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State of Washington

NO. 31065-5

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

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THE STATE OF WASHINGTON,

Respondent,

v.

MICHAEL D. COX,

Appellant.

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**RESPONDENT'S BRIEF**

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## I. INTRODUCTION

From January 1, 2009 through March 10, 2010, appellant Michael D. Cox unlawfully obtained monetary worker's compensation benefits from the Department of Labor and Industries (L&I) by color or aid of deception. Cox told his doctors and L&I that he could not perform any work, including construction work, due to alleged injuries he reported having suffered on the job. During this same period of time, Cox was personally constructing a home on his property and performing the very same tasks of manual labor he repeatedly told his medical doctors he could not perform. Cox's deception netted him over \$11,000 in monetary benefits from L&I that he should not have received. Following testimony from Cox's own physicians, a Whitman County jury convicted Michael Cox of one count of theft in the first degree and one count of theft in the second degree.

Cox was fairly convicted for his criminal conduct. Cox's claim of prosecutorial misconduct fails because the State exercised permissible discretion in the charges brought against Cox; and properly argued the evidence during closing argument. Cox's claim of ineffective assistance of counsel fails because his trial counsel provided adequate legal representation and Cox was not prejudiced by any alleged deficiencies.

## **II. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR**

- A. Should Cox's convictions be affirmed when Cox never objected to the prosecutor's closing argument, which was neither improper, "flagrant and ill-intentioned," nor prejudicial?
- B. Should Cox's convictions be affirmed where the State exercised permissible prosecutorial discretion by grouping Cox's numerous acts of theft into three distinct charging periods?
- C. Should Cox's conviction be affirmed where defense counsel provided adequate legal representation and Cox was not prejudiced by any alleged deficiencies?

## **III. STATEMENT OF THE CASE**

### **A. Facts**

Cox worked as a carpenter for Brown Contracting in Spokane from 2002 to 2006. RP 135. In late December 2006, Cox reported to Brown Contracting that during the week of December 13, 2006, he was injured when he slid down a plastic covered hill and hit rocks at the bottom. RP 138, 140-41. Cox visited a doctor on December 26, 2006, who diagnosed a "sprained neck." RP 313.

L&I received Cox's claim for benefits on January 2, 2007. RP 311. L&I accepted the claim and made Cox eligible for worker's compensation or "time loss" benefits. RP 313. Initially, however, Brown

Contracting elected to continue to pay Cox's wages in lieu of L&I paying time loss benefits to Cox. RP 137-38, 142, 313. Brown paid wages until July 2007, at which time Cox began receiving time loss payments from L&I for the reported work injuries from December 2006. RP 142, 313.

In order to obtain time loss benefits, an injured worker must certify that he has not performed any type of work. RP 301-02. The worker must also submit certification from his treating physician that he is incapable of returning to work. RP 301-02. Cox completed the necessary forms throughout 2007-2009 and repeatedly agreed to the statement, "By signing below I am certifying the following. I understand that if I make a false statement about my activities or physical condition I will be required to refund my benefits, and I may face civil or criminal penalties." RP 326.

Cox had discectomy and cervical fusion surgery in October 2007 by a Dr. Gruber. RP 388, 395. By January 21, 2008, Dr. Gruber had cleared Cox to return to work. RP 390-91.

Cox visited Dr. Helen Shearer in Moscow, Idaho, throughout 2008. RP 392-416. During this time, Cox reported to Dr. Shearer that he had severe back pain, inability to lift objects more than four pounds, and numbness in both hands. RP 383, 399, 403-04. Based on Cox's claims of severe pain, Dr. Shearer wrote several letters to L&I recommending that

Cox not return to work in any capacity despite Dr. Gruber's contrary opinion. RP 387-405.

Dr. Shearer continued to certify Cox's inability to work until November 4, 2008, when she noticed Cox in her exam room bending over and picking up a large stack of papers while talking with his cell phone propped between his ear and shoulder. RP 412-414. Cox appeared to perform these acts without any pain, contrary to what he had previously reported to Dr. Shearer. RP 414. Dr. Shearer concluded that Cox was able to return to work. RP 416. After advising Cox of her conclusion, Dr. Shearer promptly received a letter from Cox's attorney stating that she was no longer his doctor. RP 416.

In November 2008, in accordance with Dr. Shearer's opinion, Brown Contracting received notice that Cox was fit to return to work in a light duty capacity. RP 142. Brown Contracting created the job of night watchman specifically to allow Cox to return to work. RP 142-44. Cox's duties as night watchman were to secure the premises at construction sites and watch for vandalism. RP 144. Cox was free to move as he pleased, and free to sit or stand as needed, but after four weeks Cox complained that his pain was too severe to do the job. RP 143-45.

Cox stopped going to work as a night watchman on December 17, 2008. RP 146. Dr. Shearer was no longer willing to certify that Cox was

incapable of working. RP 415. Accordingly, on the same day in December 2008 that he quit working for Brown, Cox drove more than two hours from his home to visit Dr. George Monlux in Moses Lake, WA. RP 238, 441.

Cox did not provide Dr. Monlux with his complete medical records. RP 443. Cox told Dr. Monlux that he could not stand up for more than eight to ten minutes, he had difficulty gripping his right hand, and he had difficulty lifting his right arm above his shoulder. RP 444.

In light of Cox's complaints, Dr. Monlux protested the closure of Cox's L&I claim. RP 442. L&I paid time-loss benefits to Cox during 2009, including payment for those months when Cox protested the closure of his claim. RP 567, 578-79. Dr. Monlux examined Cox throughout 2009 and, based on Cox's complaints of physical pain, reported to L&I that Cox could not work and he urged L&I to keep Cox's benefits claim open. RP 466. Dr. Monlux last wrote to L&I on October 22, 2009, opining that Cox was not able to return to work. RP 466-70.

