1453B THEFT BY FRAUD: REPRESENTATIONS MADE TO AN AGENT — § 943.20(1)(d)

Statutory Definition of the Crime

Theft, as defined in § 943.20(1)(d) of the Criminal Code of Wisconsin, is committed by one who obtains title to property of another person by intentionally deceiving an agent of that person with a false representation which is known to be false, made with intent to defraud, and which does defraud the owner of the property.

State's Burden of Proof

Before you may find the defendant guilty of this offense, the State must prove by evidence which satisfies you beyond a reasonable doubt that the following eight elements were present.

Elements of the Crime That the State Must Prove

1. (Name) was the owner of property.

2. (Name) was the agent of the owner.

   An agent is a person authorized to act on the owner's behalf.[1]

3. The defendant made a false representation to the agent.

   This requires that the false representation be one of past or existing fact. It does not include expressions of opinions or representations of law.[2]

   IF THERE WAS A PROMISE IN ADDITION TO THE REPRESENTATION OF PAST OR EXISTING FACT, ADD THE FOLLOWING PARAGRAPH USING "ALSO INCLUDES." IF THE ONLY REPRESENTATION WAS A PROMISE, STRIKE THE

PREVIOUS TWO SENTENCES AND GIVE THE FOLLOWING PARAGRAPH INSTEAD, USING "IN THIS CASE MEANS."

[A false representation (also includes) (in this case means) a promise made with intent not to perform it, if the promise is a part of a false and fraudulent scheme.][3]

4. The defendant knew the representation was false.

5. The defendant made the representation with intent to deceive the agent and to defraud the owner.

This requires that the defendant made the representation with the purpose to deceive the agent and defraud the owner or that the defendant was practically certain that (his) (her) representation would deceive the agent and defraud the owner.

ADD THE FOLLOWING IF SUPPORTED BY THE EVIDENCE:

[It is not required that the defendant knew the identity of the owner.][4]

6. The defendant obtained title[5] to the property of the owner by making the false representation to the agent.

IF MONEY WAS OBTAINED, USE THE FOLLOWING:

[Money is property. Title to money is obtained by gaining possession.]

IF PROPERTY OTHER THAN MONEY WAS OBTAINED, USE THE FOLLOWING:

[Title to property may be obtained by [execution and delivery of a (deed) (bill of sale) (conditional sales contract) (land contract) (assignment) (other instrument transferring ownership)] [sale and delivery of the property] [gift] [gaining possession of property through a lease.][6]

7. The agent was deceived by the representation.

"Deceived" means "misled."

8. The owner was defrauded by the representation.

This requires that the owner of property did in fact part with title to property in reliance (at least in part) on the false representation.[7]

Deciding About Intent

You cannot look into a person's mind to find intent. Intent must be found, if found at all, from the defendant's acts, words, and statements, if any, and from all the facts and circumstances in this case bearing upon intent.[8]

Jury's Decision

If you are satisfied beyond a reasonable doubt that all eight elements of this offense have been proved, you should find the defendant guilty.

If you are not so satisfied, you must find the defendant not guilty.

IF FELONY THEFT IS CHARGED, A JURY DETERMINATION OF VALUE OR OTHER FACT MUST BE MADE. ADD THE FOLLOWING IF THE EVIDENCE WOULD SUPPORT A FINDING THAT THE VALUE OF THE PROPERTY WAS MORE THAN THE AMOUNT STATED IN THE QUESTION. SEE WIS JI-CRIMINAL 1441B FOR OTHER PENALTY-INCREASING FACTS.[9]

[Determining Value]

[If you find the defendant guilty, answer the following question:

("Was the value of the property obtained more than $100,000?"

Answer: "yes" or "no.")

("Was the value of the property obtained more than $10,000?"

Answer: "yes" or "no.")

("Was the value of the property obtained more than $5,000?"

Answer: "yes" or "no.")

("Was the value of the property obtained more than $2,500?"

Answer: "yes" or "no.")

"Value" means the market value of the property at the time of the theft or the replacement cost, whichever is less.[10] Before you may answer "yes," you must be satisfied beyond a reasonable doubt that the value of the property was more than the amount stated in the question.]

ADD THE FOLLOWING FOR FELONY CASES INVOLVING MORE THAN ONE THEFT FROM THE SAME OWNER "PURSUANT TO A SINGLE INTENT AND DESIGN," AS PROVIDED IN § 971.36(3)(a).[11]

[In determining the value of the property obtained, you may consider all thefts that you are satisfied beyond a reasonable doubt were from the same owner and committed by the defendant pursuant to a single intent and design.]

