

COURT OF APPEALS, DIVISION III

STATE OF WASHINGTON

FILED

OCT 31 2011

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DIVISION III
STATE OF WASHINGTON
By _____

STATE OF WASHINGTON,

Respondent,

vs.

CHRISTOPHER A. L. KOKER,

Appellant.

BRIEF OF APPELLANT

RICHARD D. WALL, #16581
Attorney for Appellant

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TABLE OF CONTENTS

Table of Authoritiesii

I. Assignments of Error1

1. The State Failed to Present Sufficient Evidence to Support Mr. Koker’s Conviction for Second Degree Theft When It Presented no Evidence to Establish that he had Wrongfully Obtained Property or Services Having a Value Greater than \$250.00.....1

2. The Trial Court Erred by Excluding Testimony of Mr. Koker’s Physical Condition Both Prior to and After the Time Period Covered by the Information Alleging Multiple Counts of Second Degree Theft by Unlawful Receipt of L & I Benefits1

II. Statement of the Case.....2

III. Standard of Review7

IV. Argument.....8

1. The State Failed to Present Any Evidence to Establish the Value of Any Benefits that Mr. Koker May have Received Over and Above Any Benefits he Was Legally Entitled to Receive Based Upon his Physical Conditions and Limitations8

2. The Trial Court Erred by Excluding Testimony of Mr. Koker’s Physical Condition Both Before and After the Charging Period Because Such Evidence was Clearly Relevant to his Physical Condition and Ability to Perform Work During that Period of Time13

V. Conclusion.....16

CERTIFICATE OF SERVICE17

TABLE OF AUTHORITIES

United States Supreme Court Cases:

Turner v. United States, 396 U.S. 398, 405, 90 S. Ct. 642,
24 L. Ed. 2d 57 (1970).....8

Washington State Supreme Court Cases:

State v. Brown, 132 Wn.2d 529, 571-72, 940 P.2d 546 (1997).....8

State v. Guloy, 104 Wn.2d 412, 4235 P.2d 1182 (1985).....15

State v. Lee, 128 Wn.2d 151, 904 P.2d 1143 (1995).....9

State v. Maupin, 128 Wn.2d 918, 924, 913 P.2d 808 (1996).....14

State v. Salinas, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992).....7

State v. Thomas, 150 Wn.2d 821, 874, 83 P.3d 970 (2004).....7

Washington State Appellate Court Cases:

State v. Bodey, 44 Wn. App. 698, 723 P.2d 1148 (1986).....9

State v. Casey, 81 Wn.App. 524, 527-31, 915 P.2d 587,
rev. denied, 130 Wn.2d 1009, 928 P.2d 412 (1996).....9

State v. George, 161 Wn.2d 203, 208, 164 P.2d 506 (2007).....8

State v. Hull, 83 Wn. App. 786, 794, 924 P.2d 375 (1996).....8

State v. Kovac, 50 Wn. App. 117, 120, 747 P.2d 484 (1987).....7

State v. Rehak, 67 Wn.App. 157, 162, 834 P.2d 651 (1992).....8

Statutes:

RCW 51.48.020(2)8

RCW 9A.56.020(1)(b)12

RCW 9A.56.010(4).....12

Court Rule:

ER 40114

I. ASSIGNMENTS OF ERROR

1. The State Failed to Present Sufficient Evidence to Support Mr. Koker's Conviction for Second Degree Theft When It Presented no Evidence to Establish that he had Wrongfully Obtained Property or Services Having a Value Greater than \$250.00.

ISSUE: Whether there is sufficient evidence to support a conviction for theft in the second degree when the State presented no evidence at trial to establish any dollar amount by which defendant was allegedly overpaid benefits on his Labor and Industries claim.

2. The Trial Court Erred by Excluding Testimony of Mr. Koker's Physical Condition Both Prior to and After the Time Period Covered by the Information Alleging Multiple Counts of Second Degree Theft by Unlawful Receipt of L & I Benefits.

