NO. 31313-1

IN THE COURT OF APPEALS

OF THE STATE OF WASHINGTON

DIVISION III

STATE OF WASHINGTON

RESPONDENT

V.

ADRIANE CONSTANTINE

APPELLANT,

BRIEF OF RESPONDENT

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1. Did the reviewing trial court err in concluding the issuing magistrate did not abuse his discretion in issuing the search warrant for evidence of manufacture of marijuana and/or possession with intent to deliver where officers observed approximately 20 growing plants in a greenhouse next to the residence?

2. Did the trial court err in finding a nexus between the greenhouse containing growing marijuana and the closely connected house and shed on the same tax parcel as the defendant's residence, to permit a search of the property for evidence related the crime of manufacture and/or possession with intent to deliver marijuana?

3. Did the trial court err in ruling the defendant could not raise an affirmative defense where the defendant failed to provide sufficient evidence of a valid authorization, proof of being a qualifying patient, possession of amounts above the presumptive amount, and where the defendant denied the criminal conduct?

4. Did the trial court err in assessing jury costs in excess of the statutory maximum or in assessing booking fees as permitted by statute?

C. STATEMENT OF THE CASE

On June 30, 2010, Det. Jan Lewis, a trained aerial marijuana spotter with the North Central Washington Narcotics Task Force, and Deputy Terry Shrable were flying in an Army National Guard helicopter in the area of Revas Basin Road near Tonasket, WA. CP 141-143; RP Vol. I, July 11, 2011 (hereinafter "RP 7/11"), pg. 28-32. As the officers flew over a residence located just off Revas Basin Road they observed two greenhouses. One of the greenhouses had its plastic covering rolled back approximately half way. CP 141-143; RP 7/11 pg. 31-32. The officers were able to see approximately 20 large growing marijuana plants in the uncovered portion of the greenhouse. *Id.* The nearby residence was a small stick built house with a green roof located just east of the greenhouses. A small stick built shed with a green roof was located just to the west of the greenhouses. *Id.*

Officers confirmed the property address with the growing marijuana was 44 Revas Basin Road, and the listed owner was co-defendant Morgan Davis. CP 142-143, RP 7-11 pg. 39-40.

On July 6, 2010, Det. Lewis and Det. Rubio flew over the property in a Border Patrol Helicopter and observed the buildings and greenhouses. The tops of the greenhouses were covered with plastic and dark green was visible through the plastic. Officers photographed the property from the air. CP 143-145; RP 7/11 pg. 43-45.

The greenhouses were estimated to be 50-70 feet from the residence. There were no other houses near the greenhouses. There were no other driveways or access roads permitting access to the property and greenhouses, except for the driveway leading to the residence from the east (on the opposite side of the house from greenhouses). RP 7/11 46; CP 139-144.

On July 7, 2010 Det. Lewis sought a search warrant to search the two large plastic covered greenhouses, the house to the east of the greenhouses, and shed to the west of the greenhouses. CP 139-140; RP 7/11 pg. 45. The search warrant affidavit was reviewed and signed by Judge David Edwards on July 7, 2010, and the Judge then issued a search warrant on the same day. CP 139-148; RP 7/11 pg. 45.

On July 8, 2010 the search warrant was executed on the property. Upon arrival officers made contact with the defendant, Adriane Constantine, outside the residence. She indicated her mother, or mother in law, Ms. Hale was in the house. The defendant requested that an officer retriever her marijuana card from inside the residence. Officers entered the residence to contact Ms. Hale and then had Ms. Hale remain outside the house in a shaded area. RP 7/11 46-48, 124-130. The defendant's husband arrived during the execution of the warrant. RP 7/11 pg. 128-129.

During the execution of the warrant, officers located approximately 121 growing marijuana plants RP 7/11 46. A few of the plants were located growing outside of the greenhouses. RP 7/11 pg. 56.

Officers also found in the residence various quantities of processed/packaged marijuana, marijuana seeds, paperwork and receipts, cash, electronic scale, and packaging material. Officers found additional drying marijuana plants hanging in the small shed. CP 149-152.

The defendant was charged with one count of manufacture of marijuana under RCW 69.50.401. CP 176-177.

On July 11 and 12, 2011, the trial court heard the defendant's motion to suppress and the States 3.5 motion. CP 126. On July 18, 2011 the court issued a written decision. *Id.* The Court's findings of fact, included:

- That Det. Lewis saw two greenhouses near the Davis residence;
- That upon the second flyover on July 6, 2010 the dark green color visible to Det. Lewis indicated to him the marijuana pants were still present;
- That that the photographs and testimony showed the land, house, greenhouses, outbuildings and vegetation were located at 44 Revas Basin Road and were owned by the co-defendant Morgan Davis;
- That greenhouses were approximate 50-70 feet from the home;
- That the residence, greenhouses, garden and outbuildings were all located within a clearly defined living compound and were well separated from any other structures or homes;
- That the nearest other structures were over 700 yards (2,100 feet) away; and
- That there was only one access road that approached the defendant's property and the road dead ended at the defendant's property.