COMMENT

This instruction is based on Wis JI-Criminal 1453, which was originally published in 1967 and revised in 1977, 1983, 1988, 1991, 2003, and 2006. This revision was approved by the Committee in February 2019; it updated the text and footnote 9 to reflect a new penalty category.

This instruction is for violations of § 943.20(1)(d) that involve representations made to the agent of the owner of the property. If representations were made directly to the owner, see Wis JI-Criminal 1453A. Representations communicated via a third person do not necessarily involve an agency relationship. See State v. Timblin, 2002 WI App 304, 259 Wis.2d 299, 657 N.W.2d 89, discussed in footnote 2, Wis JI-Criminal 1453A.

The basic offense is a Class A misdemeanor. The penalty increases to a felony if the value of the stolen property exceeds specified amounts. This amount was increased to $2,500 by 2001 Wisconsin Act 16, effective date: September 1, 2001, and changed again by 2001 Wisconsin Act 109. See footnote 9, below. The penalty increases to a Class H felony in six situations specified in sub. (3)(d), which are addressed by Wis JI-Criminal 1441B.

See §§ 971.32, 971.33, and 971.36 with respect to pleading, evidence, subsequent prosecutions, and what constitutes "ownership" and "possession" in theft cases. Prosecuting more than one theft as a single crime under § 971.36(3) is addressed in connection with the determination of the value of stolen property in bracketed material at the end of the instruction.

Multiple counts of theft by fraud were found to be appropriate when each required proof of a fact the other did not. State v. Swinson, 2003 WI App 45, 261 Wis.2d 633, 660 N.W.2d 12.

1. A fraudulent representation may be communicated via a third person without that third person being an agent of the defendant or the owner. See, for example, State v. Timblin, 2002 WI App 304, 259 Wis.2d 299, 657 N.W.2d 89, discussed in footnote 2, Wis JI-Criminal 1453A.

2. A false representation to an agent of the owner is within the statute. The Committee is of the opinion that if the representation is made in writing, addressed to a corporation or a partnership, etc., it is made directly to the owner, but if addressed to an officer or employee, it is made to an agent of the owner.

3. See § 943.20(1)(d). The statute changes old case law to the effect that a false promise was not sufficient to satisfy the statute. See, e.g., State ex rel. Labuwi v. Hathaway, 168 Wis. 518, 170 N.W. 654 (1919). The false promise must be part of a "false and fraudulent scheme." § 943.20(1)(d). This means that the defendant must have made the promise without any intention of carrying the promise out and for the purpose of causing the victim to part with his property. The mere failure to carry out the promise alone is, necessarily, not sufficient to support a conviction. See Melli and Remington, "Theft – A Comparative Analysis," 1954 Wis. L. Rev. 253, 271; Platz, "The Criminal Code," 1956 Wis. L. Rev. 350, 374-75; Baldwin, "Criminal Misappropriations in Wisconsin – Part I," 44 Marq. L. Rev. 253, 283-84 (1960-61).

4. The Committee concluded that the defendant need not know the identity of the person who was ultimately defrauded, as where, for example, the fraudulent representations are not made directly to the ultimate victim. See, for example, State v. Timblin, 2002 WI App 304, 259 Wis.2d 299, 657 N.W.2d 89, discussed in footnote 2, Wis JI-Criminal 1453A.

5. It is the opinion of the Committee that it is unnecessary that the defendant obtain full legal title to support a conviction under this section, although the section does specifically refer to obtaining "title." Obtaining property under a conditional sales contract, for example, would support a conviction under this section. See Whitmore v. State, 238 Wis. 79, 298 N.W. 194 (1941); Baldwin, "Criminal Misappropriations in Wisconsin - Part I," 44 Marq. L. Rev. 253, 280-81 (1960-61). Also see note 6, below.

"Property of another" is defined by §§ 939.22(28) and 943.20(2)(d).

The proper construction of "obtains title" was discussed by the Wisconsin Court of Appeals in State v. O'Neil, 141 Wis.2d 535, 416 N.W.2d 77 (Ct. App. 1987). The O'Neil decision held that the defendant need not personally receive title to the property to satisfy the statute's requirement that title be "obtained." The court noted that the version of Wis JI-Criminal 1453 then in effect was inconsistent with this holding since it defined the fourth element as requiring that "there must have been a transfer of title from the owner to the defendant." The 1988 revision of the instruction deletes that phrase.