Meanwhile, Cox's former boss at Brown Contracting, Eric Brown, hired retired FBI agent Michael Byrne to investigate reports that Cox was personally constructing a house on his property despite his reported inability to perform construction work. RP 148. In October 2009, Byrne drove to Cox's residence in Albion and over the course of several weeks

recorded hours of video footage of Cox easily performing various tasks of physical labor while building a large structure on his property. RP 173-217. Cox was filmed standing and balancing on a rooftop, nailing down roofing materials, and easily engaged in many other physical activities he had told doctors he could not perform without severe pain. RP 173-217.

Byrne gave the video footage to Brown in October 2009. RP 151. Brown in turn gave the videos to L&I and protested<sup>1</sup> Cox's continued receipt of time-loss benefits. RP 150.

L&I reviewed the video footage shot by Byrne. RP 331. L&I showed the video footage to Drs. Monlux and Shearer, the two physicians who had certified Cox's inability to work throughout 2008 and 2009. After reviewing the video evidence, Dr. Monlux and Dr. Shearer, Cox's own physicians, told L&I that had they known Cox was capable of performing the tasks shown in the video footage, they would not have certified Cox for time-loss benefits, to include the period of time from January-October 2009. RP 420-21, 473-74. Both doctors concluded that Cox was capable of performing construction work throughout the time in 2008 and 2009 when Cox certified to L&I that he was too injured to perform such work. RP 420-21, 473-474.

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<sup>1</sup> Brown's L&I insurance premiums were raised due to Cox's reported work injury.

Dr. Shearer concluded that Cox was ready to return to work in December 2007, which is the same time that the neurosurgeon, Dr. Gruber, cleared Cox to return to work. RP 389, 420-21. Dr. Monlux noted “dramatic difference” between Cox’s level of function displayed in the video footage and the physical limitations Cox had reported to Dr. Monlux. RP 470-71. Dr. Monlux noted that Cox’s ability to bend and work on an inclined roof while gripping and using a staple gun in October 2009 far surpassed the symptoms Cox reported during his medical exam in October 2009. RP 470-71.

After reviewing the video evidence of Cox engaged in carpentry, L&I terminated Cox’s time loss benefits effective October 5, 2009, the first day that Byrne filmed Cox engaged in construction work. RP 560. The last warrant<sup>2</sup> issued by L&I to Cox was March 10, 2010, for time-loss benefits from September 3, 2009, until October 5, 2009, in the amount of \$3,476.22. Ex. 3; RP 567-568. All of the warrants issued to Cox in 2009 and 2010 were cashed by Cox or his attorney. Exhibits 1, 2, 3, 119, 120; RP 541-545.

In December 2009, L&I requested that Cox undergo an independent medical examination, to include an evaluation performed by Dr. Richard Schneider. RP 359, 377. Dr. Schneider reviewed Cox’s

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<sup>2</sup> Payments to Cox from L&I were checks that L&I calls warrants.

medical records and noted that from December 2006 to December 2009, Cox presented himself to be in chronic pain, disabled with loss of function, and failing to make progress. RP 365. Cox complained to Dr. Schneider that he was in so much pain that he could not even complete the interview. RP 372.

After Cox left, Dr. Schneider viewed the video footage of Cox repeatedly and adeptly performing manual labor on his property in October 2009. RP 368. The footage showed Cox hoisting himself onto the roof through a hole in the roof and other similar activities where Cox was “extremely agile” and “extremely flexible” in his physical abilities. RP 369. Dr. Schneider noted the disparity between the physical activities Cox performed in the video and Cox’s claimed feebleness and pain during the exam. RP 368, 372-374.

In September 2010, Brown received additional video footage of Cox engaged in physical activities and building a home during 2008 and 2009. RP 150. This video footage was provided by Cox’s neighbor, David Armstrong. RP 150. The video footage was recorded on “mini DV” cassette tapes, which were converted to DVD format by L&I for ease of viewing. RP 335. Armstrong filmed Cox engaged in various physical activities shortly before or after medical appointments where Cox

complained to his doctors that he was not able to do the very things he was filmed doing. RP 254, 392-93.

Armstrong also observed and filmed Cox constructing his new home. The footings of the house were dug, rebar was mapped, and concrete was poured in November 2008. RP 608-611; Exhibits 152, 154, 155. In June 2009, Cox was filmed using a radial arm saw to cut wood for his home; and putting up the steeple and four corner towers on his home. RP 273-274. Armstrong frequently observed Cox working on his new home all day long. RP 275.

Cox consulted Dr. Graeme French in May 2011, more than a year and a half after L&I terminated Cox's time loss benefits. RP 499, 561, 666. In late 2011, after Cox told Dr. French he was too injured to work, Dr. French attempted to help Cox reopen his original L&I claim, as well as a new claim for bilateral shoulder and carpal tunnel work injuries. RP 599. L&I denied both requests. RP 599-600.

## **B. Procedure**

On November 21, 2011, the State filed an information in Whitman County Superior Court charging Cox with two counts of theft in the first degree (Counts I and II) and one count of theft in the second degree (Count III). CP 1-4. Count I alleged that Cox unlawfully obtained time-loss benefits from L&I through color or aid of deception from December

2007 through December 2008. CP 1-4. Count II alleged the same for 2009. CP 1-4. Count III alleged the same for January-March 2010. CP 1-4.

Cox's trial counsel brought a pretrial motion to dismiss all counts on double jeopardy grounds. CP 36-40. The State responded that a double jeopardy argument was premature and, regardless, the State had discretion to charge multiple counts of theft. CP 45-57. Cox's counsel struck the motion to dismiss. CP 58.

