No. 31313-1-III

IN THE COURT OF APPEALS
OF THE
STATE OF WASHINGTON

DIVISION THREE

STATE OF WASHINGTON,

Respondent,

v.

ADRIANE CONSTANTINE

Appellant.

ON APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR OKANOGAN COUNTY

The Honorable Judge Jack Burchard

APPELLANT'S OPENING BRIEF

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A. SUMMARY OF ARGUMENT

Your appellant, Adrianne Constantine, and her husband Morgan Davis, were separately convicted of manufacturing marijuana on a property at 44 Reevas Basin Road in Okanogan County that was registered to Mr. Davis.

In July 2010, after law enforcement saw marijuana in a greenhouse during a helicopter flyover, officers obtained a warrant to search the property and thereafter seized 121 marijuana plants from the greenhouse. Officers also seized various plants, matter and documentation from within the home that was located on the same property. Both Ms. Constantine and Mr. Davis were arrested and charged with manufacturing marijuana.

The trial court erred in this case by failing to suppress evidence that was obtained from the house. There was no factual nexus between the home and the greenhouses where marijuana was actually seen so as to include the home in the warrant. Inclusion of the home merely amounted to a general exploratory search based on inferences about common places to find evidence of drug activity, as opposed to the required factual showing that evidence of a crime would actually be found in the home. This constitutional error in failing to suppress the evidence cannot be considered harmless given the lack of other evidence showing Ms.

Constantine participated in any manufacturing process. As such, the defendant's conviction should be reversed and dismissed.

Alternatively, Ms. Constantine should have been permitted to raise her medical marijuana affirmative defenses as a "qualifying patient" and have the jury instructed on the same. The court erred by holding that Ms. Constantine could not raise the defense because her medical marijuana card was expired. Since law enforcement never asked for the card or questioned the defendant on it, her renewed medical marijuana card after her arrest was sufficient to raise the defense. Ms. Constantine provided sufficient prima facie showing to at least submit her defense to the jury, regardless of what the jury's ultimate factual determination may have been.

Next, Ms. Constantine should have been permitted to present her medical marijuana affirmative defense as a "designated provider" to another qualifying patient. The trial court erred by requiring live medical testimony before the defendant could present this defense. This holding was not supported by case law and contravenes the law that required the defendant to only show "some evidence," which she did, in order to present the defense to the jury.

Finally, the court erred by imposing jury and booking fees of $2,348.48 and $40 respectively that were not supported by law.

B. ASSIGNMENTS OF ERROR

1. The court erred by finding a legal nexus to search the home and thereby refusing to suppress evidence obtained from the house. (CP 129; CL 4, 5)

2. The court erred by finding that medical testimony from the authorizing physician was required to submit the medical marijuana defense to the jury. (CP 51-53)

3. The court erred by refusing to allow Ms. Constantine to present her medical marijuana defense to the jury as a "qualifying patient."

4. The court erred by refusing to allow Ms. Constantine to present her medical marijuana defense to the jury as a "designated provider."

5. The court erred by finding inadequate proof as a matter of law to establish the mere prima facie case that would have allowed the above defenses to go the jury for its factual determinations.

6. The court erred by denying the defendant the constitutional due process opportunity to present her defense and have the jury instructed on the same.

7. The court erred by imposing a jury fee of $2,343.48 and booking fee of $40. (CP 12)

C. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

Issue 1: Whether the evidence obtained from searching the home should have been suppressed because it did not have sufficient nexus to be included in the warrant.

a. The residence should not have been included in the search warrant because it lacked a nexus to the marijuana grow that was seen in the greenhouse elsewhere on this rural property.

b. Without the unlawfully obtained evidence above, Ms. Constantine's conviction cannot stand.

Issue 2: Whether the trial court erred by refusing to allow Ms. Constantine to present her medical marijuana affirmative defenses to the jury even though, viewing the evidence in a light most favorable to the

defendant, there was sufficient showing that she was a "qualifying patient" and a "designated provider."

a. The court erroneously deemed the defendant unqualified as a medical marijuana patient and threatened to notify the jury that she was not entitled to the defense if she referenced this defense at trial, significantly stifling Ms. Constantine's ability to present any defense at trial.

b. The court erred by requiring medical testimony in addition to documentation in order for the defendant to present her medical marijuana "designated provider" defense to the jury; the documentation provided by Ms. Constantine was sufficient to at least submit the defense to the jury.

Issue 3: Whether the court erred by imposing a jury fee of $2,343.48 and booking fee of $40 since these LFOs are not authorized by law.

D. STATEMENT OF THE CASE

On June 30, 2010, drug task force agents flew their government helicopter over 44 Reevas Basin Road in rural Okanogan County, a property registered solely to a man named Morgan Davis. (RP 28, 31, 39-41, 404, 406, 407, 421, 487)

During the flyover, agents noticed this property had two greenhouses, a shed, and a home, and they saw approximately 20 large marijuana plants growing in one of the greenhouses. (RP 31, 105, 121) About a week later, agents conducted another flyover, but the plastic covers were over both greenhouses, and they could only see a dark green color through the plastic tops that seemed consistent with their earlier observation of marijuana. (RP 43, 45, 406; CP 143) Based on these facts,

law enforcement obtained a warrant to search the home, greenhouses and all outbuildings at 44 Reevas Basin Road for evidence of manufacturing marijuana, including any ownership and identifying information. (RP 45, 407; CP 141-46)

Law enforcement executed the search warrant on July 8, 2010. (RP 45, 123-24, 407, 408, 419-20, 440) When they arrived to do so, Mr. Davis's wife, Adrianne Constantine, was present with her mother-in-law. (RP 47-48, 72, 125, 408, 440) Officers placed Ms. Constantine under arrest and executed the search warrant. (RP 72, 124, 126, 440) They seized 121 marijuana plants from in or around the greenhouses and up to 12 additional plants that were hanging in the shed. (RP 46, 130, 140, 408, 410-15, 420, 426-27, 446-49, 453-54, 467-69, 482; CP 150-52) From throughout the house, officers seized marijuana plants and plant matter in various stages of maturity and packaging, documentation in Mr. Davis's and Ms. Constantine's names, a medical marijuana card, $565 cash, and various household items containing marijuana. (RP 77-78, 136, 410-15, 430-31, 444-45, 457-62, 465, 473; CP 150-52)