ISSUE: Whether in a trial in which the State alleges that the defendant misrepresented his physical condition and ability to work in order to obtain L & I benefits, the trial court abuses its discretion by excluding evidence of defendant's physical condition both prior to and after the time period during which he allegedly was able to work but still receiving benefits.

II. STATEMENT OF THE CASE

In 1999, Appellant Christopher Koker sustained an on-the-job injury to his lower back when he attempted to move a transmission that was attached to a broken pallet. RP 776-80. The injury caused debilitating pain, which prevented Mr. Koker from being able to work. RP 784-85. Ultimately, Mr. Koker had a total of six surgeries on his lower back, including a fusion of the vertebrae at the lower two levels of his spine. RP 254, 373-377, 663. The surgeries, however, did not eliminate Mr. Koker's pain. RP 663-64; 784.

About one month after his injury, Mr. Koker filed a claim for benefits with the Washington State Department of Labor and Industries ("Department"). RP 72-74. Mr. Koker received time-loss benefits up until his first surgery, after which the benefits were discontinued several times. RP 785-87. Mr. Koker retained counsel to represent him on his workers compensation claim, and the claim was reopened. RP 786. Ultimately, Mr. Koker was awarded continuous time-loss benefits from the date of his injury. Exh. #231-252. Between June 2006 and July 2007, L&I issued a total of 31 warrants to Mr. Koker for time-loss benefits. Exh. #203.

In 2005, Shirley Mosher, an investigator for the Department received a complaint from Mr. Koker's former employer stating that Mr. Koker had been seen working behind the counter at a gun store. RP 74. As a result of the complaint, Ms. Mosher initiated an investigation of Mr. Koker's activities. Ms. Mosher also received a tip via the internet that Mr. Koker was operating a business called "Above Average Guns and Collectables."

RP 81.

The initial investigation did not reveal any activities by Mr. Koker inconsistent with his physical capabilities and was closed. RP 83. However, the investigation was reopened a short time later when Ms. Mosher came upon a flier for "Above Average Guns & Collectables" at a gun show at the Spokane County Fairgrounds. RP 99-101.

After reopening the investigation, Ms. Mosher attended several gun shows organized by Above Average Guns & Collectables. In addition to observing Mr. Koker directly, Ms. Mosher took video of Mr. Koker involved in various activities at the shows. RP 119-93; 427-41. Ms. Mosher was assisted in her investigation by Teresa Firas and Joshua Mott, interns at the Department's fraud unit. RP 517, 590-91. Ms. Firas testified that on one occasion she observed Mr. Koker working at a store called "The Gunatorium" and obtained video footage of him at the store. RP 575. Mr. Mott testified that he conducted surveillance on Mr. Koker during a gun show at the Kootenai County, Idaho, using a covert digital button camera. RP 591-600. The video of Mr. Koker taken by Ms. Mosher, Ms. Firas and Mr. Mott was shown to the jury.

At the request of the Department, Mr. Koker was examined by an orthopedist, Dr. James Kopp, and a neurologist, Dr. Louis Almaraz. RP 221; 369-70. Based upon their examination, which lasted approximately one hour, Dr. Kopp and Dr. Almaraz concluded that Mr. Koker was exaggerating his pain and that, while not capable of doing normal activities, he was capable of engaging in "sedentary activities." RP 238, 257, 384-90. Dr. Kopp and Dr. Almaraz also concluded that Mr. Koker was capable of being employed in certain jobs categories such as sales representative and lubrication servicer. RP 258-59. At the same time, Dr. Kopp and Dr. Almaraz concluded that Mr. Koker was

not capable of being employed in several other job categories, including sales engineer, bartender, outside deliverer, and deliverer of merchandise. RP 260-61.

Dr. Kopp and Dr. Almaraz were also asked to provide an impairment rating for Mr. Koker. RP 262. Based upon their examination and Mr. Koker's medical history, they determined that Mr. Koker's impairment rating, which had previously been established at category four, should remain as a category four. RP 264-65.

