STATE OF WISCONSIN

COURT OF APPEALS

DISTRICT I

Case Nos. 2013AP1722-CR & 2013AP1723-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

DAVID PHILLIP FOLEY,

Defendant-Appellant.

ON APPEAL FROM JUDGMENT OF CONVICTION AND SENTENCE ENTERED IN THE CIRCUIT COURT FOR MILWAUKEE COUNTY, THE HONORABLE DAVID A. HANSHER PRESIDING

# BRIEF OF PLAINTIFF-RESPONDENT

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## STATEMENT ON ORAL ARGUMENT AND PUBLICATION

Oral argument and publication are unnecessary because the issues presented are fully briefed and may be resolved by applying well-established legal principles to undisputed facts.

## ARGUMENT

### THE STATE PROVED ALL THE ELEMENTS OF THEFT BY FRAUD.

#### A. Legal Principles.

Under Wisconsin's theft-by-fraud statute, it is a crime to

> [o]btain[] 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 part of a false and fraudulent scheme.

Wis. Stat. § 943.20(1)(d).[1] Where, as here, the value of the stolen property is between $5000 and $10,000, the theft is a Class H felony. *See id.* at (3)(bm).

To prove theft by fraud, the State has the burden of proving that: (1) the named victim was the owner of the property; (2) the defendant made a false representation to the owner; (3) the defendant knew the representation was false; (4) the defendant made the representation with intent to deceive and defraud the owner; (5) the defendant obtained title to the owner's property (including money) by the false representation; (6) the owner was deceived by the representation; and (7) the owner was defrauded by the false representation. Wis. JI-Criminal 1453A (2006).

For the second element, the standard jury instruction includes the addition of the following language where necessary:

> ADD THE FOLLOWING IF THE ALLEGED REPRESENTATION WAS MADE TO A THIRD PERSON

[1]All references to the Wisconsin Statutes are to the 2011-12 edition.

> [It is not required that the defendant directly communicated with the owner. The defendant is responsible for a statement made to a third person if the defendant intended or had reason to expect that the statement would be repeated to, or its substance communicated to, the owner and that it would influence the owner's conduct in the transaction.]

*Id.* at 1-2 (footnote omitted).

In a footnote, the Jury Instructions Committee explained that:

> This material is intended to reflect the decision in State v. Timblin, 2002 WI App 304, 259 Wis.2d 299, 657 N.W.2d 89, which held that the theft by fraud statute applies in a case where the defendant did not communicate directly with the victim of his fraudulent scheme. Communication was achieved via a third person, whom, the court concluded, was not the agent of the defendant or the victim. The court relied on the Restatement (Second) of Torts which recognizes "civil liability for misrepresentation where it is foreseeable and intended that a fraudulent misrepresentation will be repeated to third parties and acted upon by them." 2002 WI App 304, ¶ 31. Though the decision addressed plea withdrawal, it appears to be clear authority for the proposition that the same rule is sufficient for criminal liability.

*Id.* at 5 (note 2).

In *Timblin*, Todd Timblin was charged with twenty-three counts of theft by fraud based on a fraudulent investment scheme in which he obtained funds to (supposedly) invest in a riverboat gambling business in Florida. Timblin enlisted the aid of his friend David Lichtensteiger to recruit investors. *State v. Timblin*, 2002 WI App 304, 259 Wis. 2d 299, ¶¶3, 14, 657 N.W.2d 89. Lichtensteiger and his friend Mark Matenaer were the only investors Timblin communicated with directly. They, in turn, talked to the others. *Id.* ¶8. Lichtensteiger did not know that Timblin was knowingly making false representations about the investment scheme, and was among Timblins' victims. *Id.* ¶13.

Pursuant to a negotiated plea agreement, Timblin pleaded to six fraud counts, in which the named victims were Lichtensteiger, Matenaer, and Chad and Wendy Graff. The Graffs had dealt with Lichtensteiger exclusively. *Id.* ¶¶7, 23.

Prior to sentencing, Timblin moved to withdraw his pleas on the Graff counts because those counts "did not allege an agency relationship" and were therefore defective. *Id.*¶17. Timblin assumed that, as a matter of law, he could only be liable for the Graff counts if the State could prove that Lichtensteiger was acting as their agent. He asserted "that there was not a factual basis for his pleas because the complaint and information were required to establish an agency relationship given that the Graffs learned of Timblin's investment plan through Lichtensteiger and gave their money to Lichtensteiger to deliver to Timblin." *Id.* ¶21.