CP 126-129. Included in the Court's conclusions of law, the Court found:

- That there was a clear legal nexus and logical close connection between the defendant's home, the greenhouses, the garden area, the yard, outbuildings and immediately surrounding areas;
- That the information presented within the search warrant affidavit established probable cause to search all the described property of the defendant for marijuana, documents, paraphernalia, controlled substances and the similar items listed.
- That the warrant was properly issued by Judge Edwards.

CP 129-130. The trial court heard motions in limine on February 22, 2012. The trial court excluded evidence of the defendant's alleged medical marijuana defense, based in part on insufficiency of the record to show the defendant was a qualifying patient or that the person (Tristan Gilbert) for whom the defendant claimed to be a designated provider, was a qualifying patient. CP 49-53; RP 2/22/12, pg. 364.[1]

The did not proceed to trial until October. The defendant was found guilty of manufacture of marijuana by a jury on October 31, 2012. CP 19.

D. ARGUMENT

1. There was probable cause to issue the warrant and the judge's decision to issue the warrant was not an abuse of discretion.

At a suppression hearing the trial court acts in an appellate-like capacity. The trial court's review of the issuance of a search warrant is limited to the four

[1] In seeking to establish herself as a designated provider, the defendant presented a document allegedly signed by Tristan Gilbert and the defendant to designate her as a medical marijuana provider. The document contained a limit of 15 plants. CP 67.

corners of the affidavit supporting probable cause; as is any subsequent review by an appellate court. *See e.g., State v. Neth*, 165 Wn.2d 177, 182, 196 P.3d 658, 661 (2008).

The magistrate's decision to issue the warrant is matter of judicial discretion and is therefore reviewed for an abuse of discretion. A magistrate's decision is given great deference. *State v. Martin*, 169 Wn. App. 620, 630-31, 281 P.3d 315, 320 (2012) *review denied*, 176 Wn.2d 1005, 297 P.3d 68 (2013); *State v. Olson*, 73 Wn. App. 348, 869 P.2d 110 (1994)

Probable cause exists where the search warrant affidavit sets forth facts and circumstances sufficient to establish a reasonable inference that the defendant is involved in criminal activity and that evidence of the criminal activity can be found at the place to be searched. It is only the probability of criminal activity, not a prima facie showing of it that governs probable cause. The issuing judge is entitled to make reasonable inferences from the facts and circumstances set out in the affidavit. *State v. Maddox*, 152 Wn.2d 499, 505, 98 P.3d 1199 (2004) (citation omitted).

The question whether probable cause exists is an objective inquiry. *State v. Goodman*, 42 Wn. App. 331, 337, 711 P.2d 1057 (1985). Probable cause exists where the facts and circumstances within the arresting officer's knowledge, for which the officer has reasonably trustworthy information, are sufficient to warrant

a person of reasonable caution in a belief that an offense has been committed. *See e.g., State v. Terrovona*, 105 Wn.2d 632, 643, 716 P.2d 295 (1986); *State v. Fricks*, 91 Wn.2d 391, 398, 588 P.2d 1328 (1979).

Evidence, which would be inadmissible at trial, may nevertheless be relied upon in making a probable cause determination. *Brinegar v. United States*, 338 U.S. 160, 69 S.Ct. 1302, 93 L.Ed. 1879 (1949); *Bokor v. Dep't of Licensing*, 74 Wn. App. 523, 874 P.2d 168 (1994). The officer need not have evidence sufficient to prove every element of the crime beyond a reasonable doubt.[2] *State v. Knighten*, 109 Wn.2d 896, 903, 748 P.2d 1118 (1988); *State v. Rogers*, 70 Wn. App. 626, 855 P.2d 294 (1993). Additionally, facts standing alone that would not support probable cause can do so when viewed together with other facts. *State v. Garcia*, 63 Wn. App. 868, 875, 824 P.2d 1220 (1992).

Courts evaluate an affidavit in a commonsense manner, rather than hypertechnically, and any doubts are resolved in favor of the warrant. *State v. Lyons*, 174 Wn.2d 354, 360, 275 P.3d 314 (2012) (quoting *State v. Jackson*, 150 Wn.2d 251, 265, 76 P.3d 217 (2003)); *State v. Chenoweth*, 160 Wn.2d 454, 477-478, 158 P.3d 595, 607 (2007). (*citing State v. Vickers*, 148 Wn.2d 91, 108-09, 59 P.3d 58 (2002).

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[2] A reasonable search is one based upon probability - a likelihood that evidence of criminal activity will be found. It does not require even a prima facie showing of guilt. *State v. Patterson*, 83 Wn.2d 49, 55, 515 P.2d 496, 500 (1973).

