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FEB 02, 2012  
Court of Appeals  
Division III  
State of Washington

NO. 29856-6-III

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**COURT OF APPEALS, DIVISION III  
OF THE STATE OF WASHINGTON**

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STATE OF WASHINGTON,

Respondent,

v.

CHRISTOPHER A. L. KOKER,

Appellant.

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**BRIEF OF RESPONDENT**

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## I. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. **Whether the jury's guilty verdicts should be affirmed when there was sufficient evidence to support the verdicts. (Appellant's Assignment of Error #1)**
2. **Whether the trial court properly excluded evidence of the defendant's physical condition both prior to and after the time period covered by the Information. (Appellant's Assignment of Error #2)**

## II. STATEMENT OF THE CASE

A jury convicted Christopher A. L. Koker of twenty-six (26) counts of Second Degree Theft, by Color or Aid of Deception, based on his failure to notify the Department of Labor and Industries (L&I) that he had returned to work and his misrepresentation of his injuries/conditions, in order to collect time-loss compensation he was not entitled to.

Koker had an industrial injury on April 1, 1999. I RP 73<sup>1</sup>; Exhibit 205. He filed an application for benefits with the Department of Labor and Industries (L&I) on May 4, 1999, shortly after he was laid off. I RP 73.

Koker received time loss compensation (wage replacement) from L&I. In order to receive time loss compensation, wage replacement, an injured worker must certify that he/she is not working and is not capable

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<sup>1</sup> The Reported of Proceedings (RP) are referred to by volume with the volume number in from of the RP, for ease of reference. For example, I RP means volume one of the RP.

of working. I RP 66, 68. Wage loss benefits are paid to a claimant until the claimant is able to return to work. IV RP 603. The worker certifies such through a worker verification form which is to be completed by the injured worker and sent to L&I. I RP 76 – 77. Koker completed many worker verification forms during his claim. V RP 829 – 830; *see also*, Exhibits 168 – 175, and 227 – 230. Koker completed eight worker verification forms between April 24, 2006 and September 20, 2007. On most of these he claimed he was not working and had not worked, paid or unpaid since 1999; on two he did not fill in the dates. I RP 85 – 94; Exhibits 168 – 175.

Each warrant (check) is accompanied by a payment order, which reads in part:

**Do not cash this warrant if you are released from work or return to any type of work during the period paid by this order of payment. Please return the warrant to Labor and Industries, Post Office Box 44293, Olympia, WA 98504. (Emphasis added.)**

I RP 96 – 97; *see also*, Exhibits 176 - 202

Based upon a tip received in late 2005, Labor and Industries Investigator Shirley Mosher was assigned to determine if Christopher Koker was working while collecting time loss compensation, specifically, whether Koker was working in a coin shop and as a vendor at gun shows. I RP 74. Additionally, there was an internet tip that stated Koker had a

business called "Above Average Guns and Collectibles." I RP 79, 81. Ms. Mosher testified that some common fraud schemes include claimants misrepresenting their physical condition to medical providers and being employed, including self-employment, while collecting time loss. I RP 63.

Ms. Mosher's initial investigation was closed because she did not find any evidence of the business; did not find Koker working at the coin shop; and did not see Koker perform any other activity that appeared to be outside of his medical restrictions. I RP 82. However, shortly after Ms. Mosher closed her initial investigation, she discovered an advertisement, in the form of a flyer, for a gun show put on by the business "Above Average Guns and Collectibles." I RP 99. The gun show was to be held on April 29 and 30, 2006. The flyer also had Koker's home telephone number on it. I RP 100. Based on this new information, Ms. Mosher's investigation was reopened. *Id.*

Ms. Mosher found a master business application for "Above Average Guns and Collectibles," which was dated April 27, 2006. I RP 105 - 106. The signature on the application was Christopher Koker and underneath the signature was his printed name. Koker was listed as

the “President” and sole owner. *Id.*; *see also* Exhibit 33<sup>2</sup>. Mr. Koker opened a business bank account for “Above Average Guns and Collectibles” at US Bank in May 2006, right after filing his Master Business Application. II RP 193; Exhibit 33; V RP 827. Prior to opening his business account, Koker used his personal account to conduct business as early as May 3, 2005, when he wrote a check to Stevens County Fairgrounds for a building rental. II RP 191 – 192. Koker also obtained flyers and event insurance using his personal account in June and August of 2005. II RP 192 – 193.