After viewing video footage of Mr. Koker from the investigation conducted by Ms. Mosher, Dr. Kopp and Dr. Almaraz retroactively approved Mr. Koker for employment in two additional job categories with certain restrictions and limitations. RP 268-70, 417-18. Although Dr. Kopp acknowledged that Mr. Koker's activity as shown on the video was greater than what he had observed during the examination, Dr. Kopp declined to testify that he would have released Mr. Koker for work without actually seeing him. RP 270.

The State also presented the testimony of Theodore Becker, Ph.D., a disability analyst who was presented as an expert in forensic biomechanics. RP 289-95. Mr. Becker testified extensively about his analysis of video footage taken of Mr. Koker as part of the Department's investigation. RP 302-25. Mr. Becker testified that based upon his analysis of the video provided to him by the Department, it was his opinion that Mr. Koker was capable of performing light to medium levels of work. RP 325.

In addition to the testimony of Ms. Mosher, Ms. Farias, Mr. Mott, Mr. Becker, and Dr. Kopp and Dr. Almaraz, the State presented testimony from Aaron Spurway, a publisher who had printed advertisements for Above Average Guns & Collectables, RP 552-557, Randal Sumner, Regional Operations Manager for U.S. Bank at which Above

Average Guns & Collectables had its business account, RP 561-71, Brian Kjensmo, an events promoter who had worked with Mr. Koker and Above Average Guns & Collectables, RP 456-83, Margi Domme, an events coordinator for the Kootenai County Fairgrounds, RP 500-513, and Sean Peters, an employee of Sir Speedy Printing, which had printed fliers for Above Average Guns & Collectables. RP 518-29. Ms. Mosher, Ms. Firiias, and Mr. Mott were the only employees of the Department to testify at trial, and the testimony of those witnesses was limited to the conduct and results of the investigation.

Through the testimony of Ms. Mosher, the State introduced as exhibits payment order issued to Mr. Koker by the Department from June 2002 through July 2007. RP 94-95; Exhs. # 176 – 202. The State also introduced a series of “worker verification forms” completed by Mr. Koker between April 2006 and September 2007. RP 85-94; Exhs. #168-175. Each worker verification form contains an entry for which the claimant represents that he or she “did not perform any work, paid or unpaid, due to work-related injury or illness.” RP 90. Mr. Koker did not indicate that he had performed work on any of the forms.

After being recalled by the State, Ms. Mosher reiterated that the purpose of her investigation was to document whether a person was involved in fraudulent activity by collecting benefits while working or by misrepresenting their physical abilities and conditions. RP 603. Ms. Mosher was then asked the following question: “And based upon your investigation, was Mr. Koker entitled to those time loss checks?” RP 604. Counsel’s objection to the question was sustained by the trial court. RP 605. The State did not present any evidence that the Department had at any time made a determination

that Mr. Koker was not legally entitled to receive any benefits for the period from April 2006 to September 2007 or that he was entitled to receive benefits in an amount less than what he actually received.

The defense presented testimony from two independent physicians, Jeffrey Larson, M.D. a neurosurgeon, RP 660-61, and Philip Monroe, M.D., a general practitioner who was Mr. Koker's treating physician. RP 702-03. Dr. Larson testified that he had performed five different surgeries on Mr. Koker as a result of the injury he suffered in 1999 and that none of the treatment provided to Mr. Koker had eliminated his pain. RP 661-66.

Dr. Monroe testified that Mr. Koker's injury in 1999 has caused a lateral disk protrusion that was pushing against a nerve. RP 704. Dr. Monroe also testified that Mr. Koker's latest MRI still showed problems with his back, probably due to scar tissue from his surgeries. RP 707. Dr. Monroe testified that he believed Mr. Koker's pain was real and that, in his opinion, Mr. Koker was not able to work because he could not do any one thing on a consistent basis, even though he had good days and bad days regarding his back pain. RP 708. Dr. Monroe stated that his opinion of Mr. Koker's employability did not change after he was shown portions of the video of Mr. Koker taken by the Department. RP 708-709.