The Courts review of a decision where the trial court's findings of fact are unchallenged is limited to a de novo determination of whether the trial court derived proper conclusions of law from those findings. *State v. O'Cain*, 108 Wn. App. 542, 31 P.3d 733 (2001). Unchallenged findings of fact made by trial court at suppression hearing will be treated as verities on appeal, while challenged facts are also binding on appeal if there is substantial evidence in the record to support them. *State v. Gentry*, 125 Wn.2d 570, 888 P.2d 1105 (1995). Substantial evidence is evidence sufficient to convince a fair-minded person of the truth of the finding. *State v. Hardgrove*, 154 Wn. App. 182, 225 P.3d 357 (2010), *reconsideration denied.* An appellate court will not independently review the evidence because the trier of fact is in a better position to assess the credibility of witnesses, take evidence, and observe the demeanor of those testifying. *State v. Maxfield*, 125 Wn.2d 378, 385, 886 P.2d 123 (1994); *State v. Dykstra*, 84 Wn. App. 186, 926 P.2d 929 (1996) ((1996).

In the present case, Appellant does not challenge any of the trial court's findings of fact. Appellant challenges the trial courts conclusion of law #4, that there was a clear legal nexus and logical close connection between the defendant's home, the greenhouses, the garden area, the yard, outbuildings and immediately surrounding areas. CP 129. Thus review is limited to the legal conclusion that facts taken as a whole, and the reasonable inferences from them, established a

reasonable inference that evidence of the criminal activity could be found at the place to be searched.

2. There was a sufficient nexus from the information gathered, to find probable cause that evidence of criminal activity could be found at the residence and shed that bounded the greenhouses.

The Fourth Amendment prohibits the issuance of any warrant except one "particularly describing the place to be searched and the persons or things to be seized." *Maryland v. Garrison*, 480 U.S. 79, 84, 107 S.Ct. 1013, 1016, 94 L.Ed.2d 72 (1987). The Washington Constitution contains a similar requirement. *State v. Myrick*, 102 Wn.2d 506, 510, 688 P.2d 151 (1984). Under the Fourth Amendment, a warrant must describe with particularity the things to be seized. *Groh v. Ramirez*, 540 U.S. 551, 557, 124 S.Ct. 1284, 157 L.Ed.2d 1068 (2004); *State v. Riley*, 121 Wn.2d 22, 28, 846 P.2d 1365 (1993). This requirement serves two functions by limiting the executing officer's discretion; and informing the person subject to the search what items may be seized. *Riley*, 121 Wn.2d at 29.

A warrant may be overbroad and, therefore, violate the particularity requirement if it authorizes police to search persons or seize things for which there is no probable cause. *See State v. Maddox*, 116 Wn. App. 796, 806, 67 P.3d 1135 (2003) *aff'd*, 152 Wn.2d 499, 98 P.3d 1199 (2004). To avoid over breadth, there must be a sufficient nexus between the targets of the search and the suspected criminal activity. *State v. Carter*, 79 Wn. App. 154, 158, 901 P.2d 335 (1995).

Three factors are relevant to determine whether a warrant is overbroad:

> "(1) whether probable cause exists to seize all items of a particular type described in the warrant, (2) whether the warrant sets out objective standards by which executing officers can differentiate items subject to seizure from those which are not, and (3) whether the government was able to describe the items more particularly in light of the information available to it at the time the warrant was issued."

United States v. Mann, 389 F.3d 869, 878 (9th Cir. 2004) (quoting *United States v. Spilotro*, 800 F.2d 959, 963 (9th Cir. 1986)).

In arguing against the issuance of the warrant, Appellant cites to *State v. Thein*, 138 Wn.2d 133, 977 P.2d 582, 582 (1999), to argue that *"... more than conclusory predictions; blanket inferences that evidence of drug dealing is likely to be found in the homes of drug dealers..."* is needed to establish a nexus to search a particular location. See Brief of Appellant, pg. 9. The Appellant's reliance upon *Thein* is misplaced.

In *Thein*, 138 Wn.2d 133, the affidavit contained *only* generalized statements of belief about drug dealers' common habits, particularly that such persons commonly keep a portion of their drug inventory, paraphernalia, drug trafficking records, large sums of money, financial records of drug transactions, and weapons in their residences. *Jackson*, 150 Wn.2d, 266-67. The affidavit in *Thein*, 138 Wn.2d 133, expressed the belief that such evidence would be found at the suspect's address. *Jackson*, 150 Wn.2d 251 Apart from such statements, there

was no incriminating evidence linking drug activity found at one residence to Thein's personal residence that was searched. *State v. Cowin*, 116 Wn. App. 752, 758-59, 67 P.3d 1108, 1112 (2003).

The *Thein* court found that such generalizations do not establish probable cause for issuance of a search warrant for an alleged drug dealer's residence, since a finding of probable cause must be grounded in fact. *Jackson*, 150 Wn.2d, 266-67. 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 between the items to be seized and the place to be searched is not established as a matter of law. *Jackson*, 150 Wn.2d at 266-67. The *Thein* court in essence declined to adopt a per se rule that once a person is determined to be a drug dealer, then a finding of probable cause to search that individual's residence would automatically follow. *Jackson*, 150 Wn.2d at 266-67.