When the warrant was being executed, Ms. Constantine asked officers for permission to retrieve her medical marijuana card. (RP 126-28, 145, 434, 441-42, 446-47; CP 128) But she was not allowed to do so and was instead informed by at least one officer that her medical

marijuana card would make no difference since there were "too many plants." (*Id.*) Shortly thereafter, Mr. Davis arrived home and was arrested as well. (RP 75-76)

Before trial, Ms. Constantine moved to suppress evidence. (CP 158-60) She argued in pertinent part that evidence obtained from the house should have been suppressed due to a lack of nexus between the greenhouses and the home. (*Id.*) But the court denied her motion. (CP 129)

Next, the State moved in limine to suppress any reference to a medical marijuana defense. (CP 55-58) Ms. Constantine suffers from numerous physical ailments, she was diagnosed as having a terminal illness or debilitating condition not relieved by other treatment measures, and she obtained a medical marijuana cards from two Washington State licensed physicians for her condition. (RP 145; CP 66, 69, 70, 71) Ms. Constantine's intended defense theory was that part of the plants seized were for her own medical marijuana use, part of the plants were medical marijuana for a patient named Tristan Gilbert for whom she was the sole designated provider, and that the remaining plants belonged to her husband as a lawful dispensary for a large medical marijuana supplier. (RP 286-92) But the court refused to allow any medical marijuana

defenses, so Ms. Constantine simply rested after the State had presented its case in chief. (RP 508-09, 511-14; CP 49-53)

After being instructed on the elements of the charge and accomplice liability, without defendant's proposed instructions on medical marijuana, the jury convicted Ms. Constantine as charged of manufacturing marijuana. (CP 19, 23-40, 44-48, 176-77) This appeal timely followed. (CP 2)

E. ARGUMENT

Issue 1: Whether the evidence obtained from searching the home should have been suppressed because it did not have sufficient nexus to be included in the warrant.

The trial court erred by denying Ms. Constantine's motion to suppress evidence that was obtained from the residence. This evidence included marijuana and paraphernalia, packaging, documentation connecting Ms. Constantine with the property, and an arguably large quantity of cash. (a) These items that were seized from the home should have been suppressed, because there was not probable cause establishing a nexus between the greenhouse where marijuana was seen in the flyovers and the home itself. (b) Without evidence from the home, there is insufficient connection of Ms. Constantine to the marijuana grow as an accomplice to the property's sole registered owner, especially where the

law is well settled that a person's mere presence or proximity to drug activity is insufficient to sustain a conviction.

a. The residence should not have been included in the search warrant because it lacked a nexus to the marijuana grow that was seen in the greenhouse elsewhere on this rural property.

There was not sufficient nexus between the greenhouse and the residence to include the home in the search warrant. Thus, evidence seized from the residence should have been suppressed, including any drugs, paraphernalia, money, documentation and identifying information.

A search warrant may only issue upon a determination of probable cause grounded in fact by a detached magistrate. *State v. Thein*, 138 Wn.2d 133, 140, 146-47, 977 P.2d 582 (1999) (citing *State v. Cole*, 128 Wn.2d 262, 286, 906 P.2d 925 (1995) (other citations omitted)). "Probable cause exists if the affidavit in support of the warrant sets forth facts and circumstances sufficient to establish a reasonable inference that the defendant is probably involved in criminal activity and that evidence of the crime can be found at the place to be searched." *Id.* "Accordingly, 'probable cause requires a nexus between criminal activity and the item to be seized, and also a nexus between the item to be seized and the place to be searched.'" *Id.* (quoting *State v. Goble*, 88 Wn. App. 503, 509, 945 P.2d 263 (1997)).

The latter requirement is at issue here – nexus between the item to be seized and the place to be searched. This nexus "must be established by specific facts; an officer's general conclusions are not enough." *Thein*, 138 Wn.2d at 145-46. "Absent a sufficient basis in fact from which to conclude evidence of illegal activity will likely be found at the place to be searched, a reasonable nexus is not established as a matter of law." *Id*. at 147. Importantly, probable cause must be based on more than conclusory predictions; blanket inferences that evidence of drug dealing is likely to be found in the homes of drug dealers lacks the necessary factual nexus. *Id*. at 147-48 (internal citations omitted). "[S]tanding alone, an officer's belief that [drug involved persons] hide evidence at other premises under their control does not authorize a warrant to search those places." *State v. Perez*, 92 Wn. App. 1, 7-8, 963 P.2d 881 (1998) (citing *State v. Olson*, 73 Wn. App. 348, 357, 869 P.2d 110, *review denied,* 124 Wn.2d 1029 (1994)).

In *State v. Thein*, the warrant to search the defendant's home was based on generalized statements about the habits of drug dealers. 138 Wn.2d at 148-49. There was no evidence of drug activity at the defendant's home as opposed to some other place. *Id*. The Court concluded it was unreasonable to believe that, since there was no other known place in the defendant's control where drugs were located, his

home was likely to reveal evidence of drug dealing. *Id*. at 150. The Court contrasted the *Thein* case with cases where facts showed sufficient nexus to the home, such as the defendant dealing drugs and then immediately returning to the house in question. *Id*. at 148 (citing *State v. Mejia*, 111 Wn.2d 892, 898, 766 P.2d 454 (1989)).[1] Even if "common sense and experience inform the inferences" pertaining to drug activity, such "broad generalizations do not alone establish probable cause." *Id*. at 148-49. In sum, since the facts did "not establish a nexus between evidence of illegal drug activity and [the defendant's] residence…, [and since the] officer's general statements regarding the common habits of drug dealers were not alone sufficient to establish probable cause…," the Court reversed that defendant's conviction. *Id*. at 151.

In *State v. Goble*, the magistrate who issued the warrant had no information that the defendant had previously dealt drugs out of his house, stored drugs at his house, or transported drugs from the house, as opposed to some different place such as "his car, at his place of employment, at a friend's house, or buried in the woods." *Goble*, 88 Wn. App. at 512. Therefore, the court reversed for lack of a factually-supported nexus to search the defendant's house as opposed to some other place. *Id*.