The defense also presented testimony from a number of witnesses who knew Mr. Koker and who had observed his physical condition and abilities. Each of those witnesses testified that Mr. Koker exhibited behavior consistent with significant back problems and chronic pain. RP 620-30; 639-44; 671-82; 688-92; 727-34; 748-52; 762-64; 767-70. The testimony of those witnesses, however, was limited to the time period

of July 2006 to July 2007 because of a ruling made by the trial court. The court restricted the testimony to that time frame after counsel for the State argued that evidence of Mr. Koker's condition at a later time was not relevant. RP 610-613; 656-58. During the defense case-in-chief, the trial court sustained several objections by the State to any testimony about Mr. Koker's condition after July 2007. RP 724; 732-33. In addition, several other lay witnesses for the defense were not allowed to testify at all because they had not known Mr. Koker prior to 2008. RP 658.

The jury was instructed as to the elements of theft in the second degree, including that the value of the property obtained by the defendant had to be greater than \$250.00. The jury was also instructed as to each of 26 separate counts that the value of the property obtained by Mr. Koker had to be greater than \$250.00. The jury found Mr. Koker guilty as to all 26 counts of second degree theft. Mr. Koker now appeals his conviction on all 26 counts.

III. STANDARD OF REVIEW

On a challenge to the sufficiency of the evidence in a criminal case, the reviewing court, taking the evidence in the light most favorable to the State, must determine whether a rational trier of fact could have found the essential elements of the offense beyond a reasonable doubt. *State v. Thomas*, 150 Wn.2d 821, 874, 83 P.3d 970 (2004). A claim of insufficiency of the evidence admits the truth of the State's evidence and all reasonable inferences that can be drawn from the evidence. *State v. Salinas*, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992). The inference of one fact from other facts is valid only when "it can at least be said with substantial assurance that the presumed fact is more likely than not to flow from the proved fact on which it is made to depend." *State v.*

Kovac, 50 Wn. App. 117, 120, 747 P.2d 484 (1987) quoting *Turner v. United States*, 396 U.S. 398, 405, 90 S. Ct. 642, 24 L. Ed. 2d 57 (1970).

A defendant has a constitutional right to present a defense consisting of relevant evidence. *State v. Rehak*, 67 Wn.App. 157, 162, 834 P.2d 651 (1992). A trial court's decision to admit or exclude evidence is reviewed for an abuse of discretion, and the trial court abuses its discretion when its decision is manifestly unreasonable or is based on untenable grounds or reasons. *State v. Brown*, 132 Wn.2d 529, 571-72, 940 P.2d 546 (1997).

IIV. ARGUMENT

1. The State Failed to Present Any Evidence to Establish the Value of Any Benefits that Mr. Koker May have Received Over and Above Any Benefits he Was Legally Entitled to Receive Based Upon his Physical Conditions and Limitations.

RCW 51.48.020(2) provides that any person claiming L & I benefits "who knowingly gives false information required in any claim or application under this title shall be guilty of a felony, or gross misdemeanor in accordance with the theft and anticipatory provisions of Title 9A RCW." The intent and purpose of RCW 51.48.020(2) is to treat L & I fraud as a specific species of theft and to incorporate the degrees of theft as defined in RCW 9A.56.030. *State v. Hull*, 83 Wn. App. 786, 794, 924 P.2d 375 (1996). Thus, in a prosecution for L & I fraud under RCW 51.48.020(2), the value of the benefits obtained is an element of the offense. *Id.*

First degree theft is defined as theft of property with a value in excess of \$1,500, and second degree theft is defined as the theft of property with a value less than \$1,500,

but more than \$250. *State v. George*, 161 Wn.2d 203, 208, 164 P.2d 506 (2007). To prove a defendant committed second degree theft by color or aid of deception, the State must prove that the defendant “obtained control over the property and services of another” having a value greater than \$250 as the result of deception. *Id.*, 161 Wn.2d at 211. Furthermore, it is not enough for the State to simply show that the defendant obtained something of value. Rather, the State must also show that the property or services obtained by the defendant belonged to someone else and that the defendant’s acts resulted in the victim being “deprived” of the property or services. *Id.*, at 211-13, *citing, State v. Lee*, 128 Wn.2d 151, 904 P.2d 1143 (1995).