In *Jackson*, 150 Wn.2d 251, the court found there were more than generalizations, in that the affidavit included some information about possible evidence located inside the defendant's residence. The court found that information permitted a reasonable person to infer that the victim may have been removed from the residence, likely in a vehicle; and therefore there was a sufficient nexus to search two vehicles the defendant had *access* to and attach GPS devices to them. *Jackson*, 150 Wn.2d at 265. S*ee also State v. Gross*, 57 Wn. App. 549, 789

P.2d 317 (1990) *disapproved of by State v. The*in, 138 Wn.2d 133, 977 P.2d 582 (1999) (finding sufficient nexus to search residence where police corroborated information from the recipients of drug shipment about location of defendant's residence); *State v. G.M.V.*, 135 Wn. App. 366, 144 P.3d 358 (2006) (a nexus to search a juvenile's home was established by evidence that the juvenile's drug dealing boyfriend, who was not a full time resident of the home, had left from and returned to the home before and after selling drugs); *State v. McGovern*, 111 Wn. App. 495, 500, 45 P.3d 624, 626-27 (2002) (a nexus existed to search defendant's residence where the defendant's husband was stopped and found to possess marijuana in his motor vehicle and he told the troopers that he had left home to go to work; that he lived about twelve miles away; and that he had bought the marijuana in Oregon. The court found the issuing judge could infer the husband had been at the residence after buying the marijuana but before being stopped, and that the amount possessed (6.4 ounces) was not an extraordinarily large amount in light of his statement he had bought too much for personal use. Therefore the issuing judge was entitled to infer he had more marijuana elsewhere); State v. *Cowin*, 116 Wn. App. 752, 759-60, 67 P.3d 1108 (2003) (a nexus existed to search defendant's residence where informant reported the plants were transferred from the house into the woods and later investigation disclosed the presence of two grow sites a short distance from the defendant's residence that were accessible only by

passing defendant's residence; and the same truck (which was registered to defendant's friend), was observed at grow sites and the defendant's residence).

The affidavit in the present case set out the fact that growing rows of marijuana plants were observed inside a partially uncovered greenhouse between the residence and shed; that on a second flyover six days later the greenhouse had been re-covered and a dark green color was still visible through the greenhouse plastic; that the parcel of property where the buildings and greenhouses were located was owned by the co-defendant; and that there were no other nearby driveways or houses except those shown in the photos.

The defendants had apparent dominion and control over, and continuous accesses to the residence, the greenhouses, and the shed. There was a sufficient nexus to the adjoining residence and shed to allow officers to search for evidence of dominion and control, drugs, and paraphernalia. Moreover, the issuing magistrate could clearly infer that access to the greenhouses was restricted to using the driveway to the residence; any movement of materials, paraphernalia, or drugs into or out of the property would have to use the residence driveway; the greenhouses would be reliant upon the residence and its occupants for water and power needs; and there were no other residences where person(s) accessing and tending the grow would have stayed.

Contrary to the Appellant's argument, *Thein*, 138 Wn.2d 133, is not analogous to her case. There were no generalized statements of habit or propensity in the affidavit to bolster probable cause. The court's decision in *Thein*, 138 Wn.2d 133 was explicitly limited to the question of whether or not generalizations about "the common habits of drug dealers" standing alone, established probable cause. *Thein*, 138 Wn.2d at 136, 148-149. [3]

Moreover, the *Thein* Court specifically distinguished its case from cases involving searches for personal property. *Thein*, 138 Wn.2d at 149, citing *State v. Herzog*, 73 Wn. App. 34, 56, 867 P.2d 648 (1994), *Wayne R. LaFave, Search and Seizure* § 3.7(d), at 381-85 (3d ed. 1996); and *State v. Condon*, 72 Wn. App. 638, 644, 865 P.2d 521 (1993). The Court reasoned that personal items, unlike drugs, are of continuing utility and that it is reasonable to infer such items will likely be kept where the person lives. See *Thein*, 138 Wn.2d at 149. *Thein* expressly agreed

[3] Appellant's reliance on and *State v. Gebaroff*, 87 Wn. App. 11, 939 P.2d 706 (1997) to support her contention that the warrant did not establish a nexus to search residence and shed is also misplaced. Both cases are distinguishable from the present case. In *Kelley*, 52 Wn. App. 581, the Court held that a search warrant that expressly authorized a search of a house and a carport did not authorize a search of several detached outbuildings on the same property when the warrant neither referred to the outbuildings nor incorporated by reference an affidavit that referred to the outbuildings. *Kelley*, 52 Wn. App. at 586. Similarly, in *Gebaroff*, 87 Wn. App. 11, the Court held that probable cause to search outbuildings on a particular piece of property does not furnish probable cause to search a house on the same property where different people controlled the house and the outbuildings. *Gebaroff*, 87 Wn. App. at 17.

Similarly Appellant's limited citation to *State v. Goble*, is misrepresentative and inapplicable, as that case involved an *anticipatory* search warrant. The court held that the nexus must exist *at the time the warrant issues*. *State v. Goble*, 88 Wn. App. 503, 511, 945 P.2d 263, 268 (1997).

with the tenet that a magistrate is entitled to make common sense inferences from the facts and circumstances contained in the affidavit; especially where they concern searches for personal property.