[1] *See also State v. G.M.V.,* 135 Wn. App. 366, 372, 144 P.3d 358 (2006) (the warrant was to search the place that the defendant left from and returned to before and after selling drugs – his residence –; i.e., there was sufficient factual nexus to search the home). *And see Perez*, 92 Wn. App. at 7-8 (specific facts supported an inference that the defendant's homes were safe houses, or places where he kept evidence of drug dealing activities).

Finally, the State may argue that probable cause to search the greenhouses automatically extended to search the house located on the same property. But probable cause to search outbuildings does not necessarily furnish probable cause to search a house, and vice versa. *See e.g., State v. Gebaroff*, 87 Wn. App. 11, 16-17, 939 P.2d 706 (1997); *State v. Kelley*, 52 Wn. App. 581, 586-87, 762 P.2d 20 (1988) (rejecting State's argument that probable cause to search outbuildings leads to probable cause to search the house).

In *State v. Kelley*, all of the information in the search warrant affidavit related to observations about the outbuildings, and there was "no information which furnished probable cause for a search of the house." 52 Wn. App. at 586. The State reasoned that, "given the information known about the outbuildings, it follow[ed] that the house probably would have contained information relating to the identity of the occupant of the outbuildings or materials used in the manufacturing or distribution of controlled substances." *Id*. But the Court found that the State's argument lacked any legal support and refused to infer probable cause to search the house from facts pertaining to the outbuildings. *Id*. at 586-87.

Here, the search warrant was based on two helicopter fly-overs by law enforcement over the rural property at "44 Reevas Basin Road," which was registered to a person named Morgan Davis. (CP 141-43, 146-

47; RP 487) During the first flyover, agents saw a greenhouse that had the plastic top pulled half-way back, revealing what appeared to be approximately 20 large growing marijuana plants. (CP 141-42) During the next flyover a week later, plastic covered both greenhouses. (CP 143) A dark green color could be seen through the greenhouses' plastic tops that could have been consistent with the marijuana seen before. (CP 143)

But nothing in the search warrant affidavit specifically referenced the house or shed or provided any basis for finding incriminating evidence at those separate locations. "During neither fly-over did the officers observe several marijuana plants that were growing between the two greenhouses." (CP 128; FF 13) Agents had no independent factual basis for searching the home itself or any other outbuildings. The affidavit may have established probable cause that marijuana would be found in the greenhouses, but then it asked for a general exploratory search warrant to search for any other evidence of a crime in any and all buildings on the same property. Importantly, there were no particular facts that provided the nexus for probable cause to search the home.

Probable cause to search a home cannot be based on general conclusions about the likely places that drug evidence may be kept, including in persons' homes. *Thein*, 138 Wn.2d at 148-51. There must be particular facts specifically tying one's residence to drug activity, as

opposed to some other place that evidence might exist, such as a car, a place of employment, a friend's house, or buried in the woods. *Goble*, 88 Wn. App. at 512. Here, the subject property was a rural residence with greenhouses located 50 to 70 feet from the house. (CP 128; FF 14) And, even if officers subjectively believed that drug or identifying evidence would likely be found in the residence, this inference has not been found sufficient to issue a search warrant for a person's home. *Kelley*, 52 Wn. App. at 586-87. Simply put, probable cause to search outbuildings (in this case greenhouses) does not lead to probable cause to search a home on the same property for contraband or identifying information. *Id*.

Without facts to otherwise show a nexus to search the home, the search warrant was overly broad. Accordingly, all evidence obtained in searching the home should have been suppressed. This included all evidence of drugs, drug paraphernalia, documentation, money, and other identifying information.

b. **Without the unlawfully obtained evidence above, Ms. Constantine's conviction cannot stand.**

There may have been evidence that the subject property was owned by Morgan Davis. But there was no such evidence connecting Ms. Constantine to the property and showing her participation as an accomplice to the marijuana grow that was located separately in the greenhouses. Thus, the failure to suppress the unlawfully seized evidence

from the house cannot constitute harmless error in this case. Ms. Constantine's conviction should be reversed and dismissed. At the very least, Ms. Constantine should receive a new trial without the tainted evidence so that a jury can determine beyond a reasonable doubt whether Ms. Constantine manufactured marijuana as an accomplice in this case.

"Failure to suppress evidence obtained in violation of a defendant's Fourth Amendment rights is constitutional error and is presumed to be prejudicial." *State v. Shupe*, 172 Wn. App. 341, 351-52, 289 P.3d 741 (2012) (citing *State v. Tan Le*, 103 Wn. App. 354, 367, 12 P.3d 653 (2000). "The State bears the burden of demonstrating the error is harmless." *Id.* "Constitutional error is harmless only if the State shows beyond a reasonable doubt that any reasonable jury would have reached the same result without the error." *Id.* (internal citations omitted).

It is a crime for any person to manufacture a controlled substance that the person knows to be a controlled substance, including marijuana. RCW 69.50.401(1). A person is an accomplice to such a crime when, "[w]ith knowledge that it will promote or facilitate the commission of the crime, he or she…[s]olicits, commands, encourages, or requests such other person to commit it… or… [a]ids or agrees to aid such other person in …committing it." RCW 9A.08.020(3)(a). But mere presence, or even assent to a crime, are not sufficient to establish liability. *State v. Roberts*,

80 Wn. App. 342, 355, 908 P.2d 892 (1996). *See also State v. Spruell*, 57 Wn. App. 383, 388, 788 P.2d 21 (1990) (mere proximity to illegal substance does not establish culpability). "One does not aid and abet unless, in some way, [s]he associates himself with the undertaking, participates in it as in something [s]he desires to bring about, and seeks by [her] action to make it succeed." *Roberts,* 80 Wn. App. at 355-56 (internal quotations omitted).

Here, any jury would not necessarily have found Ms. Constantine guilty beyond a reasonable doubt of manufacturing marijuana. There was evidence that Mr. Davis owned the property, and Ms. Constantine indicated she knew about the marijuana and had a medical marijuana card, but those facts did not establish beyond a reasonable doubt that she assisted in the manufacturing process.

