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NO. 40912-7-II

COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

CHRISTOPHER ROBIN BRIEJER,

Appellant,

v.

THE STATE OF WASHINGTON,

Respondent.

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BRIEF OF RESPONDENT

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I. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1: Should the jury's guilty verdicts be affirmed when there is sufficient evidence to support the verdicts. (Appellant's Assignment of Error #1)

2: Should the jury verdicts be affirmed when defendant's trial counsel's decision to not move to dismiss was objectively reasonable and did not result in prejudice. (Appellant's Assignment of Error #3)

3: Did the trial court properly admit evidence of the defendant's activities during the course of his L&I claim under ER 401, 403, and 404(b). (Appellant's Assignment of Error #2)

4: Did the trial court properly admit evidence after it reviewed briefs and heard oral argument, establishing that the court properly balanced the evidence under ER 403 and ER 404(b). (Appellant's Assignment of Error #4.)

II. STATEMENT OF THE CASE

A jury convicted Christopher Robin Briejer of fifty-six (56) counts of First Degree Theft, by Color or Aid of Deception, based on a false reopening application for benefits he filed with the Department of Labor and Industries and his false statements made to an independent medical examiner in support of his reopening application.

Briejer had an industrial injury on February 2, 2000. II RP 27[1]. He filed an application for benefits with the Department of Labor and Industries (L&I), and the claim was accepted based on a lumbar strain.

[1] The State will use the following format to refer to the Report of the Proceedings: I RP (June 3, 2010); II RP (June 7, 2010); III RP (June 8, 2010); IV RP (June 9, 2010); V RP (June 10, 2010); VI RP (June 11, 2010); and VII RP (July 19 2010).

Id.; CP Plaintiff's Exhibit 4.[2] The claim was closed that same year, after Briejer attended the doctor only once, and had x-rays taken of his lower back that came back normal. *Id.* at 30, 33, 51; CP Plaintiff's Exhibit 6.[3] He did not attend the prescribed physical therapy. *Id.* at 30. On January 13, 2004, four years later, Briejer filed to reopen the prior back claim with L&I. *Id.* at 30; CP Plaintiff's Exhibit 5.[4] On the reopening application, Briejer stated that his current symptoms were low back pain that was going into the left leg. *Id.* at 33. In response to the question, "[d]id your condition worsen due to another injury or accident either on or off the job?" Briejer responded "no." *Id.* Additionally, Briejer did not disclose that he had been working in self-employment on the date he last worked, and instead put that he was working for Phil's Precision Siding. II RP 32. In response to the question, "[h]ave you had any new injuries or illnesses since the date of the claim closure?" Briejer responded "yes, ankle and wrist problems." *Id.* at 33.

To determine if the current back symptoms were a worsening of the original back injury, Briejer's attending physician, Dr. Shonnard,

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[2] Document was designated as supplemental clerk's paper, but will be referred to by exhibit number as Superior Court states the exhibits will just be forwarded to the Court of Appeals.

[3]. Document was designated as supplemental clerk's paper, but will be referred to by exhibit number.

[4] Document was designated as supplemental clerk's paper, but will be referred to by exhibit number.

recommended to L&I that Briejer attend an independent medical examination (IME), stating he was "unaware of any specific trauma to [Briejer's] ankle or back." *Id.* at 43–46, 82; III RP 196, 224. Further Dr. Shonnard's records indicated that Briejer stated that the back pain "simply crept up on him slowly without any specific injury." III RP at 195.

Briejer attended an IME with Dr. Sean Ghidella, an orthopedic surgeon. II RP 50, 54; III RP 182, 186. Dr. Ghidella examined Briejer and asked him questions to "indicate whether the condition was caused or aggravated by the original industrial injury." II RP 55–7; III RP 188. Briejer denied any new accidents. III RP 198–203, 220. When Dr. Ghidella asked Briejer about any new injuries, Briejer stated he had an injury to his ankle but "that it was in no way related to the industrial claim." *Id.* at 202, 203, 223. Briejer did not disclose how the ankle injury occurred. *Id.*

Dr. Ghidella asked Briejer about his employment and Briejer stated that he had stopped working as a carpenter on October 3, 2003. When asked why he had stopped working on that date, Briejer stated it was due to his surgery and he anticipated being able to return to work shortly based on how well he was doing and how well he was progressing after the back surgery. III RP 200 - 201. Briejer had surgery on his back after

requesting his claim be reopened but before he attended the IME. II RP 53. Based on Briejer's statements that there had been no intervening back injuries or accidents, that Briejer had continued to work in the construction industry since 2000, and there was no other explanation for the worsening of Briejer's back, Dr. Ghidella recommended the back claim be reopened. II RP 61; III RP 205, 206, 220. L&I reopened the claim March 16, 2004 with an effective date of December 10, 2003 (the date on the reopening application form as the first date of treatment). II RP 61–62; CP Plaintiff's Exhibit 8.[5]