In the present case, there was probable cause for the crime of possession / manufacture of marijuana. The evidence sought in the warrant was very specific to the crime and included: records related to manufacture of marijuana; records of persons involved; evidence of ownership and dominion and control of the residence at 44 Revas Basin Road; drug paraphernalia for the packaging, weighing, distributing, manufacturing, and using marijuana; and controlled substances. Those items sought in the search warrant, unlike the drugs, were neither consumable nor routinely destructible.

The warrant set out clear objective standards and limitations as to the places to be searched and the evidence sought. The warrant described the evidence sought with particularity. The judge did not abuse his discretion in issuing the search warrant, and the trial court did not commit error in denying the defendant's motion to suppress. Based on the facts presented, the judge had sufficiently reliable information to find probable cause and to issue the search warrant. The limited scope of the warrant regarding the places to be searched and the items to be seized was not overbroad and was directly connected to the observed marijuana grow.

3. Even if there were no nexus to search the residence, admission of evidence seized therein would have been harmless.

Even if there were some way to conclude there was not a nexus between the residence and the greenhouses located in the yard of residence, admission of evidence found within the residence would still be harmless.

Violations of a person's right to be free from an illegal search and seizure are a constitutional error and are presumed to be prejudicial. *State v. McReynolds*, 117 Wn. App. 309, 326, 71 P.3d 663 (2003); see also *State v. Ladson*, 138 Wn.2d 343, 359, 979 P.2d 833 (1999) (indicating that the under the Washington Constitution, suppression of illegally seized evidence is constitutionally required). Generally when the error is constitutional, the State must show that the error was harmless beyond a reasonable doubt. *McReynolds*, 117 Wn. App. at 326 (indicating that under constitutional error analysis, the State bears the burden of demonstrating the error was harmless beyond a reasonable doubt). An error is harmless beyond a reasonable doubt if untainted evidence admitted at trial is so overwhelming that it necessarily leads to a finding of guilt. *State v. Thompson*, 151 Wn.2d 793, 808, 92 P.3d 228 (2004).

In the present case, the defendant was the first person contacted by law enforcement. The defendant identified the woman in the residence as her mother or mother in law. The defendant told law enforcement her purse was in the house and asked them to obtain her marijuana card from inside the house. The

defendant's marriage to the co-defendant and her residency were established by the defendant and was not dependent upon evidence found within the residence. [4]

The un-contested evidence in this case would have resulted in a finding of guilt regardless of the admission of the evidence from the interior of the residence.

4. The trial court properly excluded evidence about an affirmative defense, when the defendant failed to provide sufficient admissible evidence.

A defendant may be entitled to raise a medical marijuana defense and to have the jury instructed on this defense if he or she presents facts sufficient to warrant such an instruction. The elements of a medical marijuana affirmative defense are set out by statute and require that a qualified patient be diagnosed by health care professional authorize by statute, with a debilitating disease and have valid documentation showing that he has been diagnosed, and also that the defendant may benefit from the use of medical marijuana. RCW 69.51A.010(4).

For the jury to be instructed on the marijuana medical defense, the burden is on the defense to present some evidence on *all* the elements of the defense. RCW 69.51A.040; *State v. Shepherd*, 110 Wn. App. 544, 41 P.3d 1235 (2002). A defendant is not entitled to have the jury instructed on a theory of the case, unless

[4] Appellant argues that *prior* to their arrival to execute the warrant, law enforcement officers did not realize the defendant was married to Morgan Davis, or connected to the residence. Brief of Appellant pg. 16. The observations are irrelevant where the Appellant is not challenging the search warrant in its entirety, the officer's right to be present to execute the search warrant, or the officer's contact with the defendant at the scene and her statements.

those instructions are supported by evidence, the instruction is not misleading, and it correctly informs the jury of the law. *State v. Jacobs*, 121 Wn. App. 669, 89 P.3d 232 (2004) *rev'd*, 154 Wn.2d 596, 115 P.3d 281 (2005).

The affirmative defense of medical use to marijuana crimes is statutory. The requirements to assert the defense are clear and unambiguous. A defendant asserting an affirmative defense, bears the burden of offering sufficient evidence to support that defense. *State v. Tracy*, 158 Wn.2d 683, 689, 147 P.3d 559 (2006)

An affirmative defense must be proved by the defendant by a preponderance of the evidence. *State v. Camara*, 113 Wn.2d 631, 639-40, 781 P.2d 483 (1989) (consent defense to rape); *State v. Rice*, 102 Wn.2d 120, 122-26, 683 P.2d 199 (1984) (lack of knowledge defense to accomplice liability); *State v. Moses*, 79 Wn.2d 104, 110, 483 P.2d 832 (1971); *State v. Mays*, 65 Wn.2d 58, 68, 395 P.2d 758 (1964); *State v. Knapp*, 54 Wn. App. 314, 320-22, 773 P.2d 134 (1989); *State v. Gilcrist*, 25 Wn. App. 327, 328-29, 606 P.2d 716 (1980) (involuntary intoxication defense). This is so because generally, affirmative defenses are uniquely within the defendant's knowledge and ability to establish. *Knapp*, 54 Wn. App. at 320-322.

