

**State of Wisconsin
Court of Appeals
District 1
Appeal No. 2013AP1722
2013AP1723**

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**CLERK OF COURT OF APPEALS
OF WISCONSIN**

State of Wisconsin,

Plaintiff-Respondent,

v.

David Phillip Foley,

Defendant-Appellant.

**On appeal from a judgment of the Milwaukee County
Circuit Court, The Honorable David A. Hansher,
presiding**

Defendant-Appellant's Brief and Appendix

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Statement on Oral Argument and Publication

The issue presented by this appeal is controlled by well-settled law. Therefore, the appellant does not recommend either oral argument or publication.

Statement of the Issue

In order to be convicted of theft by fraud, is it required that the false representation be made directly to the victim?

In legal parlance, the issue here is whether the evidence is sufficient as a matter of law to sustain the jury's verdict finding the appellant (Foley) guilty of theft by fraud where:

- Foley wrote a \$10,000 check payable to his business (Sport-n-Cuts) and gave it to his business partner, Rick Bystra, when Foley knew that there were insufficient funds in his account to cover the check.¹
- Bystra deposited the check in the Sport-n-Cuts account at Anchor Bank, believing it to be valid
- Foley then persuaded Bystra to issue him (Foley) a \$7000 check drawn on the Sport-n-Cuts account at Anchor Bank
- Foley used this check to persuade Anchor Bank to issue a \$7000 cashier's check made payable to one of Foley's

¹ Plainly, this may be characterized as a false representation made by Foley to Bystra

creditors (Dr. Krausen)

- Dr. Krausen successfully negotiated the cashier's check, and Anchor Bank lost approximately \$5,000 (which represents the difference between the \$7000 cashier's check and the legitimate balance remaining in the account)

Answered by the circuit court: Yes.

Summary of the Argument

The criminal complaint alleges that Foley committed the crime of theft by fraud against Anchor Bank. One commits the crime of theft by fraud if he 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.

Here, Foley made no false representation to Anchor Bank. Foley presented a check issued by Bystra and the check was not a forgery (i.e. it was not a false check). The check created a legal obligation on the part of Bystra to pay the check even if it were dishonored. Here, Anchor paid the check, which ultimately created an overdraft, but Anchor has the right to collect the amount of the overdraft from Bystra.

Thus, Anchor Bank is not a victim of theft by fraud. The bank lost no tangible property. If there is a victim, it is Rick Bystra. For this reason, the evidence is insufficient as a matter of law to support Foley's conviction for theft by fraud.

Statement of the Case

I. Procedural History

In Milwaukee County case number 2011CF2291², filed on May 24, 2011, the appellant, David Foley (hereinafter "Foley") was charged with-- among a number of other counts-- theft by fraud, contrary to Sec. 943.20(1)(d), Stats.³ As to that count, the complaint alleged that Foley obtained title to the property of Anchor Bank in the form of a \$7000 cashier's check by deceiving the bank with a false representation that Foley knew to be false.

Foley waived a preliminary hearing, and then entered not guilty pleas to all counts.

Later, on November 23, 2011, Foley was charged in

² Which corresponds to appeal number 2013AP1722

³ Theft by fraud is committed by one who, "(d) 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."

Milwaukee County case number 2011CF5654⁴ with five counts of bail jumping. The criminal complaint alleged that Foley committed the crimes alleged in 2011CF2291 while he was on bail for an earlier felony case.

The case proceeded to jury trial on October 29, 2012. The jury returned a verdict finding Foley guilty of all counts⁵, including the count alleging theft by fraud that is at issue in this appeal.

The court sentenced Foley-- including all counts-- to a total of fifteen years in prison, bifurcated as ten years initial confinement and five years extended supervision.

Foley timely file a notice of intent to pursue postconviction relief. There were no postconviction motions. Foley now appeals his conviction.

II. Factual Background

It is an enormous challenge to present the facts of this labyrinthine case in a way that is comprehensible-- and therefore useful-- to the reader⁶. To that end, the focus will be on the evidence related to the theft by fraud charge.