Beginning in 2008, L&I Fraud Adjudicator Alan Gruse began to investigate Briejer's L&I claim, which was prompted by an anonymous tip that Briejer had hiked up Mount Rainer. II RP 76–77. Based upon the tip information, Gruse again reviewed Briejer's medical records and found a reference to Briejer having multiple broken bones due to extreme sporting activities. *Id.* at 79. Gruse then tried to determine where Briejer may have been treated for those injuries and eventually requested medical records from Harborview Medical Center, Good Samaritan, and additional records from Dr. Shonnard. *Id.* at 79 – 80.

During the investigation, Gruse received a report from Harborview Medical Center referring to a crushed ankle injury Briejer had suffered on

[5] Document was designated as supplemental clerk's paper, but will be referred to by exhibit number.

October 3, 2003. *Id.* at 80–1. The report indicated that Briejer fell from an eight-foot tall scaffolding while self-employed on that date, which was the same day Briejer had listed on the Application to Reopen Claim form as the "last date of work." *Id.* at 82, 81.

On the morning of October 3, 2003, Briejer fell eight feet onto four-inch wide rocks and chunks of concrete. III RP 127–28. He landed feet-first, crushing the subtalar joint in his ankle. II RP 81. Such a fall typically injures one's heels, lower back, and hips. III RP 211. A fall does not typically cause a subtalar joint crush, which more commonly results from a forceful twist. *Id.* 212-13.

Gruse requested an opinion from Dr. Tencer, a biomechanical engineer at the University of Washington, regarding what impact the October 3, 3003 fall might have on Briejer's back. *Id.* at 83. Dr. Tencer's opinion was that the crushed ankle demonstrates that there was sufficient force on Briejer's back from the fall to cause a spinal injury. *See* IV RP 68–87. Dr. Tencer testified, "I can say that to a high level of certainty the forces match. In other words, the force that fractured the ankle is similar to the force that would cause damage to the spine." IV RP 87.

Gruse forwarded to Dr. Ghidella the previously undisclosed medical reports regarding Briejer's fall on October 3, 2003, and all medical treatments that L&I had discovered, including an emergency

room visit on the day of his fall. II RP 83–4. Dr. Ghidella stated that in his opinion more probably than not, the fall that occurred on October 3, 2003, was the independent cause of the herniated disc and caused the lumbar region pain, on a more probable than not basis. *Id.* at 84; III RP 205, 210–12. Dr. Ghidella testified that had he been aware of the October 3, 2003 fall at the time of the IME in 2004, he would not have recommended L&I reopen the previous back claim. *Id.*

Gruse requested the additional opinion from Dr. Ghiella so that medical evidence would inform him as to how to proceed on Briejer's L&I claim. II RP 83, 84. Based on the results of Dr. Ghidella's report, Fraud Adjudicator Gruse, determined that L&I benefits for Briejer should immediately end. *Id.* at 84–5.

Between January 13, 2004 and April 28, 2009, Briejer received: 121 state warrants (checks) totaling $258,944.64 for time loss compensation; vocational retraining totaling $31,651.12; and medical services totaling $75,650.91. II RP 68. Each warrant for time loss compensation that Briejer cashed amounted to over $1,500.00. The State charged Briejer with 57 counts of First Degree Theft on October 22, 2009. CP 1–33. On June 3, 2010, Briejer was re-arraigned on a First Amended Information. CP 63 - 95.

Trial began on June 3, 2010 at which time the court heard both

parties' motions *in limine*. I RP 3–37; CP 48-62, 43-46. During argument, Briejer sought to suppress evidence of the recreational activities that had prompted L&I to investigate his claim based on relevancy and prejudice. I RP 33–34. The State argued the evidence was interwoven with the story of the crime since those activities led to the discovery of Briejer's deception. *Id.* at 34–36. The court denied Briejer's motion to exclude after hearing arguments from both sides. *Id.* at 38.

Testimony began on June 7, 2010. The jury returned guilty verdicts on all counts but count 55. VI RP 160–69; CP 178 - 234. The court sentenced Briejer to 43 months in prison, which was the low end of the standard range sentence. VII RP 28; CP 243-261. Briejer filed a Notice of Appeal on the same day that he was sentenced. CP 266.