To raise an affirmative defense, the defendant must offer sufficient admissible evidence to justify giving the jury an instruction on the defense. In evaluating whether the evidence is sufficient to support such a jury instruction, the trial court must interpret the evidence most strongly in favor of the defendant. *State*

v. Ginn, 128 Wn. App. 872, 879, 117 P.3d 1155, 1159 (2005).

Former RCW 69.51A.040. Provided an "affirmative" defense to the crime of possession or manufacture of marijuana. It states in part:

> (2) If charged with a violation of state law relating to marijuana, any qualifying patient who is engaged in the medical use of marijuana... will be deemed to have established an affirmative defense to such charges *by proof* of his or her compliance with the requirements provided in this chapter. Any person meeting the requirements appropriate to his or her status under this chapter shall be considered to have engaged in activities permitted by this chapter and shall not be penalized in any manner, or denied any right or privilege, for such actions. (Emphasis added).
>
> (3) The qualifying patient, if eighteen years of age or older, *shall*:
> (a) Meet *all* criteria for status as a qualifying patient;
> (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 regarding his or her medical use of marijuana.

The first step in interpreting a statute is to examine its plain language. *State v. Armendariz*, 160 Wn.2d 106, 110, 156 P.3d 201 (2007). Plain meaning "is to be discerned from the ordinary meaning of the language at issue, the context of the statute in which that provision is found, related provisions, and the statutory scheme as a whole." *State v. Engel*, 166 Wn.2d 572, 578, 210 P.3d 1007 (2009). If the statute is unambiguous after a review of the plain meaning, the court's inquiry is at an end.

Under former RCW 69.51A.040, in addition to meeting *all* the criteria to

be a "qualifying patient" (RCW 69.51A.010); the defendant must not possesses an amount of marijuana exceeding the amount medically necessary for sixty days (i.e. 15 plants and/or 24 ounces); *and* must provide "valid documentation" to law enforcement. Even if the defendant had been able to provide "valid" documentation, a doctor's "authorization" does not indicate that the presenter is complying with the Act. See Fry at 10.

Here the defendant did not have a valid medical marijuana authorization at the time of the crime. The claim that she previously had one, or subsequently received one, did not comply with the requirement of valid documentation. By analogy, that fact that someone once had, or could later obtain a prescription for a controlled substance, is not a valid defense to the charge of possession of a controlled substance.

Yet the defendant claims that the last element – presenting authorization documentation to law enforcement – operates to satisfy all the other elements. This is contrary to the statute.

a. The defendant did not present valid medical marijuana documentation and could not show a health care provider had diagnosed a qualifying medical condition that qualified under the statute or that authorized medical marijuana.

The statute clearly requires the health care professional authorizing the defendant's medical use of marijuana to have diagnosed the defendant with a condition that establishes the qualifying patient status. It is not sufficient for a

health care professional to simply claim that a defendant has been diagnosed with a qualifying condition. Instead, the defendant must actually put on evidence that the health care professional that authorized him to use marijuana diagnosed the defendant with a specific medical condition that qualifies under the statute. *State v. Fry*, 142 Wn. App. 456, 462-463, 174 P.3d 1258 (2008) *aff'd*, 168 Wn.2d 1, 228 P.3d 1 (2010).[5] It is the defendant's burden to show that this occurred. Even if the defendant had an authorization, her reliance on the vague language of the documents was insufficient to carry her burden. [6] The lack of information in the

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[5] Appellant cites to *Ginn*, 128 Wn. App. 872 to argue the trial court should have permitted an affirmative defense. However, in *Ginn*, 128 Wn. App. 872, trial court held an evidentiary hearing on the State's motion in limine and heard testimony from the defendant's treating physician; the director of the Lifeline Foundation, and a medical doctor and medical marijuana researcher. In *Ginn*, 128 Wn. App. 872, the court found the defendant had presented evidence of each element of the "qualifying patient" defense. In the present case, the defendant's reliance on the bare authorization form was insufficient and far less information than was presented in *Ginn*, 128 Wn. App. 872.

Similarly, Appellant cites to *Otis*, 151 Wn. App., 575. *Otis* also involved substantially more medical information than the bare, vague form provided by the defendant. In *Otis*, 151 Wn. App. 572, the defendants provided treating physician letters containing specific information, and the medical records of the qualifying patient. *Otis*, 151 Wn. App., 575-576.

Defendant also cites *State v. Brown*, 166 Wn. App. 99, 269 P.3d 359 (2012) However, the issue in that case was evidence of whether the defendant provided sufficient evidence that he was a provider to only one person at a time. *Brown* is unlike the present case where the issue was whether there was sufficient proof that the defendant (and Mr. Gilbert) was a qualifying patient.

[6] The documents the defendant provided to assert she and Tristan Gilbert were "qualifying patients" were also questionable on their face. For example, the patient's names, dates of birth, date of issue and expiration dates of some documents were handwritten with part in cursive and part in print lettering. The different sections were apparently written by different individuals. In the case of Mr. Gilberts alleged authorization form his name is typed in different font than any other portions of the

stock forms left the health care providers as the only witness who could provide the basic and necessary information. The forms presented did not satisfy all the elements necessary to raise an affirmative defense. The vague content and nature of the forms were also insufficient to offer the physician's opinion.

