

**COURT OF APPEALS
DECISION
DATED AND FILED**

August 7, 2012

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 No. 2010AP3069

Cir. Ct. No. 2004CF2137

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT I**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

JOSHUA T. HOWARD,

DEFENDANT-APPELLANT.

APPEAL from an order of the circuit court for Milwaukee County:
JEAN A. DiMOTTO, Judge. *Affirmed.*

Before Hoover, P.J., Peterson and Mangerson, JJ.

¶1 PER CURIAM. Joshua Howard appeals an order denying his WIS. STAT. § 974.06 (2009-10)¹ postconviction motion in which he sought to vacate his

¹ All references to the Wisconsin Statutes are to the 2009-10 version.

guilty plea or to be resentenced for conspiracy to commit theft by fraud. The issues Howard raises on appeal substantially expand upon the issues raised in the postconviction motion. We limit our review to issues properly preserved by the postconviction motion. In the motion, Howard argued: (1) there was no factual basis for the plea because there was no false representation; (2) it violated due process for the State to charge Howard with theft of phone service and then, in Howard's initial appeal, transform the charge to one of theft of electricity; and (3) Howard could not be convicted of a felony because the value of the electricity consumed by the telephone service was not established.² We reject these arguments and affirm the order.

BACKGROUND

¶2 The complaint alleged that Howard, a prison inmate, and his accomplices conspired to create false telephone accounts with intent to never pay the phone bills. The "burn-out phone scam" involved a person pretending to be someone other than himself or herself who applied for telephone service at a specific address. When the bills were sent to the listed address, they were ignored and went unpaid. The phone company, SBC, subsequently cut off phone service, but only after the conspirators generated \$40,000 in phone service fees.

¶3 The second amended information charged conspiracy to commit theft by fraud:

² Howard's postconviction motion also challenged the court's order to reimburse the cost of standby counsel. The circuit court granted Howard relief on that issue. Howard also argues that the issues raised in the postconviction motion were not procedurally barred by his earlier postconviction motion and appeal because the issues arise from this court's opinion affirming his conviction. We need not address that issue.

whereby the conspirators did combine for the purpose of obtaining title to the property of SBC, having value exceeding \$10,000, by intentionally deceiving SBC with a false representation known by the conspirators to be false, viz. a false promise to pay for telephone service accounts, which representation was made with intent to defraud and which did defraud SBC

Pursuant to a plea agreement, Howard pled guilty to the second amended information and the State dismissed four felony charges and agreed to recommend a ten-year sentence consecutive to sentences Howard was then serving.

¶4 Howard stipulated to the facts contained in the criminal complaint to provide a factual basis for the plea. Howard was asked, “So that in essence, you made a false promise to pay for telephone service accounts, and that representation was with intent to defraud SBC and it did defraud SBC?” Howard responded, “Yes.” The court also asked Howard whether he understood that the value of the telephone service was “almost \$40,000,” and Howard said he did. The State requested joint and several restitution for the losses directly attributable to crimes alleged in the information totaling \$38,178.85.

¶5 At the sentencing hearing, the court indicated that it would award restitution of \$42,214.67, at which time Howard’s counsel objected and indicated that the State and SBC were only seeking \$38,178.85. The State confirmed that amount, and the trial court accepted the concession and ordered joint and several liability in that amount.

¶6 Howard then filed a postconviction motion arguing there was no factual basis for the guilty plea because telephone services did not constitute “property” as defined in WIS. STAT. § 43.20(2)(b). He also challenged the restitution order, contending his counsel was ineffective when he stipulated to the amount of restitution. The court denied the postconviction motion and Howard

appealed. We affirmed the judgment and order, concluding telephone services are included in the definition of property because they are an applied form of electricity and fall within the term “electricity” in WIS. STAT. § 943.20(2)(b). *State v. Howard*, No. 2007AP1877-CR, unpublished slip op. ¶17 (WI App Oct. 15, 2008). We affirmed the restitution amount because the record conclusively demonstrated that Howard was aware that SBC alleged losses of over \$38,000. We noted Howard questioned the basis for that figure when he represented himself at the preliminary hearing. Instead of pursuing that issue, he decided to accept a plea agreement. He accepted appointment of counsel only after deciding to accept the plea agreement. He pled no contest knowing the State would be seeking \$38,178.85 restitution.

¶7 One of Howard’s co-conspirators, Matthew Steffes, also appealed his conviction following a jury trial. He argued that the State failed to prove that any member of the conspiracy made a false promise to pay for services. This court rejected that argument, concluding, “There is no legal requirement under WIS. STAT. § 943.20(1)(d) that at least one of the co-conspirators must expressly promise the phone company that it [the fictitious business customer] will pay for the fraudulently obtained phone lines.” *State v. Steffes*, 2012 WI App 47, ¶17, 340 Wis. 2d 576, 812 N.W.2d 529. The statute only requires that the offender intentionally deceived the victim with a false representation, known to be false, made with intent to defraud. *Id.* We concluded, “There was plenty of evidence in the record that members of the burn-out scam intentionally deceived the telephone company with numerous false representations made with express purpose to defraud the company.” *Id.*

¶8 *Steffes* also challenged the sufficiency of the evidence to prove that the conspirators stole more than \$2,500 worth of applied electricity. The court

concluded, “The market value to the telephone company of the services that the burn-out scam fraudulently obtained is the correct measure of the value of the stolen property.” *Id.*, ¶24.

DISCUSSION

¶9 Howard’s argument that there was no factual basis for the plea because there was no promise to pay for the phone service fails for numerous reasons. First, as noted in *Steffes*, a false promise expressly made is not required. Second, WIS. STAT. § 971.08(1)(b) only requires the circuit court to make “such inquiry as satisfies it that the defendant in fact committed the crime charged.” No statute requires that the court employ a particular manner in making that determination and Howard’s specific admission during the plea colloquy suffices. Third, the second amended information, to which Howard entered a guilty plea, specifically alleged a false representation consisting of a false promise to pay for telephone service accounts.

¶10 There is also no merit to Howard’s argument that his due process rights were violated by charging him with theft of telephone services and affirming his conviction on the basis of theft of electricity. His argument fails to consider the term “applied electricity” as used in this court’s opinion in which we rejected Howard’s argument that he did not steal “property.” Howard contends the only loss to SBC is the value of the electricity it used to provide the phone service. He ignores the fact that applying the electricity to telephone service enhanced its value. As we concluded in *Steffes*, the loss to SBC constitutes the correct measure of the loss and the amount of restitution. Furthermore, Howard and his attorney specifically agreed with the prosecutor’s recitation of the amount at the plea hearing and at sentencing. Finally, market value is the appropriate

measure of SBC's loss because the only alternative available under WIS. STAT. § 943.20(2)(d), the cost of replacing the property, is meaningless for a vanishing asset such as applied electricity.

By the Court.—Order affirmed.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)5.