There was evidence seized from the house that may have suggested more involvement by Ms. Constantine in the marijuana grow, including monies seized from Ms. Constantine's purse, documentation from inside the house showing her shared control over the property, and plant matter in various stages of maturity and packaging throughout the house. But when this evidence is suppressed as it should be, the constitutional error in this case is certainly not harmless. Without this evidence, there simply existed a couple of greenhouses with marijuana that were fairly isolated

from a home, a home that was registered to a person other than the defendant. (RP 40, 59-60, 487) "Prior to arrival [to execute the search warrant, officers] did not realize that Morgan Davis was married to Adriane Constantine…" (CP 128; FF 16) Prior to the unlawful raid of the home, there was nothing even connecting Ms. Constantine to the property, let alone to any manufacturing process as either a direct participant or an accomplice.

The admissible evidence that was offered by the State showed that Ms. Constantine was merely present at a house where elsewhere on the rural property there happened to be marijuana growing. And the defendant's mere presence or proximity to the drugs is inadequate to prove that the suppression error was harmless beyond a reasonable doubt. Ms. Constantine respectfully requests that her conviction now be reversed and dismissed.

Issue 2: Whether the trial court erred by refusing to allow Ms. Constantine to present her medical marijuana affirmative defenses to the jury even though, viewing the evidence in a light most favorable to the defendant, there was sufficient showing that she was a "qualifying patient" and a "designated provider."

Alternatively, in the event that this Court does not reverse and dismiss due to the unlawfully obtained evidence, or if a retrial is ordered based on the above argument, Ms. Constantine should have been permitted to raise her proffered medical marijuana defenses at trial. Ms.

Constantine's proposed defense at trial was as follows: that part of the marijuana that was seized was for her own medical issues as a "qualifying patient," that 15 of the plants belonged to another medical marijuana patient for whom she was the designated provider,[2] and that any remaining marijuana belonged exclusively to her co-defendant husband in this case who was lawfully growing the marijuana as a dispensary for a larger medical marijuana supplier. (RP 286-92, 507-09, 514)

Unfortunately, the court refused to allow Ms. Constantine to present any medical marijuana defense based on her personal use, holding that she was not a "qualifying patient" as a matter of law since her medical marijuana card had expired a few months prior to her arrest. The court erred in making this determination. The law only required that Ms. Constantine present current valid medical marijuana documentation when asked by law enforcement, which never occurred. And Ms. Constantine did renew her medical marijuana card shortly after her arrest before evidence of further questioning. Finally, Ms. Constantine did otherwise meet her threshold burden of showing she was a qualifying patient, so she should have at least been permitted to advance this medical marijuana affirmative defense to the jury who would then serve as fact finders.

[2] A qualifying patient who is also a designated provider for another patient may possess enough medical marijuana to satisfy both users' medical needs. 13A Wash. Prac. §910 (citing RCW 69.51A.040(1)(b)).

Next, the court erred by refusing to allow Ms. Constantine's "designated provider" medical marijuana defense based on a lack of live medical testimony. (RP 509) In what appears to be an unprecedented decision, the trial court held that the medical marijuana defense could not be presented to the jury without first offering live medical testimony regarding the qualifying patient's medical condition. (*Id*.) But there was other evidence establishing this defense regardless of live medical testimony, including the qualifying patient's medical marijuana documentation that was provided by the defendant. And, when this evidence is viewed, as required, in a light most favorable to the defendant, it is clear that Ms. Constantine met her threshold burden for at least advancing this affirmative defense to the jury.

Generally, as a matter of constitutional due process of law, a trial court must allow a defendant to present her defense theory of the case, and the court must instruct the jury on the defendant's theory of the case, so long as the law and evidence support it. *State v. Ginn*, 128 Wn. App. 872, 878, 117 P.3d 1155 (2005); *State v. Otis*, 151 Wn. App. 572, 578, 213 P.3d 613 (2009); *State v. Fry*, 168 Wn.2d 1, 14, 228 P.3d 1 (2010). "[F]ailure to do so is reversible error." *Ginn*, 128 Wn. App. at 878.

"At a hearing to determine whether a defendant may raise a medical marijuana affirmative defense, a defendant need only make a

prima facie case to raise the defense." *State v. Brown*, 166 Wn. App. 99, 104, 269 P.3d 359 (2012) (citing *State v. Adams*, 148 Wn. App. 231, 235, 198 P.3d 1057 (2009)) (emphasis added). "Although a defendant must show by a preponderance of the evidence that she or he is entitled to the Act's defense, the trial court must take the evidence in the light most favorable to the defendant." *Id*. *See also Ginn*, 128 Wn. App. at 882; *Otis*, 151 Wn. App. at 578; *Adams*, 148 Wn. App. at 235 (emphasis added). A "preponderance of the evidence" means that "considering all the evidence, the proposition asserted must be more probably true than not true." *Otis*, 151 Wn. App. at 578 (citing *Ginn*, 128 Wn. App. at 878).

"Trial courts may weigh issues of law when determining whether to permit the defendant to raise a medical marijuana affirmative defense. *Brown*, 166 Wn. App. at 104 (citing *State v. McCarty*, 152 Wn. App. 351, 363, 215 P.3d 1036 (2009)). "But trial courts may not weigh conflicting issues of fact to deny a defendant the opportunity to present a medical marijuana defense." *Id*. (once a defendant produces some evidence demonstrating entitlement to assert the medical marijuana defense, the trial court cannot weigh conflicting issues of fact) (emphasis added). "To the extent that the statute is ambiguous, [courts] must resolve the ambiguity in the defendant's favor under the rule of lenity." *Id*. (citing *State v. Jacobs*, 154 Wn.2d 596, 601, 115 P.3d 281 (2005)). Where the

trial court disallowed a medical marijuana defense as a matter of law, refusing to allow the defense to go to the jury, this Court's review is de novo. *Fry*, 168 Wn.2d at 6 (citing *State v. Tracy*, 158 Wn.2d 683, 687, 147 P.3d 559 (2006)).