This court rejected Timblin's agency argument. It agreed that Lichtensteiger was not the Graffs' agent. *Id.* ¶¶26-30. However:

> Despite the fact that this is not an agency relationship, Timblin may dispute his responsibility for the Graffs' losses based on his claim that he did not speak directly to the Graffs. This argument is unpersuasive. Theft by deception is a species of fraud, which is addressed by civil tort law as well as criminal law. The RESTATEMENT (SECOND) OF TORTS provides for civil liability for misrepresentation where it is foreseeable and intended that a fraudulent misrepresentation will be repeated to third parties and acted upon by them:
>
> > The maker of a fraudulent misrepresentation is subject to liability for pecuniary loss to another who acts in justifiable reliance upon it if the misrepresentation, although not made directly to the other, is made to a third person and the maker intends or has reason to expect that its terms will be repeated or its substance communicated to the other, and that it will influence

> his conduct in the transaction or type of transaction involved.
>
> RESTATEMENT (SECOND) OF TORTS § 533 (1977); *see also Chitwood v. A.O. Smith Harvestore Prods., Inc.*, 170 Wis. 2d 622, 635 n.3, 489 N.W.2d 697 (Ct. App. 1992).
>
> Thus, under the facts of this case, the trial court did not err in denying Timblin's motion to withdraw his guilty pleas. There was enough evidence to establish probable cause that the Graffs relied on the misrepresentations Timblin made to Lichtensteiger—representations that Timblin either intended or had reason to expect would be repeated to other existing or potential investors, including the Graffs…. Additionally, it seems probable that Timblin intended Lichtensteiger to pass on the February 2000 statement he made, claiming that the funds supplied by all the investors would be in jeopardy if more money were not forthcoming.

*Id.* ¶¶31-32 (footnote omitted).

B. Facts.

The State charged Foley with theft by fraud on the following grounds:

> On March 22, 2011, at 5555 North Port Washington Road, Glendale, did intentionally, as party to a crime, obtain title to the property of Anchor Bank, to wit: $7,000 in the form of an Official Check, by intentionally deceiving Anchor Bank with a false representation which he knew to be false, made with intent to defraud, and which did defraud Anchor Bank in an amount exceeding $5,000 but not exceeding $10,000, contrary to Wisconsin Statutes §943.20(1)(d) & (3)(bm) and 939.05

(3:1).[2]

[2]All record citations are to the record in Case No. 2013AP1722-CR, the appeal from Milwaukee County Case No. 2011CF2291.

The complaint summarized the factual basis for this count as follows:

> On March 17, 2011, Foley and his "Sport 'n Cuts" barbershop business partner, Rick Bystra, went to the Anchor Bank in Glendale Wisconsin. At that time, Bystra deposited a Foley E*Trade check [*i.e.*, a check from Foley's E*Trade account]—later determined to be worthless—in the amount of $10,000 into the Sport 'n Cuts account there. Five days later, on March 22, 2011, Bystra wrote a check to Foley in the amount of $7,000. Foley stated he needed the money to pay off a doctor's bill.
>
> On March 22, 2011, … Foley took the Bystra check and proceeded to the Anchor Bank in Glendale where he cashed the $7,000 Bystra check knowing full well that the $10,000 E*Trade check would never have cleared. Foley applied it to an "Official Check" drawn on the Anchor Bank in the amount of $7,000 payable to Dr. Anthony Krausen.

(2:3).

At Foley's trial, the circuit court instructed the jury on the theft-by-fraud count using Wis. JI-Criminal 1453A (51:9-12). In pertinent part, the court explained, theft by fraud

> does not require the defendant directly communicated with the owner. The defendant is responsible for a statement made to a third party if the defendant intended or had reasons to expect the statement would be repeated to or its substance communicated to the owner and that it would influence the owner's conduct in the transaction"

(51:10).

Several trial witnesses testified about this series of transactions.

Melita James, a customer service representative at the Anchor Bank in Glendale, testified that Foley and Bystra came to the bank on March 17, 2011 (49:127, 134). With James's assistance, the men deposited a $10,000

check from "E*Trade" into the Sport 'n Cuts account (49:128-29).[3] Bystra made the deposit, with Foley standing next to him (49:144).

James also served Foley at the bank on March 22, 2011 (49:136, 146). "On that date, I cashed a check and also did a withdrawal for an official check" (49:136). The check she "cashed" was "a Sport 'n Cuts check drawn on Anchor Bank in the amount of $7,000 payable to Mr. Foley and signed by Mr. Bystra" (49:137). James "had to put the check that Mr. Foley gave me [*i.e.*, the check signed by Bystra] into a GL ['general ledger'] and then take it out as … an official check" or "cashier's check" (49:138, 146). The "official check" was in the amount of $7,000 and payable to Anthony Krausen, M.D. (49:139).