III. ARGUMENT

A. The State Presented Sufficient Evidence To Persuade A Reasonable Trier Of Fact That Briejer Knowingly Deceived L&I

On a challenge to the sufficiency of the evidence, this court must decide whether, viewing the evidence in the light most favorable to the State, any rational trier of fact could have found all of the required elements of the crime beyond a reasonable doubt. *Jackson v. Virginia*, 443 U.S. 307, 319, 99 S. Ct. 2781, 61 L. Ed. 2d 50 (1979): *State v. Green*, 94 Wn.2d 216, 221, 616 P.2d 628 (1980). All reasonable inferences must

be drawn in favor of the State and interpreted most strongly against the defendant. *State v. Salinas*, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992). In a challenge to the sufficiency of evidence, the Appellant "admits the truth of the State's evidence and all inferences that can reasonably be drawn from it." *State v. Herman,* 138 Wn. App. 596, 602, 158 P.3d 96, 99 (2007), *citing State v. McNeal*, 145 Wn.2d 352, 360, 37 P.3d 280 (2002). "Credibility determinations are for the trier of fact and cannot be reviewed on appeal." *State v. Camarillo*, 115 Wn.2d 60, 71, 794 P.2d 850 (1990), *citing State v. Casbeer*, 48 Wn. App. 539, 740 P.2d 335, (1987). Thus, this Court must defer to the trier of fact on issues of conflicting testimony, credibility of witnesses, and persuasiveness of the evidence. *State v. Walton*, 64 Wn. App. 410, 415–16, 824 P.2d 533 (1992). The elements of a crime may be established by direct or circumstantial evidence, one being no more or less valuable than the other. *State v. Delmarter*, 94 Wn.2d 634, 638, 618 P.2d 99 (1980).

Briejer was charged with Theft in the First Degree, by Color or Aid of Deception, under RCW 9A.56.030(1)(a), and 9A.56.020(1)(b). To prove Briejer committed Theft in the First Degree the State had to prove each of the following elements beyond a reasonable doubt:

1) That on a date certain, Briejer, by color or aid of deception obtained control over property of another or the value thereof;

2) That the property exceeded $1,500[6];
3) That Briejer intended to deprive the other person of the property; and
4) That the acts occurred in the State of Washington.

RCW 9A.56.030(1)(a), RCW 9A.56.020(1)(b). *See* CP 119 - 175. By color or aid of deception is defined as the:

> "deception operated to bring about the obtaining of the property or services; it is not necessary that deception be the sole means of obtaining the property or services;"

RCW 9A.56.010(4). Such deception occurs when the defendant knowingly:

> a) creates or confirms another's false impression which the actor knows to be false; or
> b) fails to correct another's impression which the actor previously has created or confirmed.

RCW 9A.56.010(5)(a)(b). *See also*, CP 110–112.

The plain language of the theft by color or aid of deception statutes does not require an "express misrepresentation." *State v. Wellington*, 34 Wn. App. 607, 610, 663 P.2d 496, 499 (1983), *rehearing denied, review denied* 100 Wn.2d 1006, (1983). Instead the statutes "focus on the false impression created rather than the falsity of any particular statement." *Id.* Reliance is established if the deception in some measure operated as inducement, but deception need not be the sole means of inducing the

[6] This case was charged before the 2009 changes to RCW 9A.56.030, which increased the value required for Theft First Degree to $5000. *See* Session Laws 2009 c 431.

victim to part with his or her property. *State v. Casey*, 81 Wn. App. 524, 529, 915 P.2d 587 (1996), *citing State v. Zorich*, 72 Wn.2d 31, 34, 431 P.2d 584 (1967).

The evidence and testimony presented by the State established beyond a reasonable doubt that the Briejer knowingly deceived L&I and that deception resulted in his receipt of benefits from L&I that he would not have otherwise been entitled to. Among the evidence presented by the State was the testimony of an independent medical examiner, as well as medical documents and forms completed by Briejer or containing information provided by Briejer. The jury heard testimony and viewed evidence that, Briejer filed an L&I application to reopen an old back claim; that he did so with full knowledge that he had a new accident on October 3, 2003. That at the time he had the accident he was working in self-employment, had not elected L&I coverage, and would not have had L&I coverage. II RP 14 -15, 86 -87.

Briejer completed the worker's information section on the form to reopen his old back claim. At the top of this form, in pre-printed text, is the following information: "Important: . . . if you have had a new injury at work, complete a new Report of Industrial Injury in lieu of this application." In completing this form, despite the express instructions that a new injury requires a new form, Briejer initiated an affirmative act of

deception, as he effectively declared that there had been no new injury at work. II RP32–33, 88, CP Plaintiff's Exhibit 5.