Former RCW 69.51A.005 (2007), as enacted at the time of the defendant's arrest, reads in part as follows:

> "The people of Washington state find that some patients with terminal or debilitating illnesses, under their physician's care, may benefit from the medical use of marijuana…
>
> "The people find that humanitarian compassion necessitates that the decision to authorize the medical use of marijuana by patients with terminal or debilitating illnesses is a personal, individual decision, based upon their physician's professional medical judgment and discretion.
>
> "Therefore, the people of the state of Washington intend that:
>
> > "Qualifying patients with terminal or debilitating illnesses who, in the judgment of their physicians, may benefit from the medical use of marijuana, shall not be found guilty of a crime under state law for their possession and limited use of marijuana;
> >
> > "Persons who act as designated providers to such patients shall also not be found guilty of a crime under state law for assisting with the medical use of marijuana."

RCW 69.51A.005 (2007).

Ms. Constantine is the type of person the people of Washington intended to protect with enactment of the Medical Marijuana Act. The "Act provides an affirmative defense for patients and caregivers against

Washington laws relating to marijuana." *Adams*, 148 Wn. App. at 236.

To establish this affirmative defense, the defendant must:

> "(a) Meet all criteria for status as a qualifying patient or designated provider;
>
> "(b) Possess no more marijuana than is necessary for the patient's personal, medical use, not exceeding the amount necessary for a sixty-day supply; and
>
> "(c) Present his or her valid documentation to any law enforcement official who questions the patient or provider regarding his or her medical use of marijuana."

RCW 69.51A.040(2), (3)(a)-(c) (2007).

As set forth below, Ms. Constantine provided sufficient prima facie evidence for submitting her defense to the jury, because she showed that (a) she was a qualifying patient for medical marijuana use who was able to present valid documentation when required under the Act; and (b) she was a designated provider of medical marijuana to a qualifying patient.

a. The court erroneously deemed the defendant unqualified as a medical marijuana patient and threatened to notify the jury that she was not entitled to the defense if she referenced this defense at trial, significantly stifling Ms. Constantine's ability to present any defense at trial.

First, the court erred by concluding as a matter of law that Ms. Constantine was not a "qualifying patient" due to having an expired medical marijuana card at the time of her arrest, therein precluding her from presenting this affirmative defense at trial. (RP 508-09, 513) And

the court erred by threatening to inform the jury that, as a matter of law, Ms. Constantine was not entitled to the medical marijuana defense. (*Id*.) Sufficient prima facie showing was made so that this ultimate determination was a factual one for the jury alone to decide.

When the evidence is viewed in a light most favorable to the defendant, Ms. Constantine met her threshold burden of establishing that she was a "qualifying patient" under the Medical Marijuana Act and had valid documentation when required by the Act; indeed, Ms. Constantine renewed her medical marijuana card prior to evidence of questioning by law enforcement and did otherwise meet all criteria for this defense as a "qualifying patient." The court erred by excluding this defense based on its erroneous view of the law as to when Ms. Constantine was required to possess a current medical marijuana card. Ms. Constantine should have been permitted to submit her defense to the jury for its necessary factual determinations.

A "qualifying person" means a person who:

> "(a) Is a patient of a physician licensed under chapter 18.71 or 18.57 RCW;
>
> "(b) Has been diagnosed by that physician as having a terminal or debilitating medical condition[3];

[3] "[W]hether a defendant has a qualifying condition is a question of fact that a jury should decide once a defendant presents written authorization from a Washington-licensed physician stating that she or he has a qualifying condition." *Brown*, 166 Wn. App. at 105 (citing *State v. Fry*, 168 Wn.2d at 18-19, 23 (Chambers, J., concurring; Sanders, J., dissenting)).

> "(c) Is a resident of the state of Washington at the time of such diagnosis;
>
> "(d) Has been advised by that physician about the risks and benefits of the medical use of marijuana; and
>
> "(e) Has been advised by that physician that they may benefit from the medical use of marijuana."

RCW 69.51A.010(3) (2007).

As mentioned above, the qualifying patient must also present "valid documentation" to any law enforcement officer who questions the patient. RCW 69.51A.040(2), (3)(a)-(c) (2007); *Otis*, 151 Wn. App. at 579. "Valid documentation" means "[a] statement signed by a qualifying patient's physician, or a copy of the qualifying patient's pertinent medical records, which states that, in the physician's professional opinion, the patient may benefit from the medical use of marijuana…" RCW 69.51A.010(5)(a) (2007). This authorizing documentation must be obtained in advance of law enforcement questioning, but the documentation does not necessarily have to be obtained in advance of the initial police contact. *Adams*, 148 Wn. App. at 236 (citing *State v. Butler*, 126 Wn. App. 741, 750-51, 109 P.3d 493 (2005)); *State v. Hanson*, 138 Wn. App. 322, 157 P.3d 438 (Div. 3, 2007).

Medical marijuana documentation that is obtained or renewed after initial police involvement is still sufficient for a medical marijuana

defense, so long as police have not yet questioned the defendant on that documentation. In *State v. Hanson*, police executed a search warrant at the defendant's motel and seized 34 marijuana plants. 138 Wn. App. at 324. After the seizure, the defendant sought and obtained valid authorization from his physician to use marijuana for medical purposes. *Id*. The Court of Appeals held that, even though the defendant did not possess current and valid documentation when police initially discovered the marijuana, he did then possess valid documentation prior to police questioning him or asking to see that documentation. *Id*. By "its clear language, to be a 'qualifying patient' under the Medical Marijuana Act does not require the authorization form. [The defendant] only has to present the form when asked by the police." *Id*. at 326. The defendant "must present valid documentation 'to any law enforcement official who questions the patient regarding his or her medical use of marijuana'" (quoting RCW 69.51A.040(2)(a), (b), (c)) (emphasis included in opinion).

Importantly, this Court has found "nothing in the [Medical Marijuana Act] that requires that the documentation be posted or that the qualifying patient obtain the documentation in advance, although that is no doubt a preferable practice." *Hanson*, 138 Wn. App. at 327. This Court even acknowledged that, had police asked the defendant in *Hanson* for the documentation when the marijuana was initially seized, he would not have

been able to provide it. *Id*. Nonetheless, where such questioning has not yet occurred by law enforcement, a defendant still has time to obtain the current and valid documentation so as to then assert the protection of the "qualifying patient" medical marijuana defense at trial. *Id*.

