IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION THREE

STATE OF WASHINGTON,	)	No. 29856-6-III
Respondent,	)	
v.	)	UNPUBLISHED OPINION
CHRISTOPHER A.L. KOKER,	)	
Appellant.	)	

Kulik, J. — A jury found Christopher Koker guilty of 26 counts of second degree theft by color or aid of deception, based on his receipt of time loss compensation from the Washington State Department of Labor and Industries (L&I) while he was working. Mr. Koker appeals. He contends that the State failed to prove that he fraudulently received payments over $250 because the State did not present evidence to establish the baseline benefit he was legally entitled to receive. He also contends that the trial court erred by excluding testimony. Mr. Koker's assertions of error are unpersuasive. We affirm the convictions.

FACTS

In 1999, Mr. Koker sustained an on-the-job injury to his lower back. One month after his injury, Mr. Koker filed a claim for benefits with L&I. Mr. Koker received time loss compensation, or wage replacement, from L&I for the majority of the next few years. Of particular importance, Mr. Koker received a total of 26 checks, called warrants, issued by L&I for time loss compensation between July 25, 2006, and July 10, 2007.

To qualify for the time loss compensation, Mr. Koker signed eight worker verification forms certifying that he was not able to work because of his workplace injury. The form contained the warning provision that, "*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. I understand I must immediately contact my claim manager if I perform any work (paid or unpaid)." Exs. 168-75.

Each warrant was accompanied by a payment order, which stated, "Do not cash this warrant if you were released for work or returned to any type of work during the period paid by this order of payment. Please return the warrant to Labor and Industries." Exs. 176-202.

In 2005, L&I received a tip that Mr. Koker was working behind the counter at a gun store and operating as a vendor at gun shows. L&I investigator Shirley Mosher investigated to determine if Mr. Koker was working while collecting time loss compensation. Ms. Mosher received an additional tip that Mr. Koker was operating a business called Above Average Guns and Collectables. After failing to find evidence that Mr. Koker was working at the coin shop, had a business, or was involved in physical activity that was inconsistent with his stated disability, Ms. Mosher closed the investigation.

Shortly after, Ms. Mosher discovered an advertisement for a gun show sponsored by Above Average Guns and Collectables. The advertisement listed Mr. Koker's home telephone number. Based on this new information, another investigation of Mr. Koker began.

Ms. Mosher found a master business application signed by Mr. Koker for Above Average Guns and Collectables, dated April 27, 2006. The application listed Mr. Koker as president and sole owner. Ms. Mosher also found that Mr. Koker opened a business bank account for the business in May 2006. Additionally, using his personal bank account, Mr. Koker rented a building and obtained event insurance between May and August 2005. Mr. Koker also ordered business cards for Above Average Guns and

Collectables with Mr. Koker's name and contact information.

Ms. Mosher found several advertisements for gun shows presented by Above Average Guns and Collectables. In total, between May 2006 and May 2007, Mr. Koker produced 10 gun shows and participated as a vendor in 5 additional shows.

As part of the investigation, Ms. Mosher attended some of the gun shows organized by Above Average Guns and Collectables. Ms. Mosher observed Mr. Koker walk with a normal gait and without a cane. He was also able to bend, squat, and run. She further observed him lift sandwich board-styled signs without any problems. Ms. Mosher obtained video recordings of Mr. Koker's activities.

L&I requested an independent medical examination of Mr. Koker. Dr. James Kopp, an orthopedist, and Dr. Louis Almaraz, a neurologist, examined Mr. Koker together in May 2007. Dr. Kopp and Dr. Almaraz concluded that Mr. Koker was exaggerating his pain. The doctors also concluded that Mr. Koker was not capable of doing normal activity but could engage in sedentary type activities. Both doctors approved Mr. Koker for employment in two job categories, while ruling out any jobs that would require heavy lifting.

After the examination, the doctors reviewed the video footage of Mr. Koker at the gun shows. The doctors noted that Mr. Koker's activity and his pain behavior were

different from what they observed in the examination. As a result, the doctors approved Mr. Koker for two more jobs. Dr. Almaraz stated that he would have released Mr. Koker for employment based on the video. Dr. Kopp stated that it would have been reasonable to release Mr. Koker based on the video, but he would have been uncomfortable in doing so without first seeing Mr. Koker.