The case was tried to a jury in June 2012. RP 120-709. At the conclusion of evidence, the parties gave closing arguments. RP 671, 698. Cox did not object to any of the prosecutor's closing argument or rebuttal argument. RP 671-698, 709-19.

The jury returned verdicts of "guilty" for Counts II and III, which covered the period of time from January 2009 through March 2010. CP 1-4, CP 177-178. The jury was unable to reach a unanimous verdict for Count I, which covered December 2007-December 2008. CP 1-4, 176. The court imposed a standard range sentence. CP 219-227. This appeal follows. CP 257-58.

#### IV. ARGUMENT

**A. Cox Fails To Establish Prosecutorial Misconduct Because The Prosecutor's Closing Argument Was Neither Improper Nor Prejudicial.**

A defendant claiming prosecutorial misconduct bears the burden of establishing that the prosecutor's conduct was both improper and prejudicial. *State v. Finch*, 137 Wn.2d 792, 839, 975 P.2d 967 (1999). If the prosecutor's conduct was improper it does not constitute prejudicial error unless the appellate court determines there is a substantial likelihood the misconduct affected the jury's verdict. *Id.* If the defendant declined to object to an improper remark, a claim of error is considered waived unless the remark was "so flagrant and ill-intentioned that it evinces an enduring and resulting prejudice that could not have been neutralized by an admonition to the jury." *Id.* (quoting *State v. Stenson*, 132 Wn.2d at 719, 940 P.2d 1239 (1997)).

Here, Cox did not object to any of the argument he now complains about on appeal. Cox nevertheless argues that two instances of alleged misconduct were prejudicial. Cox offers only cursory analysis and unsupportive cases in his effort to establish both misconduct and prejudice that had a substantial likelihood of affecting the jury verdict. The record does not support Cox and his claim of prosecutorial misconduct fails.

**1. The Prosecutor Did Not “Shift The Burden Of Proof” During Closing Argument And Appropriately Responded To Defense Counsel’s Remarks During Rebuttal Argument.**

In closing argument the prosecutor has wide latitude to argue reasonable inferences from the evidence, including evidence respecting the credibility of witnesses. *State v. Thorgerson*, 172 Wn.2d 438, 448, 258 P.3d 43 (2011). The prosecutor may fairly argue that the evidence does not support the defense theory and respond to defense counsel in rebuttal argument. *Id.* at 449 (citing *State v. Russell*, 125 Wn.2d 24, 87, 882 P.2d 747 (1994)).

Cox argues that “during the State’s closing *and* rebuttal closing argument, the State develops the idea that there are medical doctors on both sides.” App. Br at 5 (emphasis added). Cox further argues that during closing and rebuttal the prosecutor argued that “the jury must decide whom they are to believe: Drs. Monlux, Schneider and Shearer or Dr. French.” App. Br. at 5. According to Cox, these arguments allegedly made by the prosecutor subtly shifted the burden of proof from one where the State had to prove the crimes beyond a reasonable doubt, to one where the jury simply had to assess the credibility of witnesses on a “more probable than not” argument. App. Br. at 5.

Cox misrepresents the record. First, the prosecutor *never* mentioned defense expert Dr. French during closing argument. RP 671-98. The prosecutor only discussed Dr. French's testimony during rebuttal argument and in response to arguments made by defense counsel. The prosecutor never compared Dr. French's testimony to the testimony of the State's medical witnesses during closing argument (which would have been entirely appropriate regardless). RP 671-698. The prosecutor's closing argument appropriately focused on the strength of the State's evidence and why it proved beyond a reasonable doubt that Cox was guilty. RP 671-98.

It was Cox's closing argument that attempted to pit the testimony of the various doctors against one another. RP 700 ("Let's discuss the doctors.") Defense counsel argued that the State's medical witnesses -- Dr. Schneider, Dr. Shearer and Dr. Monlux -- were unqualified experts who "didn't know what was going on." RP 700-702. Cox argued that Dr. Shearer "delivered babies;" Dr. Monlux was "a country doctor;" and Dr. Schneider was a psychiatrist. RP 699-700. Cox argued that his expert witness Dr. French was an orthopedic surgeon eminently qualified to assess Cox's ability to work. RP 702-04. Defense counsel argued that "Dr. French, [is the] one expert, an orthopedic surgeon, who can review the evidence and comment on the evidence with an expert eye." RP 701.

Defense counsel argued that “Dr. French’s best purpose was that he could cast the experienced eye on the videos.” RP 703.

The prosecutor appropriately responded to defense counsel in rebuttal argument. The prosecutor in fact prefaced remarks about the medical doctors by stating that he was responding to defense counsel’s arguments. RP 710. The prosecutor noted that contrary to defense counsel’s arguments, Drs. Monlux, Schneider, and Shearer were all medical doctors qualified to talk about Cox’s reported injuries and physical abilities. RP 712. The prosecutor noted that Dr. French offered opinions despite not having reviewed relevant medical records. RP 712. The prosecutor’s argument was entirely appropriate and a fair response to defense counsel’s argument.

Second, the prosecutor never suggested that the State’s burden was anything less than beyond a reasonable doubt. Contrary to Cox’s claim on appeal (App. Br. at 5), the prosecutor *never* used the phrase “more probably than not” or even suggested it. Rather, the prosecutor repeatedly reminded the jury of the State’s burden to prove each element of each crime *beyond a reasonable doubt*. RP 672, 688, 689, 690, 692, 693, 696 (closing argument); RP 709-10, 717, 718 (rebuttal argument). Cox’s argument to the contrary is wholly unsupported by the record.