Bystra testified. He said that he and Foley went to Anchor Bank on March 17, 2011 for several reasons. Most pertinently because Foley had "been trying to get some extra money to come in to infuse out of … his trust account that he said he had. And he got some money from that that he was gonna put in" (50:32). Foley explained that he had received money from an alleged mother-in-law, who put it into his account by mistake instead of the Sport 'n Cuts account. "And so he had to put it out of that account into the Sport 'n Cuts account" (50:33).

Asked by the prosecutor when Foley actually handed the $10,000 check to him, Bystra explained:

> We were both at the bank. And I went up to the window first, the teller window first, to be able to deposit the handful of [other] checks and then just to get the wire transfer. And then he stayed off in the back … for a while and he was writing out some stuff. So I'm assuming he was doing this check here and the deposit slip.

(50:35). After Bystra deposited the other checks, Foley "came after he was filling out whatever he was filling out.

[3]At this time, Foley had $10.01 in cash in his E*Trade account, and $195.00 in stocks (50:126).

So just because he came up and put it in by himself" (50:38).

Defense counsel asked the same question, and Bystra gave a similar answer:

> I don't believe that … Dave gave me the $10,000 check. He was at the bank when I was there. I took care of the wire transfer, I took care of putting the [other] checks in, and he was writing out some paperwork behind and then he walked up to the teller. I don't recall if he handed it to me when I was standing there or if he put it -- My recollection I believe is that he just put it on there for them to do.

(50:73). He also recalled:

> [W]hen I was standing at the window taking care of the funds transfer, he was standing back and I was kind of just looking … at him. And he picked up the check and he held it and he goes, see? Look. I got my signature on it. It's a real check. Thought it was kind of weird, but whatever. And then that's when he walked up to the desks and put it on the desk…. I don't recall if he just slid it the extra couple inches to her or if I did. I don't recall that.

(50:75-76).

After the deposit was made, Foley told Bystra that he needed a $7,000 check to pay Dr. Krausen. "And then I started writing out the check for his doctor and … he said no, stop, you can't write it out to his name. He wants it in cash" (50:39). Foley said "write it out to me, meaning himself, because he had to pay in cash. He said that he needed $7,000 to pay in cash because he was getting it for half price since he was paying in cash instead of $14,000" (*id.*). Bystra gave Foley the requested check on March 21 (50:40). Bystra did not go to the bank with Foley when Foley cashed this check (50:40-41).

Bystra ultimately learned that Foley's $10,000 check from his E*Trade account was worthless (50:41).

Jacqueline Kress, Melita James's supervisor, testified (49:152-53). She affirmed that "Anchor Bank rel[ied] on the authenticity of the promise to pay $10,000 when it was deposited into Anchor Bank on March 17th, 2011," and had it known that the check was worthless, would not "have advanced those funds in the form of an official check and given that check to … Foley" (49:158-59). As the result of Foley's actions, the bank lost $5,380.72 (49:160). This net loss reflects "some of the recoupments" Anchor was able to get from the legitimate balance in the Sport 'n Cuts account (*id.*).

C. Analysis.

Foley contends that there was insufficient evidence to support his guilty verdict on the theft-by-fraud count because "Foley made no false representation to Anchor Bank." Foley's Brief at 5. Foley does not deny the series of facts proved by the State: that he gave a $10,000 check from his E*Trade account for which there were insufficient funds to Bystra to deposit in the Sport 'n Cuts account; that Bystra gave Foley a $7,000 check because he believed the $10,000 check was valid; that Foley presented this $7,000 check to Anchor Bank knowing that it was not backed by sufficient funds; and that Foley then obtained a $7,000 cashier's check from Anchor Bank. Foley's Brief at 12-13.

Foley's theory is that he made no false representation to Anchor Bank because the $7,000 check he presented on March 22, 2011 "was not a forgery"; "created a legal obligation on the part of Bystra to pay … even if it were dishonored"; that "Anchor has the right to collect the amount of the overdraft [created by its issuance of the $7,000 cashier's check to Foley] from Bystra"; and thus "Anchor Bank is not a victim of theft by fraud." *Id.* at 5-6.

As an initial matter, the State notes that Foley did not present this theory of the case at trial and he has therefore forfeited it (51:44-56). *See State v. Caban*, 210 Wis. 2d 597, 604, 563 N.W.2d 501 (1997) (issues not

presented in trial court will not be considered for the first time on appeal).