There may be a reasonable presumption that a person could have misunderstood the instructions or mistakenly completed this form. However, the jury was also presented with evidence that Briejer was not unfamiliar with the L&I process, having previously filed eight (8) claims with L&I. Additionally, the evidence of Briejer's deliberate actions to deceive is further demonstrated by his other responses on the same form. As, on this same form, appears the following question: "Did your condition worsen due to another injury or accident either on or off the job? Briejer answered this question by checking the box "NO." *Id.* at 33, 88, 91–92.

Briejer's deceptive actions were conscious and deliberate, as he chose to implicate his attending physician, Dr. Shonnard, informing him that the back pain "simply crept up on him slowly without any specific injury." Dr. Shonnard, in referring Briejer's case to an independent medical examiner, noted that he was "unaware of any trauma to [Briejer's] ankle or back." *Id.* at 43–46, 82, III RP 196, 224.

Additionally, Briejer acted deceptively, and knowingly, when he responded to direct questions asked of him by the IME doctor, whom he knew and understood was tasked with determining if the new symptoms

were related to the old back claim or some other source. After reviewing the medical records, which lacked any reference to the fall that occurred on October 3, 2003, Dr. Ghidella verified with Briejer that the medical records were true. III RP 198. Dr. Ghidella asked "Is there something that I am missing, do you need to change anything?" *Id.* Briejer's response was, "Nope, that's how it went." *Id.* Briejer's response was an affirmative act of deception, indicating that the medical records were complete when he knew they were not.

When Dr. Ghidella asked about Briejer's ankle, Briejer said it was, "in no way related to the industrial claim." *Id.* at 202–3. He did not disclose that the ankle injury occurred from a serious fall while he was at work. *Id.* Briejer affirmatively withheld the fact he had fallen from an eight foot scaffolding on October 3, 2003. In the specific context of being examined for purposes of determining the cause of the pain to his back, anything Briejer did or said outside of explicitly informing the IME doctor of his fall, acted to create a false impression that there was no other explanation than the prior injury at work.

When Dr. Ghidella asked Briejer why he had stopped working on October 3, 2003, Briejer implied that he had stopped working due to his back. III RP 200. Again, he did not inform Dr. Ghidella of the fall that occurred on that same date, thus knowingly withholding and

misrepresenting important information which eventually led to his L&I back claim being reopened. *Id.*

In *George* the court noted "in many acts of thefts by deception, something falsely described is given in exchange to induce the transaction." *State v. George*, 132 Wn. App. 654, 660–61, 133 P.3d 487 (2006). That notion holds true here. By creating the false impression that he had no relevant accident between 2000 and 2003, in part by making that indication on a physical form, and then later confirming that with Dr. Ghidella, Briejer exchanged a falsely described account of his medical and work history in order to secure benefits from L&I.

Finally, Briejer's multiple acts of deception induced L&I to pay him benefits. L&I presumes that claimants disclose information about injuries honestly and completely, and any doubts are resolved in favor of the claimant. II RP74. The original L&I back claim resulted in Briejer: 1) attending only one doctor's appointment concerning the injury; 2) the x-rays of his back were normal; 3) Briejer never attended the prescribed physical therapy; and 4) the original claim was opened and closed within six months. In this instance, the only means of gaining the information necessary to evaluate whether or not the new alleged back pain was due to the old back claim was from Briejer.

Therefore, L&I sent Briejer to an IME to determine if the new

back symptoms were related to the prior industrial injury or were the result of something else. *Id* at 44–6. Dr. Ghidella testified he relies on the accuracy and honesty of patients. III RP 200. Dr. Ghidella also testified that Briejer did not disclose his eight foot fall from a scaffolding and this is information he would expect Briejer to disclose. Therefore, Dr. Ghidella had no other possible explanation for the new occurrence of back pain, other than it being related to the original injury.

Further, Dr. Ghidella stated he would not have made the recommendation to L&I that the prior back claim should be reopened, had he known of the fall. However, because Briejer withheld this information, he created the false impression of the absence of any intervening events and continued to facilitate that impression with both affirmative statements and deliberate omissions. Such actions induced L&I to reopen the old claim and pay benefits. *See Id.* at 212.

Applying the standard required for a challenge to the sufficiency of the evidence, viewing the evidence in the light most favorable to the State, any rational trier of fact could have found all of the required elements of the crime beyond a reasonable doubt. The evidence is this case was overwhelming and no rational trier of fact could have found otherwise.