Cox cites *State v. Fleming* as support for his claim of burden shifting. App. Br. at 3. In *Fleming*, the prosecutor improperly argued that the jury had to find that the State's witnesses were lying in order to acquit. *State v. Fleming*, 83 Wn. App. 209, 214, 921 P.2d 1076, 1078 (1996). In the instant case, the prosecution never argued or suggested that any defense witness, including Dr. French, was lying. The prosecutor never argued to the jury that it must find that the State's witnesses were lying in order to acquit; or that it must believe Dr. French in order to acquit. Rather, the prosecutor merely asked the jury to assess Dr. French's testimony in light of the video evidence, contrary medical testimony, and common sense. RP 711-712.

The prosecutor's rebuttal argument was an appropriate response to defense counsel's argument that Dr. French was the only medical witness who gave reliable testimony. The prosecutor argued the strengths of the State's medical testimony and the deficiencies in Dr. French's testimony. RP 711-13. The prosecutor pointed out that Dr. French was not Cox's treating physician during the relevant time period; and he had not reviewed Cox's full medical history. RP 713. The prosecutor never "shifted the burden" or argued that the jury could acquit only if it disbelieved French. There was no misconduct.

Nor does Cox establish prejudice that likely affected the outcome of the trial even if some impropriety could be identified in the argument. The trial court instructed the jury that the jurors were the sole judges of the credibility of the witnesses. RP 660. The trial court further instructed the jury that the prosecutor's remarks were not evidence and to ignore any argument not supported by the evidence. RP 660. The jurors are presumed to have followed these instructions, including during closing argument. *State v. Barajas*, 143 Wn. App. 24, 38, 177 P.3d 106 (2007). The jury would also have been presumed to follow a curative instruction had Cox objected and asked for one. Cox's claim of prosecutorial misconduct fails.

**2. The Prosecutor Did Not Appeal To Jury Passion And Prejudice By Noting That The Case Was Important Even Though It Was Not A Violent Crime.**

The prosecutor's closing argument must be evaluated in the context of the total argument, the evidence, and the jury instructions. *State v. Dhaliwal*, 150 Wn.2d 559, 578, 79 P.3d 432 (2003). Remarks that were not the subject of an objection do not necessitate reversal unless the remarks were so flagrant and ill-intentioned that the prejudicial effect could not have been cured by instructions to the jury. *State v. McKenzie*, 157 Wn.2d 44, 134 P.3d 221 (2006).

Here, Cox argues that the prosecutor committed misconduct by arguing towards the end of rebuttal argument:

The defendant didn't kill anyone. He didn't assault anyone. He didn't do a lot of serious crimes, but this is still an important case . . . [inaudible] for the state. If you steal money and it's proved beyond a reasonable doubt you should be held accountable for it and that's all the state is asking you to do based upon all the evidence that you heard we ask you to return verdicts of guilty as charged.

RP 718. Cox asserts that this argument was an appeal to jury passion and prejudice that equated Cox's offenses "to the murdering of a human." App. Br. at 5-6.

Cox compares his case to *State v. Belgarde*. In *Belgarde*, a Native American defendant was charged with murder. *State v. Belgarde*, 110 Wn.2d 504, 755 P.2d 174 (1988). Evidence was presented that the defendant had a loose association with the American Indian Movement (AIM), which had engaged in an armed standoff with federal agents at Wounded Knee. *Id.* at 506. During closing argument, the prosecutor described AIM as a faction of "militants" and "butchers" who "killed indiscriminately." *Id.* at 507. The prosecutor used the defendant's loose association with AIM to equate him to Irish Republican Army terrorists ("a deadly group of madmen") and former Libyan dictator Moammar Kadafi. *Id.* The Court held that these arguments "were a deliberate appeal to the jury's passion and prejudice and encouraged it to render a verdict

based on Belgarde's associations with AIM rather than properly admitted evidence." *Id.* at 507-08.

The prosecutor here did not commit any misconduct, much less the kind that was noted in *Belgarde*. *Belgarde* offers such stark contrast with the instant case that it demonstrates that the prosecutor's remarks here were *not* appeals to jury passion and prejudice. The prosecutor did not call Cox a "madman," "militant," or "butcher," nor use his ethnicity as evidence of guilt. The prosecutor simply noted that although the subject matter was mundane, it was still an important case that deserved a guilty verdict if the jury was convinced that the evidence proved Cox's guilt beyond a reasonable doubt. RP 718.

The prosecutor did not equate Cox to a murderer—rather, the prosecutor pointed out that Cox was *not* a murderer but he *was* somebody who stole money from the State and should be held accountable for it. RP 718. The primary evidence against Cox was muted video footage that required the jury to sit for hours watching Cox silently constructing a building. The prosecutor's argument emphasized to the jury that despite the mundane subject matter, it was still an important case. The prosecutor never asked the jury to return a verdict of guilty based upon anything other than the evidence. There was nothing "flagrant and ill-intentioned" about the argument.

Nor does the record establish any prejudice even if there was something improper about the prosecutor's argument. In *State v. McKenzie*, the prosecutor repeatedly referred to the innocence of the child victim during closing argument in a child rape case, without objection. *State v. McKenzie*, 157 Wn.2d 44, 60, 134 P.3d 221 (2006). The Court held that the argument was improper, but was not so flagrant and ill-intentioned that a jury instruction could not have cured the prejudice. *Id.*

Here, the prosecutor's argument that Cox was not a violent criminal but should be held accountable for the thefts the evidence proved he committed had far less emotive appeal than what occurred in *McKenzie*, where the court found no harmful prejudice. The record does not support Cox. There was no prejudice, and certainly no prejudice that could not have been cured with an objection and a jury instruction.