⁴ This corresponds to appeal number 2013AP1723. The two cases were joined before the trial court. Foley filed a notice appeal from his convictions. This resulted in two court of appeals case numbers being generated. However, the court of appeals later consolidated the cases for briefing. There is no appellate issue for 2013AP1723. The only issue raised is in 2013AP1722.

⁵ A number of the bail-jumping charges were dismissed by the prosecutor

⁶ Evidently, the prosecutor felt a similar frustration. The criminal complaint in this case is sixty-seven pages long, complete with photographs, illustrations, and charts. (R:2)

On February 4, 2011, Dr. Anthony Krausen performed a face-lift on Foley. (Krausen dep. p. 8) Prior to the surgery, Foley had written a check to Dr. Krausen for his fees. Three days later, on February 7, 2011, Foley's check bounced. (Krausen dep. p. 9)

When Foley visited Dr. Krausen for a follow-up examination, Dr. Krausen naturally mentioned the problem with the check. Foley explained that the check had accidentally been written on a closed account, and so he issued the doctor a second check. (Krausen dep. pp. 10-12) The second check also bounced. (Krausen dep. p. 13)

Ultimately, on March 22, 2011, Foley appeared at Dr. Krausen's office with a cashier's check, drawn on Anchor Bank, in the amount of \$7000. Dr. Krausen successfully cashed the check.

This check is at the center of the controversy in this appeal.

Here is how Foley obtained the cashier's check. Several days before March 22, 2011, Foley wrote a \$10,000 check on his E*Trade account made payable to his business, Sport-n-Cuts barbershop. There were insufficient funds in the E*Trade account to cover the check⁷. Foley gave the check to

⁷ The state presented evidence of both the official E*Trade records, and also evidence of statements that were seized from Foley's apartment, showing that the E*Trade account never had sufficient funds to cover a \$10,000 check; and, additionally, prior to the check in this case, several other checks that Foley wrote on that account were returned NSF. (R:10-30-2012 trans. pp. 112-117) Thus, a reasonable inference is that at the time Foley wrote the \$10,000 E*Trade check to Bystra, Foley knew that there were insufficient funds to

his business partner, Rick Bysta (R:10-30-12 trans. p. 22), who, on March 17, 2011, deposited the check in the Sport-n-Cuts account at Anchor Bank. (R:10-29-2012 trans. p. 128, 129) Several days later, Foley persuaded Bystra to write a \$7000 check made payable to Foley from the Sport-n-Cuts account at Anchor Bank. On March 22, 2011, Foley took that check to Anchor Bank, negotiated it, and had the teller write a \$7000 cashier's check to Dr. Krausen. (R:10-29-2012 trans. p. 137) Significantly, there was no evidence that Foley made any representations to the teller except to provide the check to her, and to provide the necessary identification. (R:10-29-2012 trans. p. 147) The teller obtained authorization from her superior to issue the cashier's check as requested.⁸ *Id.*

Foley presented the cashier's check to Dr. Krausen, and he cashed it. Anchor Bank claimed that it suffered a loss of \$5,380.72, which is the amount of the overdraft caused by the cashier's check (\$7,000) after the E*Trade check bounced. (R:10-29-2012 trans. p. 159)

cover it.

⁸ On March 22, 2011, the Sport-n-Cuts account at Anchor Bank had a balance in excess of \$10,000; however, that balance included the amount from the E*Trade check deposit that Bystra made on March 17, 2011. According to the bank teller, prior to the E*Trade deposit, the account never had a balance in excess of approximately \$2,800. (10-29-12 trans. p. 149). In other words, Foley cannot claim that he thought the account had sufficient funds to cover the Dr. Krausen check even if the E*Trade check bounced.

Argument

I. The evidence was insufficient to prove that Foley committed the crime of theft by fraud against Anchor Bank; Foley made no false representation to Anchor, and Anchor lost no property.

The criminal complaint alleges that Foley committed the crime of theft by fraud against Anchor Bank. One commits the crime of theft by fraud if he 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.

Here, Foley made no false representation to Anchor Bank. Foley presented a check issued by Bystra and the check was not a forgery (i.e. it was not a false check). The check created a legal obligation on the part of Bystra to pay the amount of the check even if it were dishonored. Here, Anchor paid the check, even though it created an overdraft, but Anchor has the right to collect the amount of the overdraft from Bystra.