The State proved all seven elements of theft by fraud. First, Anchor was the owner of the money taken by Foley (49:158). Second, Foley made two false representations to Anchor. He made the first one on March 17 when, either directly or through the unknowing Bystra, he deposited a $10,000 check into the Sport 'n Cuts account that he knew to be worthless (49:128-29, 144; 50:32-35, 73-76; 51:24). He made a second false representation on March 22 when he presented the $7,000 check signed by Bystra that he alone knew was worthless (since it was "backed" by the aforementioned worthless $10,000 check) (49:137; 50:126 51:24-25). Third, Foley knew these representations were false (50:39-40, 126). Fourth, he made the representations with the intent to deceive and defraud Anchor so that he could get money to pay his outstanding debt to Dr. Krausen (49:138; 51:48). Fifth, he obtained $7,000 from Anchor (49:158). Sixth and seventh, Anchor was deceived and defrauded by Foley's misrepresentations (49:158-60).

Foley has two principal lines of attack.

First, he focuses on his presentation of the $7,000 check signed by Bystra, insisting that it was a legitimate check because it "was not a forgery." Foley's Brief at 10. The main flaw in this argument is that it ignores the fact that Foley—either directly or indirectly using Bystra as his pawn—deposited a worthless $10,000 check into the Sport 'n Cuts account. This was the first step in Foley's multi-step plan to defraud Anchor of $7,000. The second flaw is that, just because the Bystra check was not a "forgery," Foley's presentation of the check when he knew that it was worthless (since it was based on the earlier worthless check) was a false representation made with an intent to deceive and defraud. His exchange of this check for a cashier's check was the final step in Foley's multi-step plan to defraud Anchor of $7,000.

Foley's second line of attack is that Anchor lost nothing because Bystra was liable for the $7,000. Since the check created a "legal obligation on the part of Bystra to pay the amount of the check even if it were dishonored," Anchor was not defrauded—maybe Bystra was defrauded, but Anchor wasn't. Foley's Brief at 10. "[T]he 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." *Id.* at 13. This conclusory argument is woefully undeveloped and merits no response by the State and no consideration by the court. *See State v. Jones*, 2002 WI App 196, ¶38 n.6, 257 Wis. 2d 319, 651 N.W.2d 305. "A party must do more than simply toss a bunch of concepts into the air with the hope that either the trial court or the opposing party will arrange them into viable and fact-supported legal theories." *State v. Jackson,* 229 Wis. 2d 328, 337, 600 N.W.2d 39 (Ct. App. 1999).

Although the State is not required to build up Foley's argument in order to take it apart, it will point out some of the most obvious questions raised by the argument that Foley leaves unanswered.

The statute cited by Foley, Wis. Stat. § 404.401(1), provides that a bank in Anchor's position "*may* charge against the account of a customer an item that is properly payable from the account even though the charge creates an overdraft." In other words, the bank may *choose* to collect the funds from the customer; the customer is *not automatically obligated* by the statute to pay the funds. Significantly, Foley overlooks the fact that Bystra is not "the customer" under the statute. This was a "Sport 'n Cuts" account, not a "Rick Bystra" account.[4] Maybe Anchor did try to recover the money from the company and maybe it was judgment-proof. We don't know, because this information is not in the record.

[4]The account was opened under the name Folordstra Management Group, Inc., which did business as Sport 'n Cuts Clubhouse Barbershop (50:67). Bystra was a signatory on the account; Foley was not (50:84).

Furthermore, the statute limits the definition of a "properly payable" item to one "authorized by the customer and … in accordance with any agreement between the customer and the bank." *Id.* We don't know anything about Anchor's agreement with Sport 'n Cuts.

Moreover, as a general matter, the fact that a fraud victim might somehow be made whole by civil law remedies has no bearing on whether or not he, she, or it is a victim of theft. Is a homeowner whose house is burglarized not a crime victim because his property is protected by homeowner's insurance? "The crime of theft by fraud is, as are all crimes, an offense against the people of the state of Wisconsin, and the victim's final accounting is irrelevant." *State v. Kennedy*, 105 Wis. 2d 625, 640, 314 N.W.2d 884 (Ct. App. 1981), *quoted in* Wis. JI-Criminal 1453A at 7 (note 7) ("Kennedy also held that an ultimate financial loss by the victim is not required"). It is a principle of long standing that repayment of stolen funds by the defendant does not relieve the defendant of criminal liability. *See*, *e.g.*, *McGeever v. State*, 239 Wis. 87, 93, 300 N.W. 485 (1941) ("The repayment of money unlawfully converted is material only in so far as it may bear on the defendant's intent."). *A fortiori*, the victim's recoupment of stolen funds from another party cannot relieve the defendant of criminal liability.

Foley's argument has no merit. His conviction should be affirmed.

## CONCLUSION

For the reasons stated herein, the State of Wisconsin respectfully requests that this court affirm the judgment and order from which this appeal is taken.

Dated this 8th day, January, 2014.

Respectfully submitted,

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## 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 3,418 words.

Dated this 8th day of January, 2014.

_____

Maura FJ Whelan
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 8th day of January, 2014.

_____

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