**B. The State Did Not Abuse Its Prosecutorial Discretion By Charging Cox With Three Counts of Theft Based Upon Multiple Thefts That Occurred During Three Separate Charging Periods.**

A prosecutor has broad discretion in charging a suspect with a violation of the law and in choosing what charges to make. *State v. Petrich*, 101 Wn.2d 566, 572, 683 P.2d 173 (1984). Whether multiple instances of criminal conduct are charged in one count or separate counts is a decision within the prosecutor's discretion. *Id.*

A criminal statute may limit the prosecutor's discretion if it mandates that particular conduct must be charged as one count. *State v. Knutson*, 64 Wn. App. 76, 80, 823 P.2d 513 (1991). Whether a criminal statute permits multiple counts is a matter of statutory interpretation. *Id.*

Washington's theft statutes are interpreted in light of the common law. *State v. Atterton*, 81 Wn. App. 470, 472, 915 P.2d 535 (1996). Washington common law allows aggregation of individual transactions in order to meet the threshold for a particular degree of theft, such as theft in the first degree. *Id.* Aggregation of the value of multiple thefts is permitted so long as the series of thefts are (1) from the same owner; (2) from the same place; and (3) result from a single criminal impulse pursuant to a general larcenous scheme. *Id.* at 472-73. However, if the thefts were committed against the same owner, at the same place, and at the same time, the thefts must be charged as one count because the unit of prosecution for such conduct is one count. *State v. Carosa*, 83 Wn. App. 380, 382-83, 921 P.2d 593 (1996).

Here, the thefts at issue were against the same owner (L&I), from the same place (state treasury), were part of a general larcenous scheme against L&I, but occurred at different times throughout 2007-2010. The State had discretion to charge one count of theft for the entire time period,

dozens of counts for each individual theft, or to break up the thefts into identifiable time periods and aggregate the value of individual thefts that occurred during a particular time period. The State chose the latter. Case law supports the manner of charging.

In *State v. Perkerewicz*, the defendant stole money from her employer on multiple occasions over a two-month period. *State v. Perkerewicz*, 4 Wn. App. 937, 938, 486 P.2d 97 (1971). The State aggregated the value of numerous petit larcenies that occurred each month into two separate counts of grand larceny, one for each month. *Id.* at 942. The defendant argued on appeal that the State's election of two charging periods and aggregation of amounts was "arbitrary." *Id.* The Court of Appeals rejected this argument, finding "no error in the manner in which this information was divided into two counts." *Id.* The court held that it was permissible for the State to "divid[e] the counts into consecutive calendar periods," and affirmed the convictions. *Id.*

In *State v. Carosa*, a clerk stole money from her employer on three consecutive days. *State v. Carosa*, 83 Wn. App. 380, 381, 921 P.2d 593 (1996). The amounts stolen per day were small amounts that when aggregated supported a charge of theft in the second degree. *Id.* The State charged each of the three separate work days as an individual count, and then aggregated the amounts stolen per day to reach the threshold amount

for theft in the second degree. *Id.* The defendant was convicted. *Id.* Defendant argued on appeal that because the thefts were each small and committed against the same owner at the same place over the course of three days, the State was required to charge only a single felony count of theft. *Id.* The Court of Appeals rejected this argument, holding that it was permissible to charge three separate counts (one for each day), and then aggregate the amounts for each day. *Id.*

In *State v. Kinneman*, a lawyer stole money from his IOLTA account on 67 occasions over a 16-month period. *State v. Kinneman*, 120 Wn. App. 327, 331, 84 P.3d 882 (2004). The State charged Kinneman with 67 separate counts of felony theft. *Id.* The trial court denied Kinneman's pretrial motion to consolidate the counts into one count of theft. *Id.* at 332. Kinneman was convicted of all 67 counts, resulting in an offender score of 66. *Id.* at 334. Kinneman complained on appeal that the multiple convictions violated double jeopardy because the "unit of prosecution" under the theft statute was one count for each series of thefts. *Id.* The court rejected this argument, finding that the unit of prosecution was each separate unlawful transaction. *Id.* at 338. Therefore, the State had "discretionary authority" to charge 67 separate counts because the thefts each occurred at a different time. *Id.*

Here, each separate payment from L&I that was received and cashed by Cox was an unlawful act because each was obtained by color or aid of deception. The payments were taken from the same owner (L&I), from the same place (the state treasury), but occurred at different times throughout 2009 and once in 2010. The State had discretion to charge dozens of counts of theft; one count of theft aggregating all amounts; or identify distinct time periods and aggregate the value of the thefts that occurred during those periods into a single count. The State elected the latter and charged Cox with three counts of felony theft for consecutive calendar periods, one count for each calendar year (2007-08, 2009, 2010) rather than charging 24 separate felony counts. This was entirely within the prosecutor's discretion under *Carosa*, *Kinneman*, and *Perkerewicz*.

**C. Cox Fails To Establish Ineffective Assistance Of Counsel Because Counsel's Performance Was Not Deficient And Cox Suffered No Prejudice.**

To establish a claim of ineffective assistance of counsel, the defendant must prove that counsel's performance was deficient and the deficient performance prejudiced the defense. *Strickland v. Washington*, 466 U.S. 668, 687, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984); *State v. Nichols*, 161 Wn.2d 1, 8, 162 P.3d 1122 (2007). Deficient performance is that which falls "below an objective standard of reasonableness based on consideration of all the circumstances."

*State v. McFarland*, 127 Wn.2d 322, 334–35, 899 P.2d 1251 (1995). Prejudice exists if the defendant shows that “there is a reasonable probability that, but for counsel’s unprofessional errors, the outcome of the proceeding would have been different.” *Nichols*, 161 Wn.2d at 8.

In evaluating claims for ineffectiveness, courts are highly deferential to counsel’s decisions and there is a strong presumption that counsel performed adequately. *Strickland*, 466 U.S. at 689–91. Strategic and tactical decisions are not grounds for error. *Id.*

In this case, Cox fails to establish deficient performance or that any allegedly deficient performance influenced the jury’s verdicts. Instead, the record reflects that defense counsel (1) appropriately withdrew a pretrial motion to dismiss on double jeopardy grounds, (2) exercised permissible strategic discretion in preparing the defense expert, (3) appropriately refrained from objecting to admissible evidence, and (4) did not pursue baseless investigations of his client’s mental competency.