Ms. Mosher discovered several advertisements for gun shows presented by “Above Average Guns and Collectibles,” including in the form of flyers, newspaper advertisements, and newspaper-like publications such as the Tidbits. I RP 102, 121, 131; II RP 158, 159, 160 – 162, 163, 171, 185 – 188. Ms. Mosher found gun shows presented by “Above Average Guns and Collectibles” which were held on the following dates: April 29 & 30, 2006; May 6 & 7, 2006; June 4 & 5, 2006; August 26 & 27, 2006; October 7 & 8, 2006; November 2006 (Veteran’s Day weekend); February 3 & 4, 2007; May 5 & 6, 2007; June 2 & 3, 2007; October 6 & 7, 2007; and November 2007 (Veteran’s Day weekend.) I RP 99, 102 – 103, 121; II RP 158, 159, 160, 163, 171, 185. In a twelve

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<sup>2</sup> The State submitted a supplemental exhibit list to Spokane Superior Court that includes Exhibit 33.

month period (May 2006 to May 2007) Koker produced seven (7) gun shows. In addition he was a vendor at any additional five (5) shows. III RP 440.

Ms. Mosher personally observed Koker at the gun show locations on: May 5, 6, & 7, 2006; June 3 & 4, 2006; February 2 & 3, 2007; and May 5 & 6, 2007. I RP 112 – 119, 122 – 135; and II RP 164 – 170, 176 – 184. Ms. Mosher testified that at each gun show that she observed, Koker was able to walk with a normal gait; he did not limp or use a cane; and he was able to bend, squat, and run. She further observed that he was able to move quickly and lift sandwich board type signs without any problem. I RP 116, 118, 119, 135, 149; II RP 177, 178, 184. Ms. Mosher also obtained some video recordings of Koker's activities, which were entered into evidence. I RP 119 – 120, 124, 127, 137; II RP 177 – 178. *See Exhibits 5, 8, 25 & 26.*<sup>3</sup>

Koker, as the promoter of the gun shows, arranged for the place the gun shows were held; was responsible for the advertising; obtaining tables and setting up the tables; registering vendors; approving of items and prices of items to be shown at the gun shows. I RP 108 – 110; II RP 192 – 193, III RP 500 – 511, 523 – 525; V RP 817 – 819, 823 – 824; *see also,*

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<sup>3</sup> Included in State Supplemental Exhibit list (see footnote 2).

Exhibits 1, 4, 16, 22, 29, 254.<sup>4</sup> Koker also obtained the necessary insurance for the events. III RP 502 – 503. While at the gun shows he would safety lock guns, provide security, take fees from vendors, talk to vendors, take admission fees, and open and close the gun shows. I RP 108, 112 – 115, 118, 122 – 126, 134 – 135; II RP 161- 170, 176 – 178; III RP 506, 508. Koker would place signs for the guns shows and lock the doors and gates at the end of the gun shows. II RP 178, 184. Seth Koker, Koker's son, confirmed that Christopher Koker set up the gun shows and did all the activities to set up the gun shows, including scouting locations, and drawing up the way vendor tables would be set up at locations. IV RP 630 - 637.

Three gun show promoters testified regarding activities required to set up and execute gun shows. Paul Snider is a gun show and other trade shows promoter; his business is Lewis and Clark Trader and he does the business with his wife. I RP 9 - 10. Snider testified that as a promoter he and his wife are responsible for organizing the event, which includes, finding the facility, working up the dates, completing the contracts for the facilities, buying the insurance, and advertising the event. I RP 10, 24. He is responsible for inviting all the vendors, obtaining and setting up the tables, assigning vendors to area/tables, and then allow the vendors to set

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<sup>4</sup> Included in State Supplemental Exhibit list (see footnote 2).

up their tables the night before the show. I RP 10 – 12. He and his wife decide what a vendor can sell or show. I RP 13. Mr. Snider and his wife set the price for the vendor tables and admission. I RP 14. Once the show begins, Mr. Snider does the public relations, shaking hands and visiting with vendors and the public; he is also responsible for dealing with problems during the show, making sure the guns are safety checked, and providing security during the night time. I RP 18, 19, 21 -22. Mr. Snider and his wife collect the money from the vendors and have a cashier to take admission fees. I RP 23.