In 2011, the State charged Mr. Koker with 26 counts of theft in the second degree by color or aid of deception, RCW 9A.56.040(1)(a) and RCW 9A.56.020(1)(b). The 26 counts represented the 26 warrants Mr. Koker received from L&I between July 25, 2006, and July 10, 2007.

At trial, the State alleged that Mr. Koker deceived L&I by leading them to believe he was not working and by misrepresenting his condition to L&I. The State presented to the jury the video of Mr. Koker taken at the gun shows. In addition, the State entered into evidence the advertisements for the shows, Mr. Koker's business card, several building rental agreements signed by Mr. Koker, and a copy of Above Average Guns business license. The State also entered into evidence copies of Mr. Koker's worker verification forms and L&I warrants issued in his name.

Ms. Mosher testified about her investigations of Mr. Koker and also offered general information regarding L&I investigations. Ms. Mosher said that some common

fraud schemes include claimants misrepresenting their physical condition to medical providers and being employed in some capacity, including self employment. She also testified that L&I sends worker verification forms to claimants every couple of weeks to verify that the claimant is not working and to give claimants the opportunity to notify L&I of a change in status. She stated that when an injured worker receives a time loss compensation warrant from L&I, the payment order notifies the claimant not to cash the warrant if they have returned to work.

Dr. Kopp and Dr. Almaraz testified for the State. In addition, Theodore Becker, PhD, a board-certified disability analyst and examiner, testified as an expert in forensic biomechanics. Dr. Becker stated that he reviewed the surveillance video of Mr. Koker walking, bending, squatting, pushing gates, getting in and out of vehicles, and other day-to-day activities. Dr. Becker concluded that Mr. Koker's muscles and bones, including his back, were working as they should be to hold his body and that Mr. Koker did not show signs of compensatory movements. Dr. Becker also concluded that Mr. Koker could do light to medium work. Based on the 2006 surveillance video, Dr. Becker stated that he would have released Mr. Koker to work in 2006.

Three gun show promoters testified regarding activities required to set up and execute a gun show. The promoters all testified that their general duties were to contract

with a facility, obtain the necessary insurance, advertise the event, and set prices for vendor tables and admission. The promoters also went to the facility before the event to set up and assign tables, and then allow vendors to set up their areas. The promoters stated that they are also responsible for public relations and dealing with problems during shows.

In support of his defense that he did not misrepresent his condition, Mr. Koker presented testimony from Dr. Jeffrey Larson, a neurosurgeon, and Dr. Philip Monroe, Mr. Koker's general practitioner. Dr. Larson testified that he had performed five different surgeries on Mr. Koker as a result of the 1999 injury. He also testified that he considered the treatment a failure because Mr. Koker continued to complain of pain. Dr. Larson's physician's assistant examined Mr. Koker in March 2005 and found everything normal, even though Mr. Koker reported pain. Dr. Larson treated Mr. Koker for the last time in November 2005.

Dr. Monroe testified that he saw Mr. Koker regarding his industrial back injury in 1999 and referred him to a neurosurgeon. Dr. Monroe said that Mr. Koker had not returned to his normal state and continued to complain about pain. He said that Mr. Koker's latest magnetic resonance imaging still showed problems with his back, probably due to scar tissue from his surgeries. Dr. Monroe did not release Mr. Koker for work

because he felt Mr. Koker could not do any one thing on a consistent basis without having to get up and move around.

Dr. Monroe testified that Mr. Koker told him in February 2007 that he was doing a job on the side promoting gun shows and that L&I had found out about it. Dr. Monroe cautioned Mr. Koker to be careful of Mr. Koker's promotion of gun shows while receiving lost time compensation from L&I. Dr. Monroe also said that Mr. Koker later called him and asked him to clarify that the work he was doing was promotional without any lifting. After watching the surveillance video of Mr. Koker, Dr. Monroe stated that his opinion of Mr. Koker's condition did not change because the doctor recognized that Mr. Koker had good days and bad days. However, Dr. Monroe also admitted that the video must have influenced him because he subsequently approved Mr. Koker for two jobs. Dr. Monroe also found Mr. Koker's movements to be more fluid in the videos.