**1. Trial Counsel Was Not Ineffective For Withdrawing A Premature Motion To Dismiss On Double Jeopardy Grounds.**

Cox implies<sup>3</sup> that his counsel was ineffective for withdrawing the pretrial motion to dismiss based upon double jeopardy. CP 58. The State

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<sup>3</sup> This argument was put forth within an argument about prosecutorial misconduct: “It was inexplicably stricken, but *may rise to the level of ineffective assistance of counsel.*” App. Br. at 6 (emphasis added).

responded to the merits of the argument in the motion, but also noted that any double jeopardy argument was premature prior to a sentencing hearing. CP 45-57. After receiving the State's response, defense counsel struck his motion. CP 58.

Courts will not address a double jeopardy motion that is premature. *State v. Frasquillo*, 161 Wn. App. 907, 255 P.3d 813 (2011). Here, Cox could not suffer double jeopardy until and unless a jury found Cox guilty of multiple counts based upon a single offense *and* the sentencing court imposed multiple punishments in the absence of legislative intent to do so. *See In re Borrero*, 161 Wn.2d 532, 537, 167 P.3d 1106 (2007). Cox's pretrial motion to dismiss on double jeopardy grounds was premature.

Withdrawing a premature motion was not ineffective assistance of counsel. Moreover, for the reasons set forth above, there was no meritorious double jeopardy issue to raise.

## **2. The Trial Attorney Strategically Prepared Dr. French**

The method and manner of preparing and presenting a case will vary with different counsel. *State v. Thomas*, 71 Wn.2d 470, 472, 429 P.2d 231 (1967). Deficient performance by trial counsel is not demonstrated by matters that go to trial strategy or tactics. *State v. Hendrickson*, 129 Wn.2d 61, 77-78, 917 P.2d 563 (1996).

To prevail on an ineffective assistance claim, a defendant must overcome a strong presumption that counsel's performance was reasonable. *State v. Grier*, 171 Wn.2d 17, 33, 246 P.3d 1260 (2011). A defendant can rebut the presumption of reasonable performance by showing that there is no conceivable legitimate tactic explaining counsel's performance. *Id.*

Here, Cox's trial counsel strategically prepared the defense expert witness. Dr. French was provided with a great deal of information upon which to base his opinion: four independent medical examinations, medical records from Drs. Shearer and Monlux, notes from Dr. Wilson, notes from Dr. Gruber, physical therapy reports, and chiropractic notes. RP 502-03. Dr. French also reviewed some of the video evidence. RP 502-503. The parts that were missing were some of the medical records from Drs. Monlux and Shearer where Cox reported physical incapacities that were obviously false when compared to the video evidence. RP 511-512.

If all of these medical records were provided to Dr. French, he may not have been able to deny knowledge that Cox deceived his doctors about his true physical capabilities. Dr. French was instead able to review the videos for their own merit and testify that Cox did not have "any extensive physical use of his arms at any point in four years." RP 506.

Trial counsel's preparation of Dr. French was legitimate trial strategy and tactics. Trial counsel used Dr. French to counter inculpatory evidence against Cox; to focus on Cox's claim that he was incapable of working; to show that Cox was fixable with the right doctor; to show that no one ever examined Cox's shoulder; and to establish that Dr. French would have certified Cox's time loss based upon shoulder instability and nerve injuries. RP 509, 510, 521. The record reflects that providing Dr. French with all of the available medical information, rather than select information that supported Dr. French's favorable opinions, would have caused greater harm to Cox than good.

Assuming for sake of argument that trial counsel provided deficient assistance by providing Dr. French with most but not all of the medical records, there is no substantial likelihood that it affected the verdict. The heart of the State's case was hours of video footage that showed Cox performing the very same activities he told Dr. Monlux and Dr. Shearer he could not perform throughout 2008 and 2009. Dr. French never examined Cox during this period of time and had no personal knowledge of what he reported to his doctors and what he was actually capable of doing. Whether or not the jury accepted Dr. French's testimony, the jury witnessed repeated instances of Cox's deception in the video footage. The overwhelming evidence of deception in the video

footage swallowed any prejudice resulting from Dr. French's acknowledgement that he did not have Cox's complete medical records. As the Court noted in *State v. Thomas*, 71 Wn.2d 470, 429 P.2d 231 (1967), the effectiveness of counsel cannot be gauged by the success of the trial, for "some defendants are, in fact, guilty and no amount of forensic skill is going to bring about acquittal." *Id.*

The defense attorney strategically prepared an expert witness as best he could. Defense counsel successfully hung the jury on one count in part by pursuing this strategy. The overwhelming amount of evidence supporting Counts II and III negates any prejudicial effect resulting from Dr. French's testimony.

**3. The Defendant's Trial Attorney Properly Abstained From Objecting To Admissible Evidence.**

The failure to object to admissible evidence does not establish ineffective assistance of counsel. *State v. Alvarado*, 89 Wn. App. 543, 553, 949 P.2d 831 (1998). "The decision of when or whether to object is a classic example of trial tactics." *State v. Madison*, 53 Wn. App. 754, 763, 770 P.2d 662 (1989). A defendant who claims on appeal that his trial counsel should have objected to evidence must prove (1) the absence of legitimate strategic or tactical reasons supporting the failure to object, (2) that the objection would have likely been sustained, and (3) the result of

the trial would have differed had the evidence not been admitted.

*State v. Saunders*, 91 Wn. App. 575, 578, 958 P.2d 364 (1998).