Brian Kjensmo also testified regarding gun shows; he is a gun show promoter, his company is Sports Connection Incorporated. III RP 456. When he first started promoting gun shows he started with three (3) shows; by 2011 he was promoting about thirty-one (31) or thirty-two (32) shows. III RP 456 – 457. As a promoter he does much the same things as described by Mr. Snider, including arranging for the venues, scouting new locations, advertising, finding vendors, arranging tables, setting up and taking down the show, and all the paperwork that is required to put on a show. III RP 457 – 465, 470 - 471.

Finally, Ms. Theresa Steuben, a gun show promoter, testified for the defense. V RP 728, 734. Ms. Steuben stated that her full time job is promoting gun shows, does seven (7) shows a year. V RP 734.

Additionally, Ms. Steuben testified that she has a physical disability, fibromyalgia, and guns show promotions has been a great job to do with her disability because she had the flexibility to move, sit, stand, or lay down when needed. V RP 740 – 741.

Dr. Monroe, Koker's attending physician, warned Koker that he should not work and collect time loss compensation. V RP 713. Additionally, Dr. Monroe testified that he was not aware that Koker was actually running the gun shows nor that he was there eight hours or more a day for three or four days a show. Such information would have and did effect his decisions regarding whether Koker could return to work. V RP 720, 722. After seeing Koker's activities on the video records, Dr. Monroe approved two jobs for Koker to do. *Id.* at 723, 725; Exhibit 256. Furthermore, Dr. Monroe stated that Koker moved much more fluidly on the video recordings than he did while he was being treated by Dr. Monroe. V RP 719, 725.

Koker was seen by two independent medical examiners, Dr. Kopp and Dr. Almaraz, at the request of L&I on May 12, 2007. II RP 223. Dr. Kopp is an orthopedic surgeon and Dr. Almaraz is a neurologist. II RP 214; III RP 360. Both doctors testified that Koker told them during the exam that he was not working and had not been able to work since his industrial injury in 1999. RP 247; III RP 373. Both doctors testified that

during the exam Koker demonstrated significant pain behaviors or exaggeration, including grimacing and moaning when he walked. II RP 237 -238, 241, 244 – 247, 250 – 253; III RP 379 – 380, 384 – 391, 398 – 411, 415. Both doctors diagnosed Koker with significant pain behaviors. II RP 256, III RP 413. Dr. Kopp described pain behaviors as willful misrepresentation. II RP 251. Dr. Almaraz stated that Koker's behaviors were exaggerated in order to create the impression of a higher disability than what actually exists. III RP 415. Based on the information gathered during the independent medical exam, both doctors released Koker to work, approving two jobs for Koker. III RP 414 – 415. However, after the IME was completed, both doctors were asked to review the video recordings of Koker's activities at the gun shows. II PR 266; III RP 416. Koker's movements on the video recordings were much more than Koker demonstrated in the exam room. II RP 266 – 267; III RP 417. Both Dr. Kopp and Dr. Almaraz agreed that the video recordings confirmed that Koker was exhibiting pain behaviors during the exam if not acting fraudulently. III RP 418.

After review of the video recordings the doctors released Koker to two more jobs. II RP268; III RP 418. Dr. Kopp stated that after viewing the video from May of 2006 it would be "reasonable to release him (Koker) as of date of May 6, 2006 video" but he could not say that he

would have done so without seeing him. II RP 268. Dr. Almaraz stated that he would have released Koker to work as of the date on the first video in May 2006. III RP 418.