In the O'Neil case, the defendant was the interim director of a corporation that did business with Eau Claire County. Based on records altered by the defendant, the county was overbilled. The funds so obtained were deposited in the corporation's account. The court of appeals held that O'Neil "obtained" the money even though she did not directly receive it herself:

> If a person induces another to part with money by fraudulent misrepresentations, then title to that property has been obtained within the meaning of the statute. The crime is complete when the title has been obtained. 141 Wis.2d 535, 536-37.

For a case like O'Neil, a definition of "obtains" would apparently be acceptable if it provided: "'Obtains' means to induce another to part with title to property." In the Committee's judgment, depending on the facts of the case, such a definition might not go far enough. The common meaning of "obtains" seems to have two aspects: relinquishing of title by the owner and receipt by someone else. It is the receipt aspect that O'Neil leaves open. It was not a problem in O'Neil because of the defendant's close connection with the actual recipient of the money (director of the corporation). It could be argued that a complete definition ought to include an expression of the required relationship between the defendant and the actual recipient.

6. In State v. Meado, 163 Wis.2d 789, 472 N.W.2d 567 (Ct. App. 1991), the court concluded that "the phrase 'obtains title to property,' as used in § 943.20(1)(d), Stats., is intended to include cases where a person induces another to part with property under a lease agreement by fraudulent representation." 163 Wis.2d 789, 799. Meado had obtained a van from a dealer under a lease agreement. He gave the dealer a check as the down payment and the check bounced. The check was written on an account that was closed before the check was written; Meado had also given a false home address to the dealer. The court said that Meado had gained the benefit of the van through false representation, thereby violating "the leading idea" of the statute which is "to prohibit the deprivation of the owner's property by fraudulent, non-violent means." 163 Wis.2d 789, 798.

7. Section 943.20(1)(d) requires that the defendant obtain title to the property by deceiving the victim and that the victim be defrauded by the false representation. See Frank v. State ex rel. Meiers, 244

Wis. 658, 660, 12 N.W.2d 923 (1944); Palotta v. State, 184 Wis. 290, 199 N.W. 72 (1924). The victim is not under a duty to investigate the truth of the representations, and any negligence by the victim in not discovering the fraud is not a defense. See State v. Lambert, 73 Wis.2d 590, 243 N.W.2d 524 (1976); State v. Lunz, 86 Wis.2d 695, 273 N.W.2d 767 (1979); and Palotta v. State, supra.

What now appears at elements 6 and 7 was revised in 1983 as suggested by State v. Kennedy, 105 Wis.2d 625, 314 N.W.2d 884 (Ct. App. 1981). Kennedy also held that an ultimate financial loss by the victim is not required: ". . . the victim's final accounting is irrelevant." 105 Wis.2d at 640.

8. This instruction on finding intent is a shorter version of a longer statement commonly used in the standard instructions. The Committee concluded that this shorter version is appropriate for most cases. The complete, traditional statement is found at Wis JI-Criminal 923A. If the case involves a promise made with intent not to perform it, it is appropriate to add reference to "failure to act" to this paragraph. See footnote 3, supra.

9. The jury must make a finding of the value of the stolen property if the felony offense is charged and if the evidence supports a finding that the required amount is involved. Heyroth v. State, 275 Wis. 104, 81 N.W.2d 56 (1957). While value may not, strictly speaking, be an element of the crime, it determines the range of permissible penalties and should be established "beyond a reasonable doubt." The Committee concluded that if the misdemeanor offense is charged, the jury need not make a finding as to value.

The amounts determining the penalty were changed twice during the 2000-2001 legislative session. The amount making the offense a felony was increased to $2,500 by 2001 Wisconsin Act 16, effective date: September 1, 2001. The penalty structure was revised again by 2001 Wisconsin Act 109 [effective date: February 1, 2003].

A new category – value exceeding $100,000 – was added by 2017 Wisconsin Act 287 [effective date: April 18. 2018]. The penalties provided in subs. (3) (a) through (cm) are as follows:

- if the value of the property does not exceed $2,500, the offense is a Class A misdemeanor;
- if the value of the property exceeds $2,500 but not $5,000, the offense is a Class I felony;
- if the value of the property exceeds $5,000 but not $10,000, the offense is a Class H felony;
- if the value of the property exceeds $10,000, the offense is a Class G felony; and,
- if the value of the property exceeds $100,000, the offense is a Class F felony.