Thus, Anchor Bank is not a victim of theft by fraud. If there is a victim, it is Rick Bystra. For this reason, the evidence is insufficient as a matter of law to support Foley's conviction for theft by fraud.

A. Standard of appellate review

Here, the question is whether the evidence was sufficient to convict Foley of theft by 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).

B. The elements of theft by fraud

“We have long recognized that when a court construes an ordinance or statute, words must be given their common meaning.” *Bruno v. Milwaukee County*, 2003 WI 28, 260 Wis. 2d 633, 639, 660 N.W.2d 656, 659

Foley is charged with theft by fraud. Sec. 943.20(1)(d), Stats., is violated by one who:

(d) 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

Under the plain meaning of the statute, in order for the crime of theft by fraud to be committed, the “false representation” must be made to the person who is alleged to be the victim of the crime (i.e. the person who lost the tangible property).

The supreme court also recently explained that a “false representation” is not limited to a promise made with intent not to perform it. The court wrote, “[P]roviding fictitious business names and stolen personal identifying information to a phone company with the intent of setting up temporary phone numbers constitutes a “false representation.” *State v. Steffes*, 2013 WI 53, 347 Wis. 2d 683, 695, 832 N.W.2d 101, 107-08

C. Foley made no false representation to Anchor Bank in order to prompt the bank to issue the cashier's check; any false representation by Foley was made to Bystra.

Indisputably, Foley made a false representation to Bystra. Foley gave Bystra the \$10,000 check written on the E*Trade account when Foley must have known that the check would not clear.

Bystra was cajoled by Foley to write a \$7,000 check, payable to Foley, *before Bystra confirmed that the E*Trade check had cleared.* Nevertheless, under the evidence presented during the trial, when Bystra wrote the check to

Foley, he intended for it to be paid. Bystra actually signed the check. The check was not a forgery.

Foley then appeared at Anchor Bank, with the \$7000 check that Bystra had given him, and asked that the bank convert the check into a cashier's check made out to Dr. Krauser. There were no explicit false representations made by Foley to prompt *the bank* into issuing the cashier's check.

The remaining question, then, is whether Foley obtained title to the Anchor Bank's tangible property by making an implicitly false representation to the bank by presenting the bank with the \$7,000 check written by Bystra, when Foley knew that Bystra's check would ultimately create an overdraft?⁹

Firstly, Bystra actually issued and signed the check he gave to Foley. The check was not a forgery. Bystra was negligent in issuing the check before he knew for certain that the E*Trade check had cleared.

Nevertheless, Bystra's check was valid. When a person issues a check, it creates a legal obligation on the part of the person to pay the amount of the check, even if the check is later dishonored. If the bank pays the check, as it did here, the check creates a legal obligation on Bystra's part to reimburse the bank for any loss if the check creates an overdraft. See, Sec. 404.401, Stats.

Thus, Anchor Bank did not lose title to any tangible

⁹ It is important to point out that the check was not a forgery. Bystra actually signed the check, and he believed that the account had sufficient funds to cover it.

property based upon any misrepresentation by Foley. Foley made no misrepresentation to the bank. Any misrepresentation was made to Bystra. Additionally, it is Bystra who lost tangible property. The bank did not.

As such, the evidence was insufficient as a matter of law to prove that Foley committed the crime of theft by fraud against Anchor Bank.

Conclusion

For these reasons, it is respectfully requested that the court of appeals reverse Foley's conviction for theft by fraud, and order that judgment of acquittal be entered on that count.

Dated at Milwaukee, Wisconsin, this _____ day of October, 2013.

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Certification as to Length and E-Filing

I hereby certify that this brief conforms to the rules contained in §809.19(8)(b) and (c) for a brief and appendix produced with a proportional serif font. The length of the brief is 2054 words.

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

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

Dated this _____ day of October, 2013:

Jeffrey W. Jensen

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Defendant-Appellant's Brief and Appendix

A. Record on Appeal

B. Criminal complaint

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 October, 2013.

Jeffrey W. Jensen