Mr. Koker testified that promoting gun shows was his hobby and did not classify it as a job. He decided to become involved in gun shows for social reasons. He stated that he only spent four or five hours per week on gun shows and had people assist him with the heavy labor. Mr. Koker testified that in preparation for the gun shows, he was responsible for the advertising, scouting of locations, arranging the building rental, and communicating with vendors. He would arrive the day before the gun shows and make

table and other arrangements for vendors. He stated that he did not make money from the hobby.

Several witnesses testified about Mr. Koker's physical abilities. The State requested, and the trial court agreed, to limit the testimony of the witnesses to the time period between July 2006 and July 2007. The trial court reasoned that the information regarding Mr. Koker's health after the charging period was not relevant. Each of Mr. Koker's witnesses testified that Mr. Koker exhibited behavior consistent with significant back problems and chronic pain.

The jury found Mr. Koker guilty on all 26 counts of second degree theft, RCW 9A.56.040(1)(a), dating between July 25, 2006, and July 10, 2007. The trial court sentenced Mr. Koker to 22 months' confinement and to pay $31,244.18 in restitution to L&I.

Mr. Koker appeals. He contends that the State failed to present sufficient evidence to prove the element that Mr. Koker obtained benefits above $250 that he was not legally entitled to receive. He also contends that the trial court erred by excluding relevant testimony.

ANALYSIS

Sufficient Evidence to Establish the Value of the Benefits. "The test for

determining the sufficiency of the evidence is whether, after viewing the evidence in the light most favorable to the State, any rational trier of fact could have found guilt beyond a reasonable doubt." *State v. Salinas*, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992). "[A]ll reasonable inferences from the evidence must be drawn in favor of the State and interpreted most strongly against the defendant." *Id.* In making the challenge, the defendant admits to the truth of the State's evidence and all reasonably drawn inferences. *Id*. The reviewing court will defer to the fact finder on issues of conflicting testimony, credibility of the witnesses, and persuasiveness of the evidence. *State v. Thomas*, 150 Wn.2d 821, 874-75, 83 P.3d 970 (2004). 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).

A conviction of second degree theft requires proof beyond a reasonable doubt that the defendant by color or aid of deception, obtained control over the property or services of another or the value thereof, with the intent to deprive him or her of such property or services, and that the value of property exceeds $250. RCW 9A.56.020(1)(b); Former RCW 9A.56.040(1)(a) (1995).

"By color or aid of deception" is defined as "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 if 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).

Deception incorporates the element of reliance; reliance means that the defendant created or confirmed the false impression formed by the victim and that this false impression was the basis for the victim to part with his or her money. *State v. Knutz*, 161 Wn. App. 395, 405-06, 253 P.3d 437 (2011).

"In deception cases, the statute looks only to the value of the property obtained, not to the net result of the exchange." *State v. George*, 161 Wn.2d 203, 209, 164 P.3d 506 (2007). The substance of the crime of theft by deception is the loss of property by deceptive methods; the actual pecuniary loss is irrelevant. *State v. Sargent*, 2 Wn.2d 190, 193, 97 P.2d 692 (1940). The value of a check shall be considered the amount due or collectible, generally noted on the face of the check. Former RCW 9A.56.010(18)(b)(i) (2006).

In *George*, the trial court rejected the appellants' claims that the State needed to prove the value of the truck in order to establish the amount of money they gained from their fraudulent sales transaction. *George*, 161 Wn.2d at 206-07. The Supreme Court

affirmed, determining that the actual value of the truck was not relevant to the measure of value of the stolen property. *Id.* at 209. Because the charged crime was theft by deception, the cashier's check was the property of another that the appellants attempted to obtain by deception. *Id.* Therefore, the value of the check determined the value of the property obtained. *Id.*

Here, Mr. Koker contends that 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. Therefore, in order to prove that Mr. Koker unlawfully received property from L&I over $250, the State needed to prove the amount of benefit that he otherwise would have been legally entitled to receive. Without establishing the benefit he was entitled to receive if he had reported his activity, Mr. Koker contends that there was no way for the jury to infer that the amount he was not entitled to receive was over $250.