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B. The Trial Court Did Not Abuse Its Discretion When It Admitted Evidence Of Briejer's Hiking And Off-Road Driving Activities

The admissibility of evidence is within the sound discretion of the trial court, and a reviewing court will reverse only when the trial court abuses its discretion. *State v. Atsbeha,* 142 Wn.2d 904, 913–14, 16 P.3d 626 (2001). An abuse of discretion occurs only when no reasonable person would take the view the trial court adopted. *Id.* Washington courts call this standard a "manifest abuse of discretion." *State v. Mason,* 160 Wn.2d 910, 933–34, 162 P.3d 396 (2007). Discretion is abused if it is exercised on untenable grounds or for untenable reasons. *State ex rel. Carroll v. Junker,* 79 Wn.2d 12, 26, 482 P.2d 775 (1971).

Briejer moved to exclude "any evidence regarding his mountain climbing, four-wheeling, housework, yard work, or hiking." I RP 33. When asked why this evidence should be excluded, the defense counsel argued it was irrelevant, that it would confuse the jury, and it was prejudicial. *Id.* at 33 – 35.

The State responded that the evidence of Briejer's mountain climbing, four-wheeling, and other extreme sports, was relevant to how the subsequent investigation and prosecution was started. Scrutiny of Briejer's industrial injury claims began, several years after the re-opening of the claim, because of the tip to L&I about Briejer climbing Mount

Rainer. I RP 35 - 36. Understanding why Fraud Adjudicator Gruse researched Briejer's claim, and had an investigation started, gave credibility to the investigation. *Id.*

The trial court stated to defense counsel, "[Briejer] came to their attention because of these extreme activities, including being pictured on top of Mt. Rainer." After a response from both the State and defense, the court ruled to would the evidence. I RP 36 – 36.

1. The Evidence Was Relevant And Properly Admitted Under ER 401

The evidence of hiking and "extreme sports" explained how L&I discovered Briejer's undisclosed fall, thus it was relevant to the complete history of Briejer's theft. Background evidence of why an investigation began is relevant to the crime charged and may be admitted. *State v. Bonner*, 21 Wn. App. 783, 587 P.2d 580 (1970). Additionally, "even minimally relevant evidence is admissible." *State v. Darden,* 145 Wn.2d 612, 621, 41 P.3d 1189 (2002).

In *Bonner*, the defendant was convicted of unlawful possession of a controlled substance with intent to deliver. *Id* at 787–88. The appellate court held that police testimony outlining the history of the drug problem and drug enforcement in Thurston County, admitted to give background to

the investigation and drug sting that led to the defendant's arrest, was relevant and properly admitted. *Id.* at 794.

The evidence in Briejer is analogous to the evidence in *Bonner*. The tip that Briejer was hiking, and medical reports indicating sporting activity, prompted the investigation that revealed Briejer's undisclosed work related accident. Helping the jury understand why an investigation begins lends credibility to the discovery of facts that meet the elements of a crime. Without such background evidence, juries are left to wonder if investigators randomly probed the defendant for guilt where there was no reason to be suspicious in the first place. The State made this argument before the court during the motions *in limine*. I RP 36.

2. The Argument That The Evidence Should Be Excluded Based On ER 404(b) Should Not Be Considered By This Court As It Was Not Raised Below.

The court should not consider this new argument this because it was never raise below. An error under ER 404(b) will not be considered by a reviewing court for the first time on appeal. *Mason,* 160 Wn.2d at 933 (holding ER 404(b) challenge was not preserved because defendant objected to the relevance of weapons and sexual relations, not that evidence should have been excluded as "prior bad acts."); *State v. Fredrick,* 45 Wn. App. 916, 922, 729 P.2d 56 (1986) ("an objection based solely on prejudice is insufficient to preserve appellate review on ER

404(b) grounds.") Briejer's counsel never argued that the evidence of hiking and "extreme sports" was a bad act admitted to prove a general propensity of any kind. Additionally, the State did not offer or argue that the evidence should be used for such a purpose. Thus, this issue is not properly before this court.

Additionally, although Briejer listed ER 404(b) as an objection in his trial brief, Briejer never argued that the evidence violated what ER 404(b) prohibits, character evidence. During the motions *in limine*, Briejer argued that the evidence of his hiking and of other activities was "irrelevant," "confusing," and "very prejudicial," invoking the language of ER 401 and ER 403. I RP 33–37. Briejer did not claim that those activities were "prior acts" admitted to prove character. Because Briejer failed to make the argument at trial, this Court should not consider that argument now.