Here, the question is not whether Ms. Constantine proved her "qualifying patient" affirmative defense by a preponderance of the evidence, but whether she presented sufficient evidence to allow the jury to consider her defense and be instructed on the same. *See e.g. Otis*, 151 Wn. App. at 578; *Ginn*, 128 Wn. App. at 878. The trial court found as a matter of law that "strict compliance was required" and Ms. Constantine could not assert any medical marijuana defense as a qualifying patient because her medical marijuana card had expired a few months before the police raid, and she did not renew that card until after her arrest. (RP 508-09, 511-13) But a current and valid medical marijuana card at the time of marijuana seizure is not a requirement for being a "qualifying patient" and asserting the medical marijuana defense to the jury. All that is required is that the defendant possess and produce that valid documentation when asked by law enforcement.

In this case, police arrived to execute a search warrant at the defendant's home after her medical marijuana card had expired. But, upon executing the search warrant and arresting the defendant, law

enforcement never asked for or questioned Ms. Constantine regarding her medical marijuana documentation. Quite the opposite is true. Indeed, Ms. Constantine tried to inform law enforcement of her medical conditions and even offered to retrieve her medical marijuana card, but she was repeatedly rejected in her efforts and specifically told by law enforcement that they would not talk with her about that because they thought she had too many plants, irrespective of any documentation. (RP 124, 126-28, 145, 440-42; CP 128, FF 17) Simply put, Ms. Constantine was never questioned or asked for her medical marijuana documentation, so she was not required to produce current documentation at that time.

It is true that, like in *Hanson*, 138 Wn. App. at 327, had the police questioned Ms. Constantine at the time of her arrest or asked for a copy of her medical marijuana authorization at that time, the defendant would likely have been unable to provide current documentation. Had this questioning occurred and the defendant not provided the documentation *when required* – i.e., at the time of questioning – Ms. Constantine may not have been entitled to assert this medical marijuana defense. But, like with the defendant in *Hanson*, that hypothetical situation is not what occurred here. Both Ms. Constantine and Mr. Hanson obtained current valid documentation *after* police executed their search warrants, but *before* evidence of questioning by law enforcement on that documentation. Thus,

the affirmative defense should have been available at trial to Ms. Constantine, like this Court held it should have been available for Mr. Hanson.

The State may argue, like law enforcement apparently believed when executing the warrant, that Ms. Constantine's valid documentation was irrelevant due to the large number of marijuana plants that were seized. But the law is well settled, as correctly acknowledged by the trial court (CP 51), that the number of plants possessed by the defendant is a question of fact that the jury must decide. In other words, a defendant cannot be precluded from submitting her medical marijuana affirmative defense to the jury simply because the State seized more marijuana plants than a presumptive 60-day supply. *See* WAC 246-75-010 (presumptive 60-day supply equals no more than 15 plants); *but see* 13 Wash Prac §910 (citing RCW 69.51A.045) (patient may possess greater than 15 plants with proof that this greater supply is medically necessary).

Even if the extent of a grow operation makes it unlikely that the affirmative defense will be successful once submitted to the jury, the defense should still be permitted where the defendant otherwise showed she was a qualifying patient or designated provider. *Otis*, 151 Wn. App. at 582 (police confiscated 75 plants, but this was a factual issue that did not prevent the defendant from submitting his affirmative defense to the jury);

Adams, 148 Wn. App. 231 (alleged possession of 40 plants did not prevent the affirmative defense from going to the jury); *Ginn*, 128 Wn. App. 872 (23 marijuana plants confiscated and defense allowed); *Hanson*, 138 Wn. App. 322 (Court of Appeals reversed and dismissed the prosecution where defendant had valid documentation as a qualifying medical marijuana patient, even though 34 plants had been seized.)

Here, it was a question of fact for the jury whether Ms. Constantine possessed more plants than medically necessary. And, although it is of no moment for purposes of this appeal, there are certainly facts that supported Ms. Constantine's case that she possessed no more plants than lawfully allowed. For instance, Ms. Constantine's medical authorization cards from her physicians did not limit her possession to 15 or any other certain number of plants (CP 69-70), and the jury could certainly have found that some of the plants that were confiscated belonged exclusively to Ms. Constantine's husband, the original co-defendant in this case. Regardless of the ultimate outcome on this point, this factual issue should have been left to the fact finders in this trial.

Viewing the evidence in a light most favorable to the defendant, as is required, Ms. Constantine offered sufficient evidence that she was a qualifying medical marijuana patient so that she should have at least been permitted to present this defense to the jury. Indeed, she presented

medical marijuana certifications stating that she was a patient of two Washington State licensed physicians (CP 69-70), that she was diagnosed by these physicians as having a debilitating medical condition[4] (CP 69-70), that she was a resident of the state of Washington at the time (CP 71), that she was advised by those physicians about the risks and benefits of medical marijuana (CP 69-71), and that she was advised by those physicians that she may benefit from the use of medical marijuana (*id*.) RCW 69.51A.010(3) (2007).

Ms. Constantine met all the criteria as a "qualifying patient;" it was an issue of fact that should have gone to the jury as to whether the amount of her supply was appropriate; and she was never questioned or asked by law enforcement for current valid documentation, which she did obtain after the warrant execution. RCW 69.51A.040(2), (3)(a)-(c) (2007). All prima facie requirements, when viewed in a light most favorable to Ms. Constantine, were met in this case. The court erred by refusing to allow Ms. Constantine to argue her affirmative defense theory of the case to the jury and have the jury instructed on the same. The defendant's conviction should, therefore, be reversed.

[4] Like the marijuana quantity issue, whether Ms. Constantine's medical conditions constituted a qualifying "debilitating medical condition" under the Medical Marijuana Act is also an issue of fact for the jury to decide. *Brown*, 166 Wn. App. at 105 (*citing Fry*, 168 Wn.2d at 18-19).

b. The court erred by requiring medical testimony in addition to documentation in order for the defendant to present her medical marijuana "designated provider" defense to the jury; the documentation provided by Ms. Constantine was sufficient to at least submit the defense to the jury.

