Id.*

Once again, the Legislative Council's Comments included with the 1950 and 1953 drafts of the Criminal Code, which contained a similarly broad definition of "property," are instructive:

> As defined in chapter 339, "property" is not limited to its usual legal meaning but is intended to include everything of value whether real or personal, tangible or intangible, in possession or in action, including services. . . . Because it is so broad, it eliminates the problem of whether the thing stolen is something which can be stolen. Now, anything which has value can be stolen – whether it is a

> bicycle, a tree the actor cuts down and carries away, or electricity.

1950 Report of Wisconsin Legislative Council, Vol. VII, Comment to draft § 343.15, at 90. *See id.*, 1950 draft § 339.03(39), at 5, and Comment thereto at 9.

The 1953 draft theft statute contained a definition of "property" similar to the 1950 draft and as broad as the current definition: "'[P]roperty' is not limited to its usual legal meaning but includes everything of value whether real or personal, tangible or intangible, in possession or in action." 1953 Report of Wisconsin Legislative Council, Vol. V, draft § 343.20(2)(b), p. 110.

The broad definition of "property" in the 1953 draft of § 343.15 rendered obsolete the specific provision, at former § 343.17, that contained a long list of items subject to theft by fraud ("larceny"), "including . . . gas, water, steam, or electricity." *Id.*, Comment to 1953 draft § 343.20, at 113. *Also see id.* at 114 (discussing former § 343.175, outlawing the fraudulent use of gas, electricity, water and steam: "Gas, water, steam and electricity are all property").

These clear expressions of legislative intent, coupled with the consistent plain language employed by the legislature in current § 943.20(2)(b), confirm that electricity in its applied form – here, an electrical system engineered and installed by the telephone company to project voice impulses through its telephone lines - is "property" within the contemplation of the theft statute. When Steffes fraudulently obtained the "burn out" telephone lines, he fraudulently obtained the "property" that made those lines function – the elaborate electrical system engineered and installed by the telephone company.[15] Because Steffes no longer disputes that the

[15]Steffes argues that rendering him criminally liable for the theft of the applied form of electricity used to transmit voice impulses over telephone lines will lead to prosecutions for theft of (footnote continued)

fair market value of that property fraudulently obtained exceeded the felony threshold, a rational jury could and did find him guilty of conspiracy to commit felony theft by fraud beyond a reasonable doubt.[16]

c. The lower courts properly concluded that the evidence was sufficient to convict.

The court of appeals properly held there was "ample" circumstantial evidence adduced at trial to establish to the jury's satisfaction that Steffes shared the intent of the other conspirators to steal telephone services by fraud, he agreed with at least one other person (such as Howard and Hoffman) to commit that crime, and he performed acts to further the objective of the conspiracy.

---

electricity whenever one fraudulently obtains legal services from a lawyer or a haircut from a barber because those services often involve the use of electricity (*i.e.*, legal advice over a telephone or the barber's use of electric hair clippers). Steffes' brief at 16-17. The obvious difference is that the telephone lines cannot function, and so the service cannot be provided, without an enabling electrical system: electricity is essential to the service. A telephone system cannot exist without it. The customer who purchases access to a phone line purchases the electricity that powers it. Legal services and a haircut can, theoretically, be provided without using electricity (a face-to-face meeting with a lawyer; a barber's scissors or straight razor). The electricity used in connection with those services is only incidental to the service itself. It is the value of the lawyer's *skill* and *time,* and the barber's *skill* and *labor,* that is lost when those services are fraudulently obtained by the lawyer's client or the barber's customer. The telephone company loses the value of the applied form of electricity when its services are fraudulently obtained; the value of the telephone company's spent employee skills, time and labor are only incidental to that service.

[16]Steffes asks this court to declare "almost as a matter of public policy" that electricity is not "property" within the scope of the theft statute. Steffes' brief at 16. If Steffes believes the broad statutory definition of "property" employed by the legislature is bad public policy, he should ask the legislature to change that plain language rather than ask this court to ignore it.

State v. Steffes, 340 Wis. 2d 576, ¶ 16. That evidence was fortified by the undeniable fact that Steffes also had a stake in the success of this conspiracy: unlimited free telephone line access from his prison cell.

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 (119:90).

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). 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, Howard, during much of that time frame (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).

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' lifelong 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 Hoffman, about the fraud lines. This proves circumstantially that Steffes was a "necessary" member of this conspiracy who Howard trusted from its inception.

It is reasonable to infer from all of the above that Steffes was involved from the beginning. 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 coordinated 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 with Howard, Hoffman and others before and after they "burned out."

Unbeknownst to the phone company, those fraud lines were ordered by the co-conspirators with no intention of ever paying for them. Steffes concedes that obtaining the phone lines for fictitious businesses, "is circumstantial evidence that the defendants intended not to keep any promise to pay for the services." Steffes' brief at 12. The telephone company would not have provided these lines to those non-existent businesses had it known the co-conspirators 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 they would eventually "burn out" precisely because the phone company would shut them down for non-payment. 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 the applied electricity that powers those lines.

Therefore, the state successfully proved to the jury's satisfaction beyond a reasonable doubt that the co-conspirators intentionally obtained valuable "property" (the applied form of electricity supporting the "burn out" telephone lines) from the telephone company; by falsely representing that these new "customers" who contracted for those services (unsuspecting patients of a health care clinic and fictitious businesses) had no intention of paying for those "burn out" phone lines in return. The court of appeals properly concluded that

> . . . Steffes was more than just someone who received access to a stolen phone line after others had taken the trouble to fraudulently obtain and operate it. He received specific instruction on how to use the line so that nobody – himself included –

> would get caught. He actively took part in phone calls where perpetuating the scam was discussed.

State v. Steffes, 340 Wis. 2d 576, ¶ 18.

CONCLUSION

Therefore, the State of Wisconsin respectfully requests that the decision of the court of appeals be AFFIRMED.

Dated at Madison, Wisconsin this 14th day of December, 2012.

Respectfully submitted,

J.B. VAN HOLLEN
Attorney General

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

Attorneys for Plaintiff-Respondent

Assisted by: Jason Gorn
Legal Extern

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 10,671 words.

Dated this 14th day of December, 2012.

_____
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 14th day of December, 2012.

_____
DANIEL J. O'BRIEN
Assistant Attorney General