In a prosecution for L & I fraud then, the State must show that as the result of deceptive conduct the defendant received benefits that he or she was not otherwise entitled to receive. The State must also establish that the dollar amount of the benefits unlawfully received was more than \$250. Thus, the State must prove by competent evidence that the defendant received benefits in excess of \$250 and that the defendant was either not entitled to receive any benefits, or that the difference between the amount of benefits actually received and the amount the defendant was entitled to receive is greater than \$250.

State v. Bodey, 44 Wn. App. 698, 723 P.2d 1148 (1986) illustrates this point. In *Bodey*, the defendant was prosecuted for L & I fraud under the former version of RCW 51.48.020(2), which made it a class C felony to knowingly provide false information on any L & I claim or application when the application involved an amount of \$500 or more. *Bodey*, 44 Wn. App. at 701. Bodey contended on appeal that the evidence presented at trial was insufficient to establish that he had received and overpayment of \$500 or more.

The Court of Appeals rejected that argument, noting that the Department had paid Bodey benefits of \$976 per month for over 4 months and a payment of \$1,053 per month for over five months based upon his representation that he had been earning \$3,520 per month, whereas his actual income had been only \$1,000 per month, which entitled him to receive only the minimum payment of \$253. Thus, the court concluded that a jury could reasonably find that the difference between the benefits Bodey actually received and the benefits he was entitled to receive amounted to an overpayment far in excess of \$500. *Bodey*, 44 Wn. App. at 703. Although *Bodey* predates the current version of RCW 51.48.020(2), the principles and reasoning on which the decision is based remain the same under the current law.

Here, in contrast to *Bodey*, the record is entirely devoid of any evidence as to what benefits, if any, Mr. Koker was actually entitled to receive during the applicable time period. Although both Dr. Kopp and Dr. Almaraz testified that, based upon their examination of Mr. Koker, he was capable of being employed in certain job categories and that they believed he was exaggerating his pain, they also testified that Mr. Koker was not capable of performing normal activities and that his impairment rating should remain at a level four. Neither Dr. Kopp nor Dr. Almaraz testified as to what effect, if any, their findings would have had on Mr. Koker's right to receive L & I benefits as the result of his injury during the applicable time period.

Similarly, Mr. Becker, the forensic biomechanical expert, testified only that, based upon his observations of Mr. Koker on the video taken by Department investigators, Mr. Koker was capable of performing some light to medium levels of work. Mr. Becker was not asked and did not testify as to what impact, if any, his finding would

have had on any determination by the Department as to the level of benefits, if any, Mr. Koker was entitled to receive.

Although Ms. Mosher testified generally about the L & I claims process and time-loss benefits, RP 64-73, she did not testify specifically about Mr. Koker's claim or how it was ultimately determined that he was eligible to receive benefits prior to July 2006. Ms. Mosher also did not testify that the Department had subsequently determined that Mr. Koker was not eligible to receive benefits from July 2006 to July 2007. The closest the State came to presenting any evidence as to whether Mr. Koker received more in benefits than he would otherwise have received during the applicable time period was when Ms. Mosher was asked whether, in her opinion, Mr. Koker was "entitled" to receive the benefits he was paid. Defense counsel's objection to that question was properly sustained by the trial court, as the State had not established any foundation for Ms. Mosher's opinion in that regard. Thus, the jury was never presented with any evidence from which it could reasonably have concluded that Mr. Koker was either not entitled to receive any L & I benefits during the applicable time period or that he was entitled to receive some benefits, but that in each of the twenty six instances in which he received payments from the Department, the amount he received was more than \$250 in excess of what he would otherwise have been legally entitled to receive.