The statute is specific in the element requiring valid documentation. The required proof is tantamount to the level of certainty required of expert opinions in courts. There are legal consequences that attach to these scientific opinions. Therefore, the statute requires the physician to express his opinion about the medical benefits of the marijuana to a level of medical certainty. *Shepherd*, 110 Wn. App. at 551.

The statute requires that the patient has been diagnosed by *that* physician as having a qualifying terminal or debilitating medical condition. On its face the documentation presented failed. If the documents were in fact prepared by the physicians, then neither Dr. Orvald nor Dr. Ling stated that they diagnosed the defendant. At best they claim to be "treating" the defendant. Moreover the documentation fails on its face to indicate what, if any, the qualifying "*terminal or debilitating medical condition*" is that allows for the use of medical marijuana.

The documents offered by defendant were also hearsay and inadmissible under the rules of evidence. Nothing in the medical marijuana statutes overrules or

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document. CP 66, 69, 70. No offer of proof, testimony, or other evidence was offered to authenticate the documents.

amends the rules of evidence. The fact that one element of the statute requires a defendant to present documentation to law enforcement, in no way relieves the defendant of his or her burden to prove other necessary facts to raise the affirmative defense. Nor does the statute make inadmissible hearsay admissible, or eliminate the foundational requirements necessary to offer expert testimony. See ER 702. More importantly, the Statute does not limit, or eliminate, the defendant's discovery obligation under the court rules and rules of evidence, when he or she seeks to offer expert testimony. See CRR 4.7(d) and (g); ER 705.

The right to compulsory process is synonymous with the right to present a defense. *State v. Maupin*, 128 Wn.2d 918, 924, 913 P.2d 808 (1996). But the right to present a defense is not absolute. *Maupin*, 128 Wn.2d at 924-25. A criminal defendant has a constitutional right to present relevant evidence that is not otherwise inadmissible. E.g., *State v. Rehak*, 67 Wn. App. 157, 162, 834 P.2d 651 (1992).

The documents provided did not support all the elements required by statute, and did not establish a prima facie case to assert the affirmative defense. [7]

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[7] The definitions governing the application of the affirmative defense of medical marijuana were set out in former RCW 69.51A.010. It stated in part:

(1) "Medical use of marijuana" means the production, possession, or administration of marijuana, as defined in RCW 69.50.101(q), for the exclusive benefit of a qualifying patient in the treatment of his or her terminal or debilitating illness.

(3) "Qualifying patient" means a person who:

(a) Is a patient of a physician licensed under chapter 18.71 or 18.57 RCW;

b. The defendant did not offer evidence that she was permitted to possess more than a presumptive 60 day supply of marijuana.

It was the defendant's burden to show that she possessed no more than a presumptive 60 day supply of marijuana. *See* WAC 246-75-010. The presumption may be overcome with evidence of a qualifying patient's necessary medical use. *Id.*

(b) Has been diagnosed by that physician as having a terminal or debilitating medical condition;

(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.

(4) "Terminal or debilitating medical condition" means:

(a) Cancer, human immunodeficiency virus (HIV), multiple sclerosis, epilepsy or other seizure disorder, or spasticity disorders; or

(b) Intractable pain, limited for the purpose of this chapter to mean pain unrelieved by standard medical treatments and medications; or

(c) Glaucoma, either acute or chronic, limited for the purpose of this chapter to mean increased intraocular pressure unrelieved by standard treatments and medications; or

(d) Any other medical condition duly approved by the Washington state medical quality assurance board [commission] as directed in this chapter.

(5) "Valid documentation" means:

(a) 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 potential benefits of the medical use of marijuana would likely outweigh the health risks for a particular qualifying patient; and

(b) Proof of identity such as a Washington state driver's license or identicard, as defined in RCW 46.20.035.

Former RCW 69.51A.010 (emphasis added).

Case law prior to establishment of the presumptive 60 day supply indicated a valid sixty-day supply requires evidence from health care professional as to how much the patient requires for a sixty-day supply because, "without that statement, there is no way for us to decide whether the amount . . . fell within the 60-day limitation imposed by the Act." *Shepherd*, 110 Wn. App. 544. In *Shepherd*, 110 Wn. App. 544, the court noted that the defendant needed to provide evidence as to the amount of marijuana the defendant needs to alleviate or mitigate his medical problems. *Shepherd*, 110 Wn. App. at 552. The court went on to note that there must be some evidence from a doctor as to the defendant's 60-day supply. The same evidence would be necessary to establish possession of amounts in excess of the presumptive 60 day supply.

The defendant did not provide evidence of the medically determined quantify of marijuana. Where defendant fails to provide evidence as to how much marijuana the patient's treating physician believed the defendant would need, the defendant has failed to prove that the number of plants seized was no more than was necessary to meet the patient's marijuana supply for *no more than* 60 days. See, *Shepherd*, 110 Wn. App. at 552-553. The statute requires that the defendant possess no more marijuana than is *necessary* for the patient's personal, medical use. The determination must be made by the physician regarding what amount is medically necessary.