The issue here is whether Ms. Constantine provided sufficient threshold evidence, when the evidence is viewed in her favor, that she was a designated medical marijuana provider to Tristan Gilbert. Under the circumstances of this case, Ms. Constantine's defense should have at least been submitted to the jury for its factual determinations.

A "designated provider" means a person who

> "(a) Is eighteen years of age or older;
>
> "(b) Has been designated in writing by a patient to serve as a designated provider under this chapter;
>
> "(c) Is prohibited from consuming marijuana obtained for the personal, medical use of the patient for whom the individual is acting as designated provider; and
>
> "(d) Is the designated provider to only one patient at any one time."

RCW 69.51A.010(1) (2007).

The court held as a matter of law that Ms. Constantine could not present her "designated provider" defense to the jury, because she did not make sufficient prima facie showing to support her defense in the form of live medical testimony from the patient's physician. Ms. Constantine "bore the burden of producing at least some evidence…," (*Fry*, 168 Wn.2d

at 11), but the trial court held Ms. Constantine to an improperly elevated burden of proof by requiring live medical testimony, which has not been required by other courts.

For example, in *State v. Brown*, the defendant offered testimony of the qualifying patients and "provided documentation to support his claim – medical marijuana prescriptions and signed [designated provider] forms…" 166 Wn. App. at 105-06. The Court stated, "[v]iewing the evidence in the light most favorable to [the defendant], we conclude that [the defendant] established a prima facie case to support the medical marijuana affirmative defense." *Id*. Importantly, the defendant's prima facie showing was not inadequate in that case for want of live medical testimony; the defendant established sufficient evidence to at least introduce the defense to the jury when he provided the medical marijuana prescriptions and designated provider forms. *See id*. Following that prima facie showing by the defendant, "[w]hether and when someone is a designated provider to a particular patient is a factual issue [that goes to the jury.]" *Id*.

Similarly, in *State v. Otis*, the defendant offered a letter from the qualifying patient's doctor that the doctor was treating the patient, had discussed use of medical marijuana to treat the patient's symptoms, and believed that the benefits of medical marijuana use outweighed the risks.

151 Wn. App. at 575. The defendant also offered the qualifying patient's letter regarding his particular medical condition, along with medical records to show how previous use of traditional prescription medications was unsuccessful to treat the patient's AIDS symptoms. *Id*. at 575. There is no indication that live medical testimony was ever offered, let alone required, in order for the defendant to meet his prima facie showing for the affirmative defense. *See id*.

Moreover, the *Otis* Court held, "the plain language of the Act does not require 'valid documentation' to list the patient's condition… We interpret 'valid documentation' not to require such disclosure as this may conflict with one or more purposes of the patient-physician confidentiality statute." *Otis*, 151 Wn. App. at 581 (internal citations omitted). The Court specifically noted that the "valid documentation" from the physician merely required "a written statement that generally convey[ed] a physician's professional opinion that the benefits of the medical use of marijuana outweigh the risks for a particular patient…" *Id*. at 582. Importantly, the documentation from the physician was held sufficient for the defendant to assert the "designated provider" defense, even though the documentation did not list the patient's medical condition and there was no evidence of live medical testimony from the physician. *See id.*

Finally, in *State v. Ginn*, the State argued that the defendant did not make a sufficient prima facie showing for her affirmative defense, because her physician never testified that he had discussed "the risks and benefits of the medical use of marijuana." 128 Wn. App. at 882. But the Court looked to the medical form that had been submitted rather than merely the physician's testimony, which stated, "I have advised [the patient] about potential risks and benefits of the medical use of marijuana." *Id*. The Court held, "taken in the light most favorable [to the defendant], there was evidence before the trial court from which a jury could have concluded that [the patient/defendant] had been advised of the potential 'risks and benefits of the medical use of marijuana." *Id*. at 883. "Thus, the jury should have been instructed on the burden and elements of that affirmative defense." *Id*.

Here, the defendant made a sufficient prima facie showing that she was a designated provider to a qualifying patient so that this defense should at least have gone to the jury. Indeed, Ms. Constantine submitted proof that she was eighteen years of age or older (CP 71), that she had written designation from the patient to serve as a designated provider (CP 67), that the medical marijuana patient was indeed qualified (CP 66), and that certain marijuana plants were grown for the sole use of this patient (RP 286-88). Ms. Constantine, her husband Mr. Davis and the qualifying

patient Tristan Gilbert were all prepared to testify in order to supplement the medical documentation that had been provided to the court and support this defense. (RP 507-08, 514-15)

The trial court held that the "designated provider" defense would not be allowed because the defendant did not include live medical testimony about Mr. Gilbert's medical condition in her above offer of proof. (CP 51-52) But live medical testimony would have simply gone to the weight of Ms. Constantine's defense; such testimony was not required as a threshold matter to simply present the defense in the first place. The defendant introduced the medical authorization for Mr. Gilbert to possess medical marijuana that was signed by Washington State physician Thomas Orvald, MD. (CP 66, 69) This medical authorization stated as follows:

> "I, Thomas Orvald, am a physician licensed in the State of Washington. I am treating the above named patient [Tristan Gilbert] for a terminal illness or a debilitating condition as defined in RCW 69.51A.010. I have advised the above named patient about the potential risks and benefits of the medical use of marijuana. I have assessed the above named patient's medical history and medical condition. It is my medical opinion that the potential benefits of the medical use of marijuana would likely outweigh the health risks for this patient."

(CP 66) (emphasis added).

This medical authorization form, which states that Mr. Gilbert is a patient being treated for a terminal illness or a debilitating condition, was sufficient when viewed in a light most favorable to the defendant to

present the affirmative defense to the jury. While live medical testimony may have strengthened Ms. Constantine's defense at trial, for purposes of her prima facie showing, she was only required to submit "some evidence"[5] supporting the defense. The qualifying patient's testimony along with the medical authorization forms, which clearly stated Mr. Gilbert had a terminal illness or debilitating medical condition, met the threshold requirement for asserting the designated provider affirmative defense. *See e.g., Brown*, 166 Wn. App. at 105-06 (testimony from qualifying patient, designated provider form, and medical authorization form constituted sufficient prima facie evidence for same affirmative defense).