Cox's argues that his trial counsel was ineffective for (1) failing to lodge a foundational objection to the video footage recorded by Armstrong, and (2) not objecting to Armstrong's sometimes negative remarks about Cox. Cox's decision not to object to the Armstrong video footage was not deficient because there was no meritorious objection to make. Additionally, trial counsel's decision not to object to Armstrong's video footage and Armstrong's testimony was strategic.

a. Foundation for Video Evidence

A "photograph" includes "videotapes, and motion pictures" and an original includes "any print therefrom." ER 1001(b) and (c). ER 1003 provides, "A duplicate is admissible to the same extent as an original unless (1) a genuine question is raised as to the authenticity of the original or (2) in the circumstances it would be unfair to admit the duplicate in lieu of the original."

Cox argues that his trial counsel should have objected to the video evidence filmed by Armstrong on grounds that the video evidence was "altered" and presented without proper foundation. If by "altered" Cox means that video footage recorded on mini cassette tapes was copied onto

DVDs, he is correct. However, Cox offers no evidence in the record that any video footage was “altered” as opposed to “copied.”

More importantly, Cox’s trial counsel had no basis for a foundational objection and appropriately stipulated to admissibility. The digital copies of Armstrong’s video footage were “originals” pursuant to ER 1001(c). There was no foundational issue because the State presented originals as defined by the Evidence Rules.

The video evidence offered by the State without objection and published to the jury was also admissible under ER 1003 as a duplicate. The record demonstrates that the State established proper foundation that the duplicate was an accurate copy of the original. The record suggests that defense counsel had already previewed the exhibit and accordingly stipulated to its admissibility. RP 240. Armstrong confirmed that the video footage at issue was filmed by him on mini tapes which he later provided to L&I. RP 240. L&I Investigator McCord testified that the video footage recorded on Armstrong’s mini tapes was copied onto DVD. RP 335. Armstrong’s videos were published during Armstrong’s testimony and he testified throughout that he filmed the video footage that was published to the jury. RP 241-291.

To the extent that the digital copy of the video footage was a “duplicate,” it was admissible under ER 1003 unless Cox had a genuine

issue of authenticity to raise. As discussed, there was no genuine issue of authenticity to raise and Cox does not identify one on appeal. Rather than lodging a frivolous objection, Cox's trial counsel stipulated to admissibility. Counsel could not be ineffective for declining to object to admissible evidence. *State v. Alvarado*, 89 Wn. App. 543, 553, 949 P.2d 831 (1998).

Finally, trial counsel had strategic reasons for allowing the video evidence even if some foundational objection could be constructed. Trial counsel wanted to show the jury how much and how often Armstrong intruded into Cox's daily life by filming Cox. Trial counsel argued in closing that "the videos are what they are. I'm not suggesting that he [Armstrong] doctored the evidence." RP 704. Trial counsel then used the video evidence to argue that Armstrong engaged in ongoing harassment of Cox. RP 705. Trial counsel was ultimately successful in avoiding a guilty verdict on the only count (Count I) that relied solely on Armstrong's video evidence and testimony as proof of Cox's true capabilities in 2008. CP 176.

b. Armstrong's Characterizations of Cox

Trial counsel repeatedly and successfully objected when Armstrong volunteered information about Cox's violation of local laws and other matters. RP 242, 246, 269, 278, 281. Trial counsel objected to the audio

portion of Armstrong's video due to derogatory comments made by Armstrong during the videos. RP 199. The audio was not played for the jury because of trial counsel's objection. RP 199.

Armstrong testified at times about activities that Cox engaged in that Armstrong felt were intended to annoy him. However, a reasonable review of the record shows that defense counsel allowed Armstrong to testify without objection only about innocuous activities that "annoyed" him, such as lawn mowing. Counsel did so in order to portray Armstrong as a biased witness and eccentric neighbor who unnecessarily meddled in Cox's daily activities on his own property. After allowing Armstrong to talk about his annoyances on direct examination without objection, defense counsel began cross-examination by asking Armstrong what "annoyed" him about seemingly innocuous actions such as Cox walking his dogs, riding a motorcycle, mowing the lawn, plowing snow off of the street, and walking on a public street. RP 284-290. The defense attorney successfully admitted defense Exhibit 150, an Anti-Harassment Order that protected Cox from Armstrong's constant filming of Cox. RP 267. Defense counsel used Armstrong's testimony about the behaviors by Cox that annoyed him to show that Armstrong was unreasonable and to demonstrate Armstrong's bias against Cox.

This was legitimate trial strategy that cannot support a claim of ineffectiveness. Defense counsel's strategy appears to have been successful as the jury did not convict on Count I, which was the only count that relied upon Armstrong's testimony and video footage to show Cox's true physical capabilities in 2007 and 2008. CP 176.

**4. The Record Does Not Support Cox's Claim That Trial Counsel Had Reason To Question And Investigate Cox's Competency To Stand Trial.**

A defendant is incompetent to stand trial if (1) the defendant does not understand the nature of the charges, and (2) he is incapable of assisting in his defense. *In re Fleming*, 142 Wn.2d 853, 862, 16 P.3d 610, 614 (2001) (quoting *Dusky v. United States*, 362 U.S. 402, 402, 80 S. Ct. 788, 4 L. Ed. 2d 824 (1960)). A motion to find the defendant incompetent must be supported by a factual basis in order to be considered. *State v. Lord*, 117 Wn.2d 829, 901, 822 P.2d 177 (1991).

