1453C THEFT BY FRAUD: FAILURE TO DISCLOSE AS A REPRESENTATION – § 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 that person by failing to disclose a fact that (he) (she) had a duty to disclose, done with intent to defraud, and which does defraud that person.

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 six elements were present.

Elements of the Crime That the State Must Prove

1. The defendant obtained title[1] to the property of (name of victim).

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.][2]

2. The defendant obtained title to the property of (name of victim) by failing to disclose a fact to (name of victim).

3. The defendant had a duty to disclose that fact.

A duty to disclose a fact exists under the following circumstances:[3]

• the fact is material to the transaction; and,

• the defendant knew that (name of victim) was about to enter into the transaction under a mistake as to the fact; and,

• the fact was peculiarly and exclusively within the knowledge of the defendant, and (name of victim) could not reasonably be expected to discover it; and,

• (name of victim) reasonably expected disclosure of the fact.

4. The defendant failed to disclose the fact with intent to deceive and to defraud (name of victim).

This requires that the defendant failed to disclose the fact with the purpose to deceive and defraud (name of victim) or that the defendant was practically certain that (his) (her) failure to disclose the fact would deceive and defraud (name of victim).

5. (Name of victim) was deceived by the failure to disclose the fact.

"Deceived" means "misled."

6. (Name of victim) was defrauded by the failure to disclose the fact.

This requires that (name of victim) did part with title to property in reliance (at least in part) on the failure to disclose.[4]

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.[5]

Jury's Decision

If you are satisfied beyond a reasonable doubt that all six 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.[6]

[Determining Value]

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

("Was the value of the money used more than $100,000?"

Answer: "yes" or "no.")

("Was the value of the money used more than $10,000?"

Answer: "yes" or "no.")

("Was the value of the money used more than $5,000?"

Answer: "yes" or "no.")

("Was the value of the money used 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.[7] 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).[8]

[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

Wis JI-Criminal 1453C was originally published in 2008. This revision was approved by the Committee in February 2019; it updated the text and footnote 6 to reflect a new penalty category.

This instruction is for violations of § 943.20(1)(d) that involve failure to disclose facts to the owner of the property. See State v. Ploeckelman, 2007 WI App 31, 299 Wis.2d 251, 729 N.W.2d 784, discussed in footnote 3. For cases involving an agent of the owner, see Wis JI-Criminal 1453B for possible changes in the instruction. Representations communicated via a third person do not necessarily involve an agency relationship.

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 7, 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. 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).

"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 Wis JI-Criminal 1453 deleted 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, that a definition might not go far enough. The common meaning of "obtains" appears 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.

2. 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.

3. This definition is based on the standard adopted in State v. Ploeckelman, 2007 WI App 31, 299 Wis.2d 251, 729 N.W.2d 784:

> ¶18. A representation can be acts or conduct. In Kaloti Enters., Inc. v. Kellogg Sales Co., 2005 WI 111, our supreme court laid out the circumstances where a failure to disclose can constitute a representation. The court concluded:
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> A party to a business transaction has a duty to disclose a fact where: (1) the fact is material to the transaction; (2) the party with knowledge of that fact knows that the other party is about to enter into the transaction under a mistake as to the fact; (3) the fact is peculiarly and exclusively within the knowledge of one party, and the mistaken party could not reasonably be expected to discover it; and (4) on account of the objective circumstances, the mistaken party would reasonably expect disclosure of the fact.

If a duty to disclose exists, the failure to disclose is a representation.

4. 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 note 7, Wis JI-Criminal 1453A.

5. 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.

6. 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).

[In the context of this offense, the "property" is the money used for purposes other than paying the claims due.] 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.

7. Section 943.20(2)(d). The "value of the property" is the value of the property the defendant received due to the failure to disclose. Note the final sentence of sec. 943.20(2)(d): "If the thief gave consideration for, or had a legal interest in, the stolen property, the amount of such consideration or value of such interest shall be deducted from the total value of the property."

8. 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:
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> (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."