The questions in the instruction omit the upper limits of the categories for Class I, Class H, and Class G felonies; it is no defense that the value was actually greater than the amount alleged. More than one question may be presented to the jury, however. If the evidence would allow a reasonable jury to find, for example, that the value did not exceed $10,000 but did exceed $5,000, the two relevant questions could be submitted.

The other facts that increase the penalty to the felony level are addressed in Wis JI-Criminal 1441B.

10. Section 943.20(2)(d).

11. Section 971.36 sets forth a number of rules relating to the pleading and prosecution of theft cases. Subsection (3) allows the prosecution of more than one theft as a single crime under certain circumstances:

> (3) In any case of theft involving more than one theft, all thefts may be prosecuted as a single crime if:
>
> (a) The property belonged to the same owner and the thefts were committed pursuant to a single intent and design or in execution of a single deceptive scheme;
>
> (b) The property belonged to the same owner and was stolen by a person in possession of it; or
>
> (c) The property belonged to more than one owner and was stolen from the same place pursuant to a single intent and design.

The material in the instruction addresses the situation defined in subsec. (3)(a): more than one theft from the same owner, pursuant to a single intent and design. There is no Wisconsin case law interpreting this aspect of § 971.36. But the Committee's conclusion that it may be dealt with most effectively as part of the value question is supported by the case law on related issues, as described below.

State v. Spraggin, 71 Wis.2d 604, 239 N.W.2d 297 (1976), dealt with the receipt of several articles of stolen property. Spraggin was charged with a felony offense, based on the receipt of multiple stolen articles (valued at more than $500) at one time. The applicable statute, § 943.34, did not have a provision like § 971.36, so the court held that lumping multiple articles together was proper only if they were received at one time. If there were separate receipts, separate misdemeanor charges would have been required, and a felony charge could not be supported. The case was presented to the jury as a felony, but the jury found the value of the goods received as $180. The court entered judgment on the basis of the felony conviction, apparently relying on the prosecutor's contention that a 25-inch color TV was worth more than $500. The supreme court reversed, holding that, at most, two misdemeanors were committed.

The Spraggin court held that presenting the case to the jury solely as a felony "was in effect a decision on the grade of the offense, which is clearly an issue only for the jury." (81 Wis.2d 604, 615, citing State v. Heyroth, the case holding that finding value in a theft case is for the jury.) The court went on to point out that there are optional ways of proceeding in a case like this:

> Since variances between the allegations and the proof may be beyond the control of the state, see: People v. Smith (1945), 26 Cal.2d 854, 161 Pac.2d 941; State v. Niehuser (Or. App. 1975), 533 Pac.2d 834; People v. Roberts (1960), 182 Cal.App.2d 431, 6 Cal. Rptr. 161, one option is to charge in the alternative. Likewise, the defense could request, or the state on its own, could submit the alternative charges of a single or multiple receptions, when, as in cases of lesser included charges, see: Devroy v. State (1942), 239 Wis.2 466, 1 N.W.2d 875; State v. Melvin (1970), 49 Wis.2d 246, 181 N.W.2d 490, a reasonable view of the evidence reveals that there is a reasonable basis for conviction on either. With the alternatives phrased in terms of separate or joint receptions of multiple stolen items, the jury may decide on the evidence and thereafter grade the offense through the establishment of value.

71 Wis.2d 604, 616-17.

Submitting the issue to the jury seems to be required by the Spraggin case because it goes to "the grade of the offense." This is consistent with the position the Committee has taken in similar situations in the past: if a fact determines whether a different range of penalties applies (e.g., changes a crime from a misdemeanor to a felony or from one class of felony to another), it is for the jury; if a fact only influences the length of possible sentence within a statutory range, it is for the judge.

The Committee concluded that it would be more effective, or at least more efficient, to leave the multiple item decision for the value question alone. The instruction for the offense can be used without change for either a misdemeanor or a felony charge. If satisfied that the offense was committed with regard to "any property," the jury should find the defendant guilty. Then, in determining value, the jury is instructed to "consider all thefts you are satisfied beyond a reasonable doubt were from the same owner and committed by the defendant pursuant to a single intent and design."