

**COURT OF APPEALS
DECISION
DATED AND FILED**

June 17, 2014

Diane M. Fremgen
Clerk of Court of Appeals

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. See WIS. STAT. § 808.10 and RULE 809.62.

**Appeal Nos. 2013AP1722-CR
2013AP1723-CR**

**Cir. Ct. Nos. 2011CF002291
2011CF005654**

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT I**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

DAVID PHILLIP FOLEY,

DEFENDANT-APPELLANT.

APPEALS from judgments of the circuit court for Milwaukee County: DAVID A. HANSHER, Judge. *Affirmed.*

Before Curley, P.J., Fine and Brennan, JJ.

¶1 BRENNAN, J. David Phillip Foley appeals judgments of conviction entered after a jury found him guilty of one count of theft by fraud, as party to a crime, one count of issuing a worthless check greater than \$2500, and

two counts of bail jumping.¹ He argues that there was insufficient evidence to support the jury's verdict as to the theft-by-fraud count. We disagree and affirm.

BACKGROUND

¶2 On May 24, 2011, the State filed a complaint, charging Foley, as relevant to this appeal, with theft by fraud, contrary to WIS. STAT. § 943.20(1)(d) (2011-12),² for “intentionally ... obtain[ing] 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.” The parties agree that the following facts were shown at trial.

¶3 In February 2011, Foley wrote two separate personal checks to Dr. Anthony Krausen to pay for an elective surgical procedure, a face lift, performed by Dr. Krausen. Both checks were returned because the accounts from which they were to be drawn were closed.

¶4 Sometime in March 2011, after his checks to Dr. Krausen were returned, Foley wrote a \$10,000 check from his E*Trade account made payable to his business, Sport ‘N Cuts barbershop. Thereafter, Foley gave the \$10,000 check to his business partner Rick Bystra, who, on March 17, 2011, deposited the check

¹ The jury found Foley guilty of theft by fraud, as party to a crime, and of issuing a worthless check greater than \$2500 in Milwaukee County Circuit Court Case No. 2011CF2291. The jury found Foley guilty of two counts of bail jumping in Milwaukee County Circuit Court Case No. 2011CF5654. The cases were joined before the trial court, and Foley filed a notice of appeal as to each case. We granted Foley's motion to consolidate the cases for appeal. However, the only issue Foley raises before this court is whether there was sufficient evidence to support his conviction for theft by fraud in Case No. 2011CF2291.

² All references to the Wisconsin Statutes are to the 2011-12 version unless otherwise noted.

in the Sport 'N Cuts account at Anchor Bank. Foley told Bystra not to spend any of the money right away because he had bills he had to pay first. The E*Trade account never had sufficient funds to cover the \$10,000 check Foley wrote to Sport 'N Cuts. Foley concedes that it is reasonable to infer that he knew that there were insufficient funds in the E*Trade account to cover the \$10,000 check.

¶5 On March 21, 2011, Foley asked Bystra to write him a check for \$7000 from the Sport 'N Cuts account. Bystra did so. On March 22, 2011, Foley returned to Anchor Bank and completed two transactions.

¶6 First, Foley cashed the \$7000 check Bystra had written him from the Sport 'N Cuts account at Anchor Bank. While the Sport 'N Cuts account contained more than \$10,000 at the time Foley cashed the check, that balance included the \$10,000 E*Trade check deposit Bystra had made on March 17, 2011. Prior to the E*Trade deposit, the account never had a balance in excess of \$2900. Second, Foley used the \$7000 check Bystra issued Foley from the Sport 'N Cuts account to obtain a cashier's check from Anchor Bank payable to Dr. Krausen.

¶7 Foley presented the check to Dr. Krausen who cashed it. Anchor Bank claimed that it suffered a loss of \$5380.72, that is, the amount of the overdraft caused by the \$7000 cashier's check after the \$10,000 E*Trade check bounced.

¶8 The jury convicted Foley of one count of theft by fraud, as party to a crime. Judgment was entered accordingly, and Foley appeals.

DISCUSSION

¶9 Foley argues that there is insufficient evidence to support the jury’s conclusion that he committed theft by fraud against Anchor Bank because: (1) he “made no false representation to Anchor Bank,” rather, he only made false representations to Bystra; and (2) Anchor Bank lost nothing because the \$7000 check Bystra issued to Foley left Bystra with a “legal obligation ... to pay [the amount of] the check even if it were dishonored.” His arguments are entirely without merit.