In *Personal Restraint of Brett*, a death row inmate alleged that he received ineffective assistance of counsel because his trial counsel failed to properly evaluate him for competency. *In re Brett*, 142 Wn.2d 868, 875-882, 16 P.3d 601 (2001). Brett presented persuasive evidence that his counsel was aware he had "mental problems" at the time of trial; and there was medical evidence reasonably available at the time that should have called Brett's competence into question. *Id.* at 880. Brett presented

substantial medical evidence that his mental faculties in fact were impaired at the time of trial. *Id.* at 874-75. Brett presented expert legal testimony that the circumstances, including that it was a capital case, should have caused defense counsel to investigate Brett's mental capabilities. *Id.* at 876-77. The court reversed Brett's aggravated murder conviction and death sentence. *Id.* at 883.

Here, Cox does not provide any factual basis to support a similar claim. Cox offers medical records showing that certain medications were prescribed to him two and five months prior to trial by Cox's physician, and his own expert witness at trial, Dr. French. CP 204-15. Cox makes vague references to a Google search performed by appellate counsel to show some of the conditions that these medications *might* be prescribed for (anxiety, depression, insomnia, etc.) and argues that these conditions could be evidence that Cox was incompetent to stand trial.

Cox's claim is sorely lacking in any substantive evidence from the record. Cox's post-hoc Google search of medications, and what they might be used to treat, is not remotely comparable to the evidence that established ineffective assistance of counsel in *Brett*. Notably, the medications at issue were prescribed months prior to trial and there is no evidence that Cox was suffering from any condition that would make him incompetent at the time of trial. Indeed, Dr. French's medical reports

documenting these medications were dictated during examinations of Cox. CP 204-15. Dr. French did not note anything that would suggest his patient was incompetent. CP 204-15. There is no evidence that Dr. French or trial counsel had *any* reason to question Cox's competency.

The record lacks any evidence that Cox did not understand the nature of the charges against him or was incapable of assisting his attorney. To the extent that the record reflects anything about Cox's competency, it shows that Cox demonstrated comprehension of the nature of the charges against him and the ability to assist in his own defense when he reminded trial counsel of his alleged inability to perform physical labor when his attorney asked the judge about the option of the prisoner's work-release program. RP 7/20/2012 at 18. By reminding the attorney of his alleged status, Cox conveyed that he understood the sentencing proceedings and was capable of assisting his defense by attempting to continue avoiding work.

**5. Cox Fails His Burden Of Proving That Ineffective Assistance of His Trial Counsel Likely Changed The Outcome Of The Trial.**

Cox's claim of ineffective assistance of counsel further fails because it does not meet the high standard of proving that trial counsel's allegedly deficient performance was so egregious that he was deprived of a fair trial. *See State v. Thomas*, 109 Wn.2d 222, 226, 743 P.2d 816

(1987) (quoting *Strickland v. Washington*, 466 U.S. 668, 687, 104 S. Ct. 2052, 2064, 80 L. Ed. 2d 674 (1984)).

Cox could raise a double jeopardy claim on appeal, but like his trial counsel, he does not do so because it would be a meritless argument. As argued earlier, such a motion would have been unsuccessful. Moreover, the motion pertained to sentencing, not trial.

Had Cox successfully objected to the authenticity of Armstrong's video footage, the State would have simply found a means to play the original "mini-DVs" in court. There was no dispute as to the authenticity of the video footage itself. Cox complains only about the media used to store the video footage, which was used to more easily play the footage in court. There was no prejudice.

Had Cox successfully objected to portions of Armstrong's testimony, he would not have had as much evidence to show Armstrong's bias or to portray Armstrong as a dislikable figure, which would have only hurt Cox's defense. Similarly, a curative or limiting instruction would have prevented Cox from arguing that the evidence showed how eccentric and biased Armstrong was. Cox's trial counsel used Armstrong's testimony to Cox's advantage and was ultimately successful in hanging the jury on the sole count (Count I) that relied on Armstrong's testimony and video footage as proof of Cox's true physical capabilities in 2008.

Had Cox's trial counsel been aware of the medications prescribed to Cox at the time of trial (and there was no record that he was not aware), there is still no record or reason to believe he had any reason to question Cox's competency. Depression and anxiety do not establish incompetency to stand trial without more.

Finally, Cox ignores the effective representation that was provided to him. Cox's counsel made appropriate and successful objections throughout trial, cross-examined the State's witnesses, called numerous witnesses on Cox's behalf, hired an expert, presented expert testimony on Cox's behalf, and was successful in hanging the jury on the most serious count (Theft 1) that carried the greatest amount of restitution. Cox's trial counsel provided more than adequate assistance in the face of very strong evidence that Cox was guilty as charged. Cox's claim of ineffective assistance of counsel is not supported by the record.

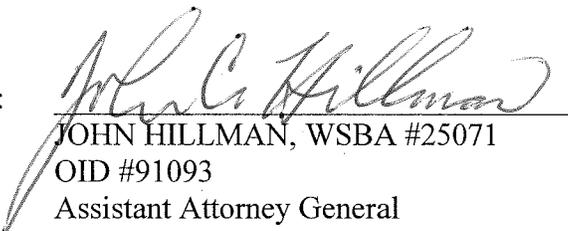
V. CONCLUSION

Michael Cox was fairly convicted of two counts of theft after a trial where his counsel provided adequate assistance and the prosecutor made appropriate closing argument. Cox's convictions and standard range sentences should be affirmed.

RESPECTFULLY SUBMITTED this 16<sup>TH</sup> day of August, 2013.

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NO. 31065-5-III

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

THE STATE OF WASHINGTON,

Respondent,

vs.

MICHAEL D. COX,

Appellant.

DECLARATION OF  
SERVICE

I, Lissa Treadway, declare as follows:

On August 16, 2013, I sent via the United States mail a true and correct copy of Respondent's Brief and Declaration of Service, postage fully prepaid, addressed as follows:

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

DATED this 16th day of August, 2013, at Seattle, Washington.

  
LISSA TREADWAY