Dr. Theodore Becker, a board certified disability analyst and examiner and licensed physical therapist (also known as a forensic biomechanics) also reviewed the video records of Koker at the gun shows. II RP 289 – 290, 299, 302. He testified that Koker holds his body, including the back, in a stable, normal way. II RP 322 – 323. Furthermore, that even though Koker has had back surgeries, it is obvious that “. . . the structural component is now stable and the muscles around that area are functioning well to move the body in what would be called normal activity.” II RP 323. Dr. Becker concluded that the biomechanical function of Koker’s spine is working and that Koker could return to work in a light to medium work type job. II RP 324, 325. Based upon the video recordings Dr. Becker would have released Koker to work in May of 2006, because the biomechanical functions from the video recordings in May of 2006, were the same as in the video recordings from May of 2007 and both showed normal functions. II RP 326

Koker had several witnesses testify to his physical abilities from before his industrial injury in 1999 through 2007. He called eight lay witnesses, including his mother and son. *See* ¶ IV RP 620, 639, 671, 688;

V RP 727, 745, 762, 767. Seth Koker and Barbara Koker testified to Koker's pain and activities before and after his accident in 1999 and his pain while doing gun shows. IV RP 620 – 629, 672 – 676, 680 – 681. Both witnesses indicated that Koker was active and worked regularly before the 1999 industrial accident, but after the accident he was in a lot of pain, could not do many activities, and did not work a steady job. *Id.* Barbara Koker testified that Koker's physical problems after the accident never changed, if anything, they are “. . . worse today than they've been.” IV RP 681.

Kevin Kopp testified that he had seen Koker in pain a number of times and on at least 4 occasions “in the past seven years” had to take Koker to the hospital due to Koker's back. IV RP 640 – 643. Don Stovall also testified to Koker's pain and physical limitations including Koker using a cane, being uncomfortable when he sits or stands, and bending over due to pain. IV RP 689 - 690. He also stated he had seen these same pain behaviors from Koker while at gun shows with Koker in 2006 and 2007. *Id.* Mary Lou Hawks and Thomas von Muller, testified to much the same information as the other lay defense witnesses. V RP 749 – 752; V RP 769 – 770. Theresa Steuben testified that at the gun shows she was at with Koker, he seemed to be in pain most all the time. V RP 732 – 733. Finally, Koker's pastor testified to the times he saw Koker walk with a

cane, grimace or other wise indicate that he was in pain while at church.

V RP 763 – 764.

Koker made an offer of proof regarding several additional defense witnesses, by way of testimony from Steve Rapier, outside the presence of the jury. IV RP 648 – 654. Mr. Rapier testified that he met Christopher Koker through a club, Combat Vet Riders, (a veterans helping veterans club) in the middle of 2008. IV RP 650 – 651, 653. Mr. Rapier testified that he did not know Koker in 2006 and 2007. IV RP 654. He did help Mr. Koker with a gun show Mr. Koker was promoting but that was not until 2009. *Id.* Koker wanted Mr. Rapier and other members of the Combat Vet Riders to testify to his physical movements and disabilities during the time that they knew him in 2008 and later. IV RP 651 – 652. The trial court held that the testimony of Mr. Rapier, and others with the same type of testimony from 2008 forward, was not relevant and should be excluded. IV RP 658.

Koker also called two doctors, Dr. Monroe and Dr. Larson. V RP 701 and IV 606. Dr. Larson testified to Koker's treatment and back surgeries performed, including the back fusion he performed on Koker. IV RP 661 – 663. Dr. Larson explained in detail what a back fusion entails IV RP 664 – 665. Dr. Larson last treated Koker on November 8, 2005. IV RP 669.

Between July 25, 2006 and July 10, 2007, Koker received 26 state warrants (checks) for time loss compensation through his attorney. Exhibit 203. Each payment was over \$250. *Id.*; *see also*, Exhibits 176 – 202. During that same period of time, Koker was working in self-employment and failed to notify L&I that he had returned to work or was capable of working. *See* Exhibits 168 through 175. Instead Koker affirmatively stated that he was not working and had not worked at any job, paid or unpaid since his accident in 1999. *Id.* Also, during the same time period Koker was misrepresenting his injuries and ability to work to his doctor and the IME doctors.