¶10 When reviewing an insufficiency-of-the-evidence claim, we give great deference to the jury’s determination and view the evidence in the light most favorable to the State. *See State v. Hayes*, 2004 WI 80, ¶57, 273 Wis. 2d 1, 681 N.W.2d 203. If more than one inference can be drawn from the evidence, we must adopt the inference that supports the conviction. *State v. Hamilton*, 120 Wis. 2d 532, 541, 356 N.W.2d 169 (1984). We will not substitute our own judgment for that of the jury unless the evidence is so lacking in probative value and force that no reasonable jury could have concluded, beyond a reasonable doubt, that the defendant was guilty. *State v. Poellinger*, 153 Wis. 2d 493, 507, 451 N.W.2d 752 (1990). Under this standard of review, we conclude that the record is sufficient to uphold the conviction in this case.

¶11 Theft by fraud, as defined in WIS. STAT. § 943.20(1)(d), is committed by one who:

[o]btains 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.

Theft by fraud requires the State to prove, by evidence beyond a reasonable doubt, the following seven elements: (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 to defraud the owner; (5) the defendant obtained title to the property of the owner by the false representation; (6) the owner was deceived by the representation; and (7) the owner was defrauded by the representation. WIS JI—CRIMINAL 1453A.

¶12 Foley first challenges the sufficiency of the evidence to prove the second element, to wit, that he “made a false representation to” Anchor Bank. Foley argues that the only representation he made to Anchor Bank was the presentation of the \$7000 check that Bystra made out to Foley from the Sport ‘N Cuts account. Because the check was not a forgery, Foley contends that he did not make any misrepresentations to Anchor Bank. However, he admits that he made false representations to Bystra to convince Bystra to issue him the \$7000 check.

¶13 It is well-established law that a defendant need not directly communicate with the victim of his fraudulent scheme to be guilty of theft by fraud. *State v. Timblin*, 2002 WI App 304, ¶31, 259 Wis. 2d 299, 657 N.W.2d 89. In fact, WIS JI—CRIMINAL 1453A provides for just such a situation, stating that:

It is not required that the defendant directly communicated with the owner [of the stolen property]. 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 [of the stolen property] and that it would influence the owner’s conduct in the transaction.

Id. at 1-2.

¶14 In his brief to this court, Foley admits: (1) that he gave Bystra a \$10,000 check from the E*Trade account, knowing that there were insufficient funds to cover the check; (2) that Bystra gave Foley a \$7000 check from the Sport ‘N Cuts account, at Foley’s request, because Bystra was falsely led to believe that the \$10,000 E*Trade check was valid; (3) that Foley presented this \$7000 check to Anchor Bank, knowing that it was not backed by sufficient funds; and (4) that Foley then used the \$7000 check made out to him by Bystra from the Sport ‘N Cuts account to obtain a \$7000 cashier’s check from Anchor Bank. It was reasonable for the jury to find, based on these facts conceded by Foley, that Foley’s representation to Bystra—primarily that Foley had sufficient funds to pay the \$10,000 check written to Sport ‘N Cuts from Foley’s E*Trade account—“would be repeated to” Anchor Bank and be used to influence Anchor Bank to issue Foley a \$7000 cashier’s check despite a lack of funds in the Sport ‘N Cuts account.

¶15 Foley also claims that there was insufficient evidence to support the jury’s verdict that he defrauded Anchor Bank because Bystra, having written the \$7000 check upon which the cashier’s check to Foley was issued, was liable to Anchor Bank for the \$7000. To begin, Foley’s argument in that regard is wholly undeveloped. “A party must do more than simply toss a bunch of concepts into the air with the hope that either the ... 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). Second, Foley fails to respond to the State’s argument that, as a general matter, the fact that a fraud victim might somehow be made whole by civil law remedies has no bearing on whether the victim in fact was the victim of a theft. Unrefuted arguments are deemed

admitted. *See Charolais Breeding Ranches, Ltd. v. FPC Secs. Corp.*, 90 Wis. 2d 97, 109, 279 N.W.2d 493 (Ct. App. 1979).

¶16 In sum, we conclude that the record is sufficient to uphold the conviction.

By the Court.—Judgments affirmed.

Not recommended for publication in the official reports.