3. The Evidence Was Relevant And Properly Admitted Under The Principle Of *Res Gestae* And Was Not Offered Or Admitted Under ER 404(b)

If this Court finds Briejer properly articulated an ER 404(b) argument, the questioned evidence was nonetheless an inseparable part of the crime charged (*res gestae*). A defendant's prior acts are admissible if they are so connected in time, place, or circumstances that presenting such activity is necessary "to complete the story of the crime on trial." *State v.*

Lane, 125 Wn.2d 825, 831, 889 P.2d 929 (1995) (quoting *State v. Tharp,* 27 Wn. App. 198, 204, 616 P.2d 693 (1980)).

The admitted evidence linked the theft to the subsequent investigation and prosecution. Scrutiny of Briejer's industrial injury claims began, several years after the claim was filed, because of the tip to L&I about Briejer climbing Mount Rainer and continued in part due to the discovery of extreme sporting activity. II RP77–78. Without the tip and subsequent discoveries, it is unlikely Briejer's deception would have been uncovered. Understanding why Fraud Adjudicator Gruse researched Briejer's claim gave credibility to the investigation.

Briejer's case is distinguishable from *State v. Trickler*, 106 Wn. App. 727, 25 P.3d 445 (2001). In *Trickler*, the defendant's landlord called the police when he suspected the defendant had stolen his property. *Id.* at 729. When the police searched the defendant's truck, they discovered a stolen credit card belonging to a third person. *Id.* at 730. The prosecution in *Trickler* presented witnesses attesting to sixteen (16) pieces of stolen property belonging to the landlord, even though the defendant was not charged with any crime related to that property. *Id.* at 733 - 734. In reversing Trickler's conviction, the reviewing court held that "[w]hile the events leading up to the discovery of the stolen credit card were relevant and somewhat probative, it was not shown that [the defendant's]

possession of other allegedly stolen items was an inseparable part of his possession of the stolen credit card . . . ." *Id.* at 729, 734. The sixteen (16) pieces of stolen property at issue in *Trickler* is not similar to the questioned evidence in this case.

The limited evidence of Briejer engaging in hiking and extreme sports was not submitted in order to prove some general propensity, or even to show a "prior bad act." Instead, as the state argued during the motion *in limine*, the evidence was admitted to explain to the jury why an investigation of Briejer's reopened claim began after he had been receiving L&I benefits continuously for nearly five years. I RP 33–37.

4. The Evidence Was Probative and Minimally Prejudicial Under ER 403.

Exclusion of evidence under ER 403 is an extraordinary remedy, and the burden is on the defendant to show that the probative value is substantially outweighed by the undesirable characteristics. *Carson v. Fine*, 123 Wn.2d 206, 224–25, 867 P.2d 610 (1994). Even "if the balance is substantially in favor of prejudice, the judge need not exclude the evidence, but merely has the discretion to do so." *Lockwood v. AC & S, Inc.*, 44 Wn. App. 330, 350, 722 P.2d 826 (1986), *aff'd* 109 Wn.2d 235, 744 P.2d 605 (1987).

The evidence of hiking and extreme sports was minimally prejudicial, if at all. It was clear from both the motion *in limine* and the testimony of Mr. Gruse that the evidence related only to how the fraud was discovered and was therefore relevant. Additionally, the evidence was not the focus of Mr. Gruse's lengthy testimony.

5. The Trial Court's Failure To Articulate Its Own Balancing On The Record Was Not Error

A court is generally not required to articulate its reasons for ruling on the admissibility of evidence. However, on-the-record balancing is required under ER 404(b) and ER 609. Nonetheless, such on-the-record balancing is not required under ER 403. *State v. Gould*, 58 Wn. App. 175, 184, 791 P.2d 569 (1990) ("[defendant] cites no authority for the proposition, and we know of none, that a balancing on the record is required outside of the 404(b) and 609 contexts"). *See also*, *U.S. v. Sangrey*, 586 F.2d 1312, 1315 (9th Cir. 1978) (it is desirable for the trial judge's balancing analysis to appear in the record, but its absence does not necessarily warrant reversal).

However, even when the trial is required to undertake the balancing process on the record, failing to do so is not an automatic reversible error. *See*, *State v. Gogolin*, 45 Wn. App. 640, 645, 727 P.2d 683 (1986) (a trial court's failure to articulate its balancing process on the

record doesn't make admissible evidence inadmissible). Failing to balance on the record is harmless when there is a sufficient record to determine that, had the court explicitly balanced prejudice and probative value, it would have admitted the evidence. *State v. Carelton,* 82 Wn. App. 680, 686-87, 919 P.2d 128 (1996); *see also*, *State v. Tharp*, 96 Wn.2d 591, 599–601, 637 P.2d 961 (1981) (admitting evidence of prior conviction without balancing prejudice on the record was harmless error).