The State charged Koker with 26 counts of Second Degree Theft on April 23, 2009. CP 1 – 18. Before the start of trial, Koker was re-arraigned on a First Amended Information. CP 19 – 36. Testimony began on March 1, 2011. I RP 1.

During the trial there was no testimony or other evidence to indicate that Koker was entitled to part of the time-loss compensation funds he received. Koker instead argued only that he was entitled to all of the time-loss compensation as he was not working and was not exaggerating his disability. *See generally*, Christopher Koker's testimony, V RP 776 – 832.

The jury returned guilty verdicts on all counts. CP 109 = 134. The court sentenced Koker to 22 months in prison, which was the low end of the standard range sentence. CP 135 – 147. Koker filed a Notice of Appeal on April 14, 2011. CP 149 - 158.

### III. ARGUMENT

#### A. **The State Presented Sufficient Evidence To Persuade A Reasonable Trier Of Fact That Koker Obtained Funds From The Department Of Labor And Industries In Excess of \$250, By Color Or Aid Of Deception**

On a challenge to the sufficiency of the evidence, the 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).

Koker was charged with Theft in the Second Degree, by Color or Aid of Deception, under RCW 9A.56.040(1)(a), and 9A.56.020(1)(b). The State did not charge Koker under RCW 51.48.020(2), as referenced in the Appellant’s Brief. Appellant Brief at 8. In *State v. Hull*, 83 Wn. App. 786, 794, 924 P.2d 375 (1996), the court determined that the state could only charge either L&I fraud, under RCW 51.48.020(2), or Theft but could not charge both crimes. *See Id.* at n. 6. Additionally, the court did hold that both L&I Fraud and Theft required that the amount of loss must be established as an element of each of the two offenses. *Id.*

To prove Koker committed Theft in the Second Degree the State had to prove each of the following elements beyond a reasonable doubt, including value as to each count:

- 1) That on a date certain, Koker, by color or aid of deception obtained control over property of another or the value thereof;
- 2) That the property exceeded \$250<sup>5</sup>;
- 3) That Koker intended to deprive the other person of the property; and
- 4) That the acts occurred in the State of Washington.

RCW 9A.56.040(1)(a), RCW 9A.56.020(1)(b). *See* CP 31. 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 31.

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

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<sup>5</sup> This case was charged before the 2009 changes to RCW 9A.56.030, which increased the value required for Theft Second Degree to \$750. *See* Session Laws 2009 c 431.

inducement, but deception need not be the sole means of inducing the 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 value of the item taken is the fair market value. In case of a stolen check, it is the face value of the check, which establishes the amount. *State v. Lampley*, 136 Wn. App. 836, 840 – 841, 151 P.3d 1001 (2006). In the present case, not only did Koker obtain the state warrant (check), he received the full value of the face amount of the check when it was redeemed and used for his benefit. Exhibit 203; *see also* Exhibits 81, 83, 93, 95, 99, 100, 105, 107.<sup>6</sup>

The evidence and testimony presented by the State established beyond a reasonable doubt that the Koker knowingly deceived L&I through submissions of worker verification forms which he signed. I RP 85 – 94; Exhibits 168 – 175; V RP 809, 829 – 832. That deception resulted in his receipt of benefits, time-loss compensation, from L&I that he would not have otherwise been entitled to. IV RP 603; *see also* V RP 809.

The amount of the theft is easily established by the amount on the face of the warrants that were redeemed. The time-loss payments show

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<sup>6</sup> Included in State Supplemental Exhibit list (see footnote 2).

the amount of the payment is over \$250. *See* Exhibit 203. Additionally, the Payment Order that accompanied the time-loss payments included the amount of the payment. I RP95. Each order indicated an amount well over \$250. Exhibits 176 – 202.

The State proved that Koker was not entitled to the time loss checks. While it is true the trial court sustained an objection to the question posed by the State to Ms. Mosher as to whether Koker was entitled to the time loss benefits, it was sustained as being the very question the jury was to decide, not for lack of foundation. IV RP 604 – 605. The State's proof that Koker was not entitled to any of the time loss benefits is set forth below.