It is of no avail for the State to now argue on appeal that Mr. Koker was not entitled to receive the benefits he was paid, if that is in fact true. Because the value of the property or services received by Mr. Koker as the result of any alleged deception is an essential element of each of the twenty six counts of second degree theft for which he was charged, his convictions cannot be sustained absent evidence in the record to support

a finding beyond a reasonable doubt as to that element by the jury. The jury cannot simply assume that Mr. Koker was not entitled to receive any L & I benefits because he was capable of being employed in some limited capacity. Nor can the jury speculate as to how much in benefits he might have otherwise received or what impact the conclusions of Drs. Kopp and Almaraz and the conclusions of Mr. Becker would have had on Mr. Koker's eligibility to receive benefits. Because there is no evidence in the record from which the jury could reasonably conclude the difference between the benefits Mr. Koker actually received and the benefits he was legally entitled to receive was greater than \$250, the convictions must be reversed.

For the same reasons as outlined above, the evidence adduced at trial fails to establish that any alleged act of deception by Mr. Koker was the actual cause of any benefits being paid to him by the Department. The phrase "by color or aid of deception" means that the deception "operated to bring about the obtaining of the property or services." RCW 9A.56.010(4). To satisfy that element of theft under RCW 9A.56.020(1)(b), the State must prove that the victim of the theft relied upon the defendant's deception. *State v. Casey*, 81 Wn.App. 524, 527-31, 915 P.2d 587, *rev. denied*, 130 Wn.2d 1009, 928 P.2d 412 (1996).

Here, no evidence was presented at trial to show that the Department relied Mr. Koker's alleged acts of deception in issuing benefits checks to him from July 2006 to July 2007. The investigation into Mr. Koker's claim was prompted by a complaint from Mr. Koker's previous employer. RP 74. The initial investigation into the complaint resulted in a report being forwarded to the Department's claims manager, but no action was taken based on the findings. RP 82. Later, Ms. Mosher conducted a more extensive

investigation of Mr. Koker's activities, including the use of undercover informants and video recordings of Mr. Koker. Significantly, however, Ms. Mosher never testified what action, if any, was taken by the Department as a result of that further investigation. Thus, there is no evidence in the record that the Department had at any time concluded that Mr. Koker was not qualified to receive time-loss benefits for the period of July 2006 through July 2007 or that the Department relied on any deceptive acts by Mr. Koker in paying benefits to him during that time.

Based on the evidence presented at trial, any conclusion that the Department would not have paid benefits to Mr. Koker from July 2007 through July 2007 had it been aware of the alleged deception could only be based upon mere conjecture. No claims manager or other person with authority to act on behalf of the Department in determining whether Mr. Koker was entitled to receive time-loss benefits was ever called to testify at trial. Thus, the jury could only speculate as to what action, if any, the Department might have taken as a result of Ms. Mosher's investigation. Absent such evidence, there is simply no proof that the Department relied on any deception by Mr. Koker or that any alleged deception operated to bring about his receipt of time-loss benefits.

2. The Trial Court Erred by Excluding Testimony of Mr. Koker's Physical Condition Both Before and After the Charging Period Because Such Evidence was Clearly Relevant to his Physical Condition and Ability to Perform Work During that Period of Time.

Evidence is relevant if it has "any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than

it would be without the evidence. “ ER 401. The right of a defendant to present relevant evidence in his or her defense is a fundamental element of due process of law. *State v. Maupin*, 128 Wn.2d 918, 924, 913 P.2d 808 (1996).

Here, defense counsel attempted to introduce evidence through several witnesses showing that Mr. Koker exhibited pain and limited ability to engage in physical activity prior to, during, and after the period from July 2006 to July 2007 when Mr. Koker allegedly received L & I payments as the result of misrepresentations and deception. In addition, testimony of other witnesses who observed Mr. Koker only after July 2007 was specifically excluded.