However, Mr. Koker was not charged or convicted of L&I fraud under RCW 51.48.020(2). The State charged and convicted Mr. Koker of second degree theft by color or aid of deception, RCW 9A.56.040(1)(a) and RCW 9A.56.020(1)(b).[1] Under

[1] In *State v. Hull*, 83 Wn. App. 786, 794, 924 P.2d 375 (1996), the court determined theft and L&I fraud are the same offense for double jeopardy purposes. The court noted that the State needed to charge Mr. Hull with no more than one of the two crimes. *Id.*

second degree theft by color or aid of deception, the State did not need to prove the amount of time loss compensation that Mr. Koker was entitled to receive. The statute for theft by deception does not focus on the net result of Mr. Koker's benefit based on the amount he was legally entitled to receive; instead, the theft by deception statute centers on the deceptive act and the value of the property that was obtained because of the deceptive act. Consistent with the jury instructions, the State had to prove beyond a reasonable doubt that Mr. Koker obtained the property of L&I by color or aid of deception between July 2006 and July 2007, that the property exceeded $250 in value, that Mr. Koker intended to deprive L&I of the property, and that the acts occurred in the state of Washington.

The State presented evidence to show that Mr. Koker acted deceptively by knowingly creating the false impression that he had not returned to any type of work and was not able to work. The State presented Mr. Koker's signed worker verification forms in which he certified that he had not returned to work, either paid or unpaid. He also certified that if he made a false statement about his activities or physical condition, he would be required to refund the benefits and may face civil or criminal penalties. The State also presented the L&I warrants and the payment orders issued to Mr. Koker that instructed him not to cash the warrant if he returned to any type of work during the pay

period covered by the warrant. Mr. Koker testified that he received the payments during this period.

Even though Mr. Koker signed the worker verification forms and cashed the warrants, other evidence showed that Mr. Koker returned to work and that his physical condition changed. Mr. Koker admitted to promoting gun shows and testified to his responsibilities. The State presented evidence of the responsibilities of gun vendors. The surveillance video of Mr. Koker also showed him engaged in promoting gun shows. Mr. Koker also testified that he acted as a gun show vendor. Based on Mr. Koker's actions as a gun show promoter, a jury could find beyond a reasonable doubt that Mr. Koker deceived L&I when he certified that he had not returned to any type of work, either paid or unpaid.

Evidence also supports the conclusion that Mr. Koker intended to deprive L&I of its property. Dr. Monroe testified that Mr. Koker admitted to having a side job promoting gun shows and that L&I had found out about it. Mr. Koker testified that he knew that L&I would stop payments if he returned to work. The State also presented evidence of two doctors and an expert who concluded that Mr. Koker was capable of working and was exaggerating his injury during the period that he was collecting time loss compensation. The State presented surveillance video of Mr. Koker performing multiple

tasks at gun shows. A jury could conclude beyond a reasonable doubt that Mr. Koker intended to hide his work in order to obtain lost time benefits from L&I.

The State presented copies of the warrants; all 26 were issued in an amount over $250. As stated, the payment order accompanying the warrant specifically stated that if a person was working or if his circumstances had changed, he was not to cash the warrant. Thus, the evidence supports the jury's determination that the deception resulted in the receipt of benefits above the amount of $250, which was established by each warrant issued to Mr. Koker. This evidence shows that L&I relied on Mr. Koker's false assertions in issuing the time loss compensation. In conclusion, the State presented sufficient evidence to allow a rational trier of fact to find all the elements of second degree theft by color or aid of deception beyond a reasonable doubt.

Mr. Koker contended for the first time in his reply brief that RCW 51.32.240(5)—a subsection of the Industrial Insurance Act (IIA), Title 51 RCW, regarding repayment for willful misrepresentation—dictates that the State must show an injured worker has received greater benefit than the amount the worker would have been entitled before L&I is entitled to repayment. Mr. Koker also contends that allowing the State to use theft statutes to recover payments from Mr. Koker undermines the purposes and intent of the IIA because the theft statute treats a claimant harsher than the repayment

statute if a false representation is made. In general, this court will not consider arguments raised for the first time in the reply brief. *Boyd v. Davis*, 127 Wn.2d 256, 264-65, 897 P.2d 1239 (1995). We will not consider this new argument.