First, the Payment Orders specifically state:

**Do not cash this warrant** if you are released from work **or return to any type of work** during the period paid by this order of payment. (Emphasis added.)

I RP 96 – 97; *see also* Exhibits 176 – 202

Koker returned to work during the period he was collecting time loss payments. I RP 99 – 100, 105 – 106, 112 – 119, 121 - 135; II RP 158 – 162, 164 – 184; 191 – 193; . III RP 440. *See also* Exhibit 33, 5, 8, 25, 26. Therefore was not entitled to any of the warrants (checks) at issue in the 26 counts. Additionally, time loss compensation is wage replacement benefits, therefore, a jury could easily infer that Koker was not entitled to

wage replacement benefits if and when he returned to work. I RP 66, 68; IV 603; IRP 96 – 97.

Next, the State's evidence showed that Koker acted deceptively, and knowingly, by returning to work without notifying L&I. I RP 85 – 94; Exhibits 168 – 175; V RP 809, 829 – 832. The State's evidence also showed that Koker affirmatively deceived L&I by completing worker verification forms stating he was not doing any work, paid or unpaid. *Id.* Wage loss benefits are paid to a claimant until the claimant is able to return to work. IV RP 603. This demonstrates that Koker intentionally withheld his work activities from L&I, which at least in part caused L&I to pay wage replacement benefits to Koker that he was not entitled to. *See also* V RP 809.

Finally, the State proved both through lay and medical witnesses that Koker was capable of working and was deceiving L&I and medical providers as to his true capabilities during the period that he was collecting time loss compensation. II RP 237 – 238, 241, 244 – 247, 250 – 253, 251, 266 267, 323 – 326; III RP 379 – 380, 384 – 391, 398 – 411, 415, 416 – 418; V RP 713, 720 – 725; *see also* Exhibits 5, 8, 25, 26. Had L&I been aware of Koker's ability to work, he would not have received time loss compensation. I RP 66, 68, 96 – 97, IV RP 603, V RP 713.

No witness, either for the State or defense, stated that Koker was

entitled to part of the time loss payments.

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, including the value of the funds obtained. The evidence in this case was overwhelming and no rational trier of fact could have found otherwise.

**B. The Trial Court Did Not Abuse Its Discretion When It Excluded Evidence Of Koker's Physical Condition In 2008 And Later**

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). *State v. Simon*, 64 Wn. App. 948, 965, 831 P.2d 139 (1991), *reconsideration denied* (1992), *decision aff'd in part; reversed in part* (on other grounds) by *State v. Simon*, 120 Wn.2d 196, 840 P.2d 172 (1992).

Relevant evidence is evidence that tends to make a fact of consequence more or less probable. ER 401. Where the alleged acts or testimony occurred after the charging period they have no relevance to the crimes that occurred during the charging period. *See State v. Simon*, 64 Wn. App. at 965.

The State in this case only moved to exclude evidence of the defendant's condition in 2008 and later, as such was not relevant to whether Koker could work or was working in 2006 and 2007. IV RP 654 – 657. There was substantial evidence of Koker's physical abilities and medical conditions before and after his industrial accident in 1999. IV RP 620 – 620, 672 – 676, 680 – 681. Additionally, Seth Koker, Barbara Koker, and Kevin Kopp all referred to Koker's capabilities without regard to the 2006 and 2007 charging period. *Id.*; *See also* IV RP 640 – 643, 681.

The witnesses the State moved to exclude did not know Koker until mid-2008. IV RP 655 – 656; *see generally* IV RP 650 – 654. Therefore, these witnesses were completely incapable of offering any evidence to the trier of fact relevant to Koker's physical conditions in 2006, 2007, nor any time period before. Most importantly and critically, they could not speak to the fundamental issue—whether or not Koker was working or capable of working during the relevant time period of 2006 and 2007. This was clear from the offer of proof made by way of

Mr. Rapier's testimony. *See generally* IV RP 650 – 654. Koker's ability in mid-2008, whether he was physically better, worse, or the same, did not make any issue at trial more or less probable.