The State’s theory of the case was two pronged. First, that Mr. Koker failed to indicate on his application forms that he had engaged in work, regardless of whether he was paid for the work, and second, that he was exaggerating both his pain and his physical limitations. The trial court excluded any testimony regarding Mr. Koker’s behavior demonstrating that he was suffering from pain or limitation of physical abilities except for the precise time period applicable to the specific charges. The trial court’s expressed reason for excluding the evidence was that it was not relevant to the charged conduct.

The trial court clearly erred by excluding such evidence. Even though Mr. Koker was charged with theft of benefits only for payments issued to him between July 2006 and July 2007, evidence that he was experiencing pain and physical limitations prior to and after that period was clearly relevant to a material issue at trial. Testimony that Mr. Koker exhibited signs of pain and physical limitations prior to July 2006 and after July 2007 would clearly tend to make it more likely that he was experiencing a similar level of

pain and physical limitation during that time. It was part of the defense theory at trial that Mr. Koker's condition had not substantially changed since he first applied for and received L & I benefits, and the evidence tended to support that theory. The trial court's conclusion that the proffered evidence should be excluded because it was not relevant to any issue at trial was manifestly unreasonable and not based upon any tenable grounds.

That theory was supported by the testimony of Mr. Koker's treating physician, Dr. Monroe. However, the trial court's ruling deprived the defense of the opportunity to demonstrate that Mr. Koker exhibited obvious signs of pain and physical limitation on a fairly consistent basis following his injury and multiple back surgeries, although some days were better than others. Such evidence would have tended to contradict the State's argument that Mr. Koker's behavior as shown on the video taken during the Department's investigation was his normal behavior and that his appearance during medical examinations was the result of exaggeration and misrepresentation. As a result of the exclusion of evidence relevant to that issue, Mr. Koker was denied his constitutional right to fully present his defense as to that issue.

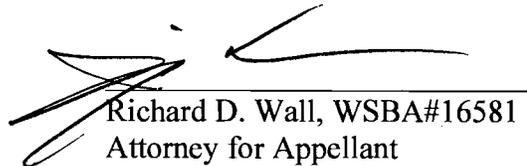
The error was not harmless. An error of constitutional magnitude is harmless only when the appellate court is convinced beyond any reasonable doubt that any reasonable jury would have reached the same result absent the error. *State v. Guloy*, 104 Wn.2d 412, 4235 P.2d 1182 (1985). Here, the question whether Mr. Koker was in fact suffering from significant pain and limitation of his physical activity during the relevant time period or whether he was "faking" was clearly central to the State's case and to the defense. The testimony of witnesses that Mr. Koker's behavior in that respect was during that time period was consistent with his behavior both before would have supported not

only the defense theory of the case, but also Mr. Koker's own testimony and credibility as a witness. Under the facts of this case, it cannot be said that beyond a reasonable doubt any jury would have necessarily reached the same result, even if the evidence had not been excluded. The trial court's error in excluding the evidence requires reversal of Mr. Koker's conviction and remand for a new trial.

V. CONCLUSION

For the foregoing reasons, this court should reverse Mr. Koker's conviction and order that all charges be dismissed on the grounds that the State failed to present sufficient evidence at trial to sustain the convictions. In the alternative, this court should reverse Mr. Koker's conviction and remand for a new trial.

Respectfully submitted this 28th day of October 2011.


Richard D. Wall, WSBA#16581
Attorney for Appellant

CERTIFICATE OF SERVICE

The undersigned hereby certifies under penalty of perjury under the laws of the State of Washington that on this date the foregoing was caused to be served on the following person(s) in the manner indicated:

Susan Sackett Danpullo, AAG
Attorney General's Office
Criminal Justice Division
800 Fifth Avenue, Suite 2000
Seattle, WA 98104-3188

By: US Mail

Dated this 28 day of October, 2011.

A handwritten signature in black ink, appearing to read "Susan Sackett Danpullo", written over a horizontal line.