In this case, no evidence was admitted under ER 404(b), therefore, no on-the-record balancing was required. Even if the Court finds such balancing was required, the trial court adopted the state's balancing arguments from oral argument. I RP 34 – 37. There is no error if the record shows the assigned trial court adopted one party's express argument as to the weighing of probative and prejudicial value. *State v. Pirtle,* 127 Wn.2d 628, 650–51, 904 P.2d 245 (1995). The court's balancing is sufficient if the record reflects that the court made a "conscious determination." *Carelton,* 82 Wn. App. at 685. In *Pirtle*, the trial court heard argument on whether evidence of the defendant's prior felony assault was more probative as to motive than it was prejudicial. *Pirtle,* 127 Wn.2d at 648–49. Immediately after, the court declared that the evidence was indeed more probative than prejudicial. *Id.* at 650. The reviewing court held it was "clear from this record that the court agreed

with the prosecutor and did not need to reiterate the prosecutor's argument." *Id.* at 651.

In the present case, the trial court adopted the State's argument in allowing the limited evidence that Briejer climbed Mt. Rainer and participated in "extreme sporting" events and disagreed with Briejer's argument regarding undue prejudice. Argument went back and forth during the motions *in limine*; Briejer and the State each spoke four times, the transcript of which spans five pages of the record. I RP 33–37. At one point, the court interrupted Briejer's counsel to reiterate the State's position and sharpen the area of disagreement: "they're arguing, very simply, that this is how Mr. Briejer came to the attention. . . ." *Id.* at 36. In so doing, the court implied its agreement with the State. The court clearly adopted the State's argument when it declared, "I'm going to allow it," *Id.* at 37, right after the State finished speaking, finding it did not need to reiterate the State's argument.

6. Even If The Trial Court Should Not Have Admitted The Evidence Under ER 401, 403, Or 404(b), It Was Harmless

Even if the trial court should not have admitted the evidence that Briejer climbed Mt. Rainer and participated in "extreme sporting" events under ER 401, 403, or 404(b), any error was harmless. Evidentiary errors under ER 404 are not of constitutional magnitude, so this Court must

determine whether the trial outcome would have differed if the error had not occurred. *See, State v. Jackson,* 102 Wn.2d 689, 689 P.2d 76 (1984). Where there is sufficient evidence proving each element of the crime when considering the untainted evidence, the improper evidence is unlikely to have affected the outcome. *See, State v. Thach*, 126 Wn. App. 297, 310–11, 106 P.3d 782 (2005); *see also Carelton,* 82 Wn. App. at 686.

Admitting the evidence in this case was harmless because participating in sports type actives is not a bad thing that that inherently causes feelings among jurors, unlike prior criminal acts do. Furthermore, the defense did not prove there was any real prejudice in allowing the evidence of Briejer's sporting activities. Additionally, the testimony relating to Briejer's hiking Mt. Rainer was only introduced briefly. The testimony about his extreme sport activity was minimal. Gruse responded to specifically directed questions about how Briejer's activities became known and why these activities were the catalyst to the investigation for fraud. II RP 76–79, 81. The video of Briejer hiking was not shown or described in significant detail. *Id.* When speaking to injuries on medical reports, Gruse referred to "extreme sports" just twice. *Id.* at 79. Out of the over 480 pages of trial record, the questioned evidence was only even mentioned on six (6) pages, including clarifying the basis for the testimony by defense counsel. *Id.* at 76–79, 81, 93. Gruse's testimony

that, after the discovery of Briejer's 2003 fall, "*the working theory of the case suddenly turned* to, not so much whether he was able to climb a mountain, but whether falling eight feet on hard ground [caused the back injury]," made clear to the jury that the *fall* was the underlying theory for deception. *Id.* at 81. Gruse further testified this particular case had "*nothing to do with* [Briejer] *climbing Mount Rainer*." *Id.* at 93.

Given that the State's witnesses hardly mentioned the evidence of hiking or extreme sports, any error in this case is harmless. The evidence of hiking or sports, which only one witness briefly referred to, was inconsequential compared to the eleven State's witnesses who carefully explained how Briejer fell from an 8 foot scaffolding, how that fall injured his back, how he filed to reopen his old claim, and how he carefully failed to disclosed that fall. The state presented sufficient evidence to persuade a reasonable juror beyond a reasonable doubt that Briejer was guilty. Informing the jury that Briejer had once hiked Mount Rainer was of minor significance compared to the overwhelming amount of other evidence of his deception as a whole.

