

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

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CLERK OF SUPREME COURT
OF WISCONSIN

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 Reply Brief

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Argument

I. Steffes’ argument is not that a “false promise” is the sine qua non of theft by fraud; rather, the argument is that none of the false representations made during the course the transactions were fraudulent, and there was no evidence of a false promise to pay for services 4

II. Steffes does not argue that electricity is not tangible property; rather, the argument is that telephone services are not tangible property, despite the fact that electricity is needed to provide such services..... 6

Certification as to Length and E-Filing

Argument

I. Steffes' argument is not that a "false promise" is the *sine qua non* of theft by fraud; rather, the argument is that none of the false representations made during the course the transactions were fraudulent, and there was no evidence of a false promise to pay for services.

The State writes that, "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."¹ Respondent's brief p. 16. If this is how the State understood Steffes' argument, then either the argument was unclear, or the state's attorney did not read the argument closely.

To be certain, as Steffes stated at page thirteen of his opening brief: 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. Steffes then

¹ The State claims that Steffes made this argument at pages 18 and 19 of his brief. At pages 18 and 19 of his brief Steffes does correctly point out that there was no evidence presented at trial that any member of the conspiracy ever made a false promise. However, this comment was made in the context of his argument that the trial court erred in instructing the jury. Steffes never expressly or implicitly argued that the word "false representation" as used in the statute was ambiguous.

went on to explain why, under the facts of this case, in order for fraud to occur, it was necessary that there be some promise to pay for the services or, at the very minimum, a request to be extended credit. Here, there was none of that.

Steffes does not suggest-- as the State apparently believes-- that an express false promise is *required* in order to prove theft by fraud. The statute's language is not ambiguous. It clearly states that fraud may be committed by one who makes a *false representation*. Thus, the State's dissertation on the legislative history, although comprehensive and interesting, it is wholly beside the point. There is no dispute that fraud may be committed by making a false representation; but any such misrepresentation must be material to the transaction. Here, none of the misrepresentations were material. All of the misrepresentations involved names, addresses, and contact information.

The point that Steffes attempted to convey in his opening brief is that there was no evidence that any of the misrepresentations made by the women setting up the accounts induced SBC to provide the telephone services; and, similarly, there was no testimony that had the women used their real names in setting up the services, that SBC would have declined.

There is no getting around the inference that, in setting up the accounts, the members of the conspiracy had no intention of paying for the services. The use of fake names was obviously intended to make it difficult for SBC to collect the debt. Nevertheless, it is equally true that the women were never called upon to make a promise to pay for the services. This is why the State encouraged the court to instruct the jury that such a representation may be *implicit* in the nature of the transaction. In the absence of such a promise, there is no fraud under the facts of this case.

II. Steffes does not argue that electricity is not tangible property; rather, the argument is that telephone services are not tangible property, despite the fact that electricity is needed to provide such services.

Once again, the State somewhat mischaracterizes Steffes' argument in order to more effectively knock it down.

The State writes:

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).

Respondent's brief p. 29.

To clarify once again, Steffes does not suggest that electricity is not tangible property. The statute plainly says that it is.

The central point of Steffes' argument is that SBC is not a *purveyor* of electricity, as the State simply assumes. Rather, SBC is a purveyor of telephone services and, like many services, electricity is required in order to provide the service.

That what SBC provides is a *service*, and not tangible property (electricity), is easily demonstrated. An electric company manufactures electricity by various means (hydroelectric generators, atomic, coal burning, windmills). Just like any tangible property, manufactured electricity may be kept on "inventory" by storing it in batteries, for example, to be sold as needed. As customers consume electricity, more electricity must be generated. When a customer fails to pay for electricity that is consumed, the electric company has lost the amount of money it will require to replenish the stolen amount of electricity.

Telephone services, on the other hand, cannot be stored or kept on inventory. As customers use their telephones, they do not consume anything that must be replenished. SBC's ability to provide telephone services is limited only by the

capacity of its network. The network must be maintained regardless of the market demand for telephone services. Thus, when a customer fails to pay for telephone services, SBC does not bear the expense of purchasing or manufacturing additional telephone services to replenish the supply.

Electricity is tangible property. Telephone services are not.

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

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Jeffrey W. Jensen