Even if we were to address Mr. Koker's new arguments, his contentions fail. First, the provisions of the IIA regarding repayment do not apply here because the State charged Mr. Koker with theft in the second degree and not L&I fraud under RCW 51.48.020. Second, the use of the theft statute to prosecute fraudulent claimants and recoup payments by restitution does not undermine the remedial legislative intent of the IIA. The legislature clearly envisioned criminal punishment for a person who gives false information on an L&I claim by incorporating the degrees of theft in RCW 51.48.020(2). Last, the theft statute and the repayment statute are not irreconcilable. The theft statute allows for restitution for a criminal finding of fraud, whereas RCW 51.32.240 addresses civil repayment penalties when a claimant acts fraudulently. The statutes are not incompatible simply because they address two different venues for seeking repayment.

Excluded Evidence of Mr. Koker's Physical Condition Outside the Charging Period. 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

when no reasonable person would take the view the trial court adopted. *Id*. at 914 (quoting *State v. Ellis*, 136 Wn.2d 498, 504, 963 P.2d 843 (1998)). 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).

Relevant evidence is evidence that tends to make a fact of consequence more or less probable. ER 401.

Mr. Koker contends that the trial court should not have excluded testimony regarding his injuries before and after the charging period of July 2006 and July 2007. He contends that this testimony is relevant to support his defense theory that his condition remained constant from the time he was first injured.

The trial court excluded evidence that pertained to Mr. Koker's physical condition after the charging period. The trial court did not abuse its discretion by excluding this testimony. The evidence was not relevant because it addressed activities that occurred outside the charging period. Furthermore, the excluded witnesses who would have offered this evidence did not meet Mr. Koker until after the charging period and investigation. These witnesses had no knowledge of Mr. Koker's actions during the charging period and, likewise, had no knowledge of whether his condition remained the same. Thus, the testimony did not make the issue of Mr. Koker's condition more or less

probable.

STATEMENT OF ADDITIONAL GROUNDS FOR REVIEW

Mr. Koker alleges several errors in his statement of additional grounds for review.

First, in his statement of additional grounds for review, Mr. Koker contends that he should have not been allowed to sign the time loss forms because he was on medication, that his attorney told him that it would be fine for him to work at the gun shows, that the language changed in the forms he filled out for time loss compensation, and that his attorney cashed the L&I warrants. He contends that these issues were all raised at trial. These allegations are factual issues that relate to whether Mr. Koker intentionally deceived L&I. Issues of conflicting testimony, credibility of witnesses, and persuasiveness of the evidence are within the purview of the jury. *Thomas*, 150 Wn.2d at 874-75. As such, these were issues for the jury as the trier of fact and are not subject to review.

Next, Mr. Koker contends that the State committed prosecutorial misconduct by lying to the jury that Mr. Koker only attended college once during the charging period even though he attended twice. Issues on appeal not supported by citation to authority will not ordinarily be considered unless well taken on their face. *State v. Kroll*, 87 Wn.2d 829, 838, 558 P.2d 173 (1976). This error is not reviewable because the record does not

support this allegation. Furthermore, any misstatement by the prosecutor was rebutted when Mr. Koker testified in cross-examination that he attended college twice.

Last, Mr. Koker assigns error to the admission of two video recordings. He contends that the unedited versions of the videos not shown at trial contain evidence that contradict testimony given at trial. "Failure to object to the admissibility of evidence at trial precludes appellate review of that issue unless the alleged error involves manifest error affecting a constitutional right." *State v. Florczak*, 76 Wn. App. 55, 72, 882 P.2d 199 (1994). Mr. Koker did not object to the admission of the edited videos and waives review of the issue. Furthermore, at trial, Mr. Koker questioned the witnesses who recorded the video and did not challenge their testimony.

Mr. Koker does not present any reviewable errors in his statement of additional grounds.

We affirm the convictions for 26 counts of second degree theft.

A majority of the panel has determined this opinion will not be printed in the Washington Appellate Reports, but it will be filed for public record pursuant to RCW 2.06.040.

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Kulik, J.

WE CONCUR:

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Brown, J.	Siddoway, A.C.J.