The State may argue that live medical testimony was required because Mr. Gilbert's medical authorization form did not specifically list what the patient's qualifying medical condition was. But this argument has already been rejected by *State v. Otis*, 151 Wn. App. at 575 ("'valid documentation' not to require such disclosure as this may conflict with one or more purposes of the patient-physician confidentiality statute." *Otis*, 151 Wn. App. at 581 (internal citations omitted). Moreover, this case is further like *State v. Otis* where there was apparently no live

[5] *See e.g., Tracy*, 158 Wn.2d at 689-91 (defendant was required to introduce "at least some evidence that she was a qualified patient of a qualified physician…" – i.e., her California medical marijuana card – , in order for the Court to address her full faith and credit argument).

medical testimony provided; evidence offered from the qualifying patient himself could sufficiently supplement the medical forms and prove to the jury that the patient indeed had a qualifying medical condition. *See id*.

Finally, the State argued in *State v. Ginn* that medical marijuana authorization forms may not be relied upon in the absence of live medical testimony in order to satisfy a defendant's burden of proof under the Act. 128 Wn. App. at 882-83. But, its argument was rejected in *State v. Ginn*, and the trial court's decision based on this same erroneous theory requiring live medical testimony should now be reversed. *Id*. In order to make a threshold, prima facie showing under the Act, a defendant may rely on statements in the medical marijuana authorization forms to satisfy the defense criteria, and there need not necessarily be live medical testimony of the same evidence. *See id.* The evidence presented is taken in a light most favorable to the defendant, making it somewhat easier for the defendant to at least get the defense to the jury, regardless of what the jury's factual determinations may ultimately be based on the strength of the defendant's case.

The trial court erred in this case by holding Ms. Constantine to an unprecedented high burden of proof for her mere prima facie showing on the medical marijuana affirmative defense. The evidence that she provided, including the medical authorization and designated provider

forms that referenced Mr. Gilbert having a terminal illness or qualifying medical condition, along with that patient's testimony, met the burden for allowing the designated provider defense to go to the jury. Ms. Constantine respectfully requests that this Court reverse her conviction, which was obtained in violation of her constitutional due process rights to present her defense.

Issue 3: Whether the court erred by imposing a jury fee of $2,343.48 and booking fee of $40 since these LFOs are not authorized by law.

The court erroneously imposed a jury fee of $2,343.48, even though the maximum jury fee allowed by law was $250. Moreover, the booking fee of $40 was not authorized by any statute and should likewise be stricken.

The court may impose costs on a convicted defendant for those expenses specially incurred by the state in prosecuting the defendant. RCW 10.01.160(1), (2). But such costs "cannot include expenses inherent in providing a constitutionally guaranteed jury trial…" (RCW 10.01.160(2)), except for a jury fee cost, which is capped at a maximum of $250 for a jury with 12 jurors (RCW 10.01.160(2); RCW 10.46.190; RCW 36.18.016; 13B Wash. Prac. §3612).

In *State v. Hathaway*, the trial court had imposed a $1,604.53 jury fee. *State v. Hathaway*, 161 Wn. App. 634, 652-53, 251 P.3d 263, *review*

denied, 172 Wn.2d 1021 (2011). But the Court of Appeals reversed, because a jury fee cannot exceed the statutory maximum of $250. *Id*. *See also State v. Moreno*, __ Wn. App. __, 294 P.3d 812, 823 (2013) (remanding to correct sentence where the jury fee of $5,780.50 exceeded the statutory cap of $250); *State v. Bunch*, 168 Wn. App. 631, 633-34, 279 P.3d 432 (2012) ("jury costs of more than $6,000 clearly exceeded the maximum fee permissible for [defendant's] 12-person jury.")

Here, the court imposed a jury fee of $2,343.48. (CP 12) This fee clearly exceeds the statutory maximum of $250 for a 12-person jury. This case must, therefore, be remanded to correct this unlawful sentencing financial obligation.

Next, the court imposed a $40 booking fee. But it is well settled that "costs are creatures of statute" and "there is 'no inherent power in the courts to award costs' absent express statutory authority." *State v. Sizemore*, 48 Wn. App. 835, 839, 741 P.2d 572 (1987) (quoting *Pierce County v. Magnuson*, 70 Wash. 639, 641, 127 P. 302 (1912)). Some counties[6] do allow booking fees as costs by special ordinance, but there is no apparent authority for a county to impose such a booking fee for a crime charged under state statute, as in this case. *See* Op. Atty. Gen. 1993 No. 11.

[6] Okanogan County does not appear to have a local ordinance authorizing booking fees.

Certain fees that were imposed against Ms. Constantine were specifically authorized by statute, including fees for a victim assessment, filing, DNA, and court appointed representation. (CP 11) But the booking fee was not authorized by statute, nor was it an expense specially incurred in prosecuting the defendant. Without a statute specifically authorizing the $40 booking fee, it was improper to impose this cost and the sentence should be corrected.

F. **CONCLUSION**

Based on the foregoing suppression error or the denied opportunity to present her defense, Ms. Constantine respectfully requests that her conviction be reversed and dismissed. Or, in the alternative, the case should be remanded for retrial with opportunity for Ms. Constantine to assert her medical marijuana defenses. At a minimum, remand is necessary to correct the unlawfully imposed jury and booking fees.

Respectfully submitted this 23rd day of April, 2013.

/s/ Kristina M. Nichols _____
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Attorney for Appellant

COURT OF APPEALS
DIVISION III
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON	)	
Plaintiff/Respondent	)	COA No. 31313-1-III
vs.	)	
	)	
ADRIANE CONSTANTINE	)	PROOF OF SERVICE
	)	
Defendant/Appellant	)	
_____	)	

I, Kristina M. Nichols, assigned counsel for the Appellant herein, do hereby certify under penalty of perjury that on April 23, 2013, I deposited for mail by U.S. Postal Service first class mail, postage prepaid, a true and correct copy of the Appellant's opening brief to:

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Having obtained prior permission, I also served Karl Sloan at ksloan@co.okanogan.wa.us, syusi@co.okanogan.wa.us, and shinger@co.okanogan.wa.us by e-mail using the electronic service feature while e-filing.

Dated this 23rd day of April, 2013.

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