While it is true a defendant has a right to present relevant evidence in his defense, such right is not unfettered. *State v. Thomas*, 123 Wn. App. 771, 98 P.3d 1258 (2004), *review denied* 154 Wn.2d 1026, 120 P.3d 73 (2005); *see also State v. Howard*, 127 Wn. App. 862, 113 P.3d 511 (2005).

Koker relies on *State v. Maupin*, 128 Wn.2d 918, 924, 913 P.2d 808 (1996), to claim that the trial court should have allowed additional testimony regarding Koker's physical abilities after the charging period. At issue in *Maupin*, was whether or not an eyewitness could testify that a child who had been killed was still alive and in the care of another person the day after Maupin was alleged to have killed the child. While the evidence was not exculpatory in nature, the evidence still made the defendant's denial of killing the child more probable than without the evidence. *Id.* However, the same is not true in this case.

Koker was able to present his defense that he was not working, and was not capable of working through many witnesses. The trial court's ruling was merely an evidentiary ruling and such ruling was correctly made.

**1. Even If The Trial Court Should Have Admitted The Evidence Of Koker's Activities in 2008, It Was Harmless Error**

Even if the trial court should have admitted the additional evidence of Koker's physical abilities in 2008 and beyond, any error was harmless. Evidentiary errors are not of constitutional magnitude, so this Court must determine whether the trial outcome would have differed if the error had not occurred. *State v. Howard*, 127 Wn. App. at 871; *see also State v. Jackson*, 102 Wn.2d 689, 689 P.2d 76 (1984). To do so the Court measures the admissible evidence of defendant's guilt against the prejudice, if any, caused by the erroneous exclusion of evidence. *Howard* at 871. An error is not prejudicial to a defendant unless, "within reasonable probabilities, the outcome of the trial would have been materially affected had the error not occurred." *Id.*

In this case, the evidence was overwhelming that Koker was working promoting gun shows in 2006 and 2007. In the one year period Koker promoted at least seven (7) gun shows and was a vendor at five (5) other gun shows. III RP 440. Additionally, the evidence that Koker misrepresented his capabilities came from video evidence, the IME doctors and Koker's own doctor, Dr. Monroe. II RP 251, 266 – 267; III RP 414 – 418; V RP 719 – 725; Exhibits 5, 8, 25, 26. Any possible harm

from excluding Koker's proposed witness that knew him only beginning in 2008, would have no impact on the outcome of the trial.

Finally, even if the court were to find that the evidentiary ruling denied the defendant a constitutional right to present his defense, thus creating a constitutional error, the Court may still find that such error was harmless. When an error of constitutional magnitude is presented, the Court must use a more stringent test of harmless beyond a reasonable doubt. *Howard* at 871; *see also State v. Evans*, 96 Wn.2d 1, 4, 633 P.2d 83 (1981). Where the evidence overwhelming supports the jury's verdicts the error is harmless beyond a reasonable doubt. *Evans*, 96 Wn.2d at 5. Such is the case here. The evidence of Koker's guilt overwhelmingly supports the jury's verdicts on each of the 26 counts and therefore, any possible error was harmless beyond a reasonable doubt.

#### IV. CONCLUSION

There was sufficient evidence to convict Koker of twenty-six (26) counts of Theft in the Second Degree. The trial court did not commit

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reversible error when it excluded evidence that was irrelevant. The State respectfully requests that this Court affirm the verdicts of the jury.

RESPECTFULLY SUBMITTED this 2<sup>nd</sup> day of February, 2012.

ROBERT M. MCKENNA  
Attorney General

By:   
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CERTIFICATE OF SERVICE

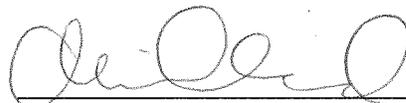
I certify that on the 2<sup>nd</sup> day of February, 2012, I deposited copies of the foregoing document into the United States Mail, first-class postage prepaid addressed as follows:

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I declare under the penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

RESPECTFULLY SUBMITTED this 2nd day of February, 2012.



ALLISON CLEVELAND