C. Passing on the Option to Move to Dismiss Does Not Constitute Ineffective Assistance of Counsel.

To demonstrate ineffective assistance of counsel, the defendant must prove both that the attorney's performance was: (1) deficient, i.e.,

that it fell below an objective standard of reasonableness; and (2) the deficiency resulted in prejudice, i.e., that there is a reasonable possibility that, but for the deficient conduct, the outcome of the proceeding would have differed. *State v. Thomas*, 109 Wn.2d 222, 225-26, 743 P.2d 816 (1987). This standard is "highly deferential and courts will indulge in a strong presumption of reasonableness." *Id.* at 226. Deference is given to trial counsel's performance in order to "eliminate the distorting effects of hindsight." *State v. Herman,* 138 Wn. App. at 605, (internal quotation marks deleted, citations omitted.) Reviewing courts presume that counsel's conduct constituted sound trial strategy. *In re Rice*, 118 Wn.2d 876, 888–89, 828 P.2d 1086 (1992). As such, decisions regarding trial strategy or tactics will not establish deficient performance by counsel. *Herman,* 138 Wn. App. at 605. Under *Strickland* courts ascertain prejudice by asking whether the defendant received a fair trial. *State v. Carter*, 56 Wn. App. 217, 224, 783 P.2d 589 (1989); *Strickland v. Washington*, 466 U.S. 668, 684–86, 104 S. Ct. 2052 (1984).

There is no merit to the argument that Briejer's trial counsel was ineffective because he did not move to dismiss at the close of the State's case. This motion is generally referred to as a directed verdict or "half time motion." Briejer's brief is silent on the standard and the merits of such motion. The trial court reviews a "half time motion," not to

determine whether the evidence has been established "beyond a reasonable doubt," but whether the State has made a primia facie showing. *See*, *State v. Wilson*, 74 Wn.2d 243, 249 (fn 3), 444 P.2d 141, *rehearing denied*, (1968). The trial court accepts as true the nonmoving party's evidence and all favorable inferences arising from it. *Stiley v. Block*, 130 Wn.2d 486, 504, 925 P.2d 194 (1996). The motion must be denied if there is *any* competent evidence or reasonable inference from which reasonable minds might reach conclusions that could sustain a verdict. *Saunders v. Lloyd's of London*, 113 Wn.2d 330, 335, 779 P.2d 249 (1989) (emphasis added).

Briejer makes the unqualified assertion that the prejudice required for ineffective assistance is established merely because trial counsel did not seek a half time motion. Briejer states that, by failing to make a motion to dismiss at the close of the State's case, ". . . counsel limited the possibility that Mr. Briejer would be acquitted by 50 percent." Brief of Appellant at p. 22. In fact, given the standard for such a motion, the suggestion that it would have been successful is not only purely and highly speculative. In this instance, based upon the evidence presented to the jury, it is also incredibly unlikely.

Hence, to establish a claim of ineffective assistance, it is not enough to take issue with trial counsel not bringing a particular motion. It

has to be demonstrated that the conduct was deficient and but for the deficient conduct, the outcome of the proceeding would have differed. It is precisely because of the blanket and unqualified assertions like the one posed here—the failure to make half-time motion is ineffective assistance—that courts have been so clear in emphasizing that arguments for ineffective assistance must be based on more than decisions regarding trial strategies and tactics.

Even if the decision to forego the motion to dismiss was deficient, a jury finding of guilt where there was sufficient evidence does not constitute prejudice. Based upon the evidence, there is no reasonable probability that the outcome of the jury would have been different.

As Briejer is unable to demonstrate that his trial counsel's performance was deficient and thereby prejudiced him, Briejer's claim of ineffective assistance of counsel on the basis of not bringing what would have clearly been a meritless motion to dismiss, must fail.

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IV. CONCLUSION

There was sufficient evidence to convict Briejer of theft by deception. The decision by defendant's trial counsel to not move to dismiss was constitutionally adequate. Finally, the trial court did not commit reversible error when it admitted evidence that was relevant and minimally prejudicial. The decision should be affirmed.

RESPECTFULLY SUBMITTED this 23rd day of August, 2011.

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NO. 40912-7

COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, Respondent, v. CHRISTOPHER ROBIN BRIEJER, Appellant.	DECLARATION OF SERVICE

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DAISY JACOBSON declares as follows:

On Tuesday, August 23, 2011, I deposited into the United States Mail postage prepaid and addressed as follows:

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Copies of the following documents:

- Brief of Respondent
- Declaration of Service.

I declare under penalty of perjury under the laws of the state of Washington that the forgoing is true and correct.

EXECUTED this 23rd day of August, 2011, at Seattle, Washington.

DAISY JACOBSON

WASHINGTON STATE ATTORNEY GENERAL

November 02, 2011 - 10:07 AM

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