In this case, the forms attributed to Dr. Orvald failed to reference any

amounts. The form the defendant obtained and submitted after her arrest that she attributed to Dr. Ling, indicated the patient's recommended 60 day supply was 24 ounces of dried marijuana and as many plants as the patient "feels" necessary to maintain that amount. Giving the defendant the benefit of the doubt, at best, the form attributed to Dr. Ling recommended the statutory presumptive 60 day supply.

The defendant is not qualified to testify as to how much marijuana is medically necessary. ER 701 clearly states that "if a witness is not testifying as an expert, the witness' testimony in the form of opinions or inferences is limited to those opinions or inferences which are . . . (c) not based on scientific, technical, or other specialized knowledge within the scope of rule 702." Testimony concerning the treatment of a complex medical condition is not within the scope of evidence that a lay witness would be able to testify to and thus, the defendant's opinion on how much marijuana she might medically need in 60-days is irrelevant and inadmissible to show that the defendant had only the marijuana necessary for her personal, medical 60-day supply. Further, the court in *Shepherd*, 110 Wn. App. 544 clearly indicated that this information must come from a doctor.

Based on the information presented, the defendant offered no proof to support her assertion that she needed to medically possess or manufacture more than the statutory presumed 60 day supply. The defendant could not carry her burden to assert the affirmative defense.

c. The proposed defense that the co-defendant was responsible

for the marijuana precluded raising an affirmative defense.

An affirmative defense admits the defendant committed a criminal act but pleads an excuse for doing so. *State v. Fry*, 168 Wn.2d 1, 7, 228 P.3d 1 (2010); *State v. Votava*, 149 Wn.2d 178, 187, 66 P.3d 1050 (2003) (citing *State v. Riker*, 123 Wn.2d 351, 367, 869 P.2d 43 (1994)).

In the present case, defense initially stated they were not asserting a medical marijuana affirmative defense. RP 7/12, pg. 286, 293-294. Ultimately, the defendant sought to offer an affirmative defense, while still claiming she did not commit the crime. The defendant cannot assert an affirmative defense, while denying the underlying act. *See e.g., State v. Barragan*, 102 Wn. App. 754, 9 P.3d 942 (2000), P.3d 942 (2000) (defendant cannot deny striking someone and then claim the affirmative defense of self-defense).

Appellant asserts her defense was that part of the marijuana was hers, part was for a qualifying patient and "*...that any remaining marijuana belonged exclusively to her co-defendant husband...who was lawfully growing marijuana for as a dispensary for a larger medical marijuana supplier.*" Appellant's brief pg. 17. See also RP 7/12, pg.290-291 (defense asserted the defendant did not grow *any* marijuana).

Because the Appellant cannot deny the crime of manufacture of marijuana and still claim an affirmative defense, on that basis alone, the court properly prohibited he defendant from raising the affirmative defense.

The defendant's denial of involvement in manufacturing was also undermined by her involvement as a one of the "governing people" in the Canna Loon dispensary. The information was included in documents the defendant provided to the court. CP 75-79. See also RP 7/12, pg. 286-294. Involvement in manufacturing and delivering marijuana to others would also have prevented the defendant from asserting an affirmative defense as she would not be incompliance with the statutory requirements.

It is also significant to note that the defense advised the court that despite the designation as a provider, the defendant did not grow marijuana for Mr. Gilbert, because he had his own grow. RP 7/12, pg. 290-291.

Although the court properly limited evidence of the affirmative defense; nothing in the court's ruling limited the defendant from raising the defense that her co-defendant was responsible for the manufacture of marijuana. On the contrary, the trial court ruled the co-defendant could testify. The defendant chose not to offer that defense

d. **The defendant placed her medical records at issue and they were not protected by privilege.**

The affirmative defense that the defendant sought to claim was based solely on medical status. The Appellant cites to *State v. Otis*, 151 Wn. App. 572, 213 P.3d 613, 618 (2009) to argue that disclosure of the required medical condition is

unnecessary.[8] This is not supported by the statutes or case law. RCW 69.51A.010(5) (a) specifically lists "*a copy of the qualifying patient's pertinent medical records*" as a form of "valid" document necessary to raise the affirmative defense. Clearly, there is no privacy protection afforded the underlying medical records by the medical marijuana statute.

The Appellant argues the Court should accept a vague standardized form as the *sole* basis to raise the affirmative defense and that no medical evidence or testimony beyond that is necessary to assert the affirmative defense. Again, the valid documentation is only *one* element needed to establish the affirmative defense. To accept the Appellant's assertion would effectively make the other statutory elements required to assert the defense moot.

There is no prohibition or limitation on disclosure of pertinent medical records where defendant seeks to assert a medical marijuana affirmative defense. Under RCW 5.60.060(4), the physician-patient privilege, is a creature of statute, and thus is a procedural safeguard and not a rule of substantive or constitutional law. E.g., *Carson v. Fine*, 123 Wn.2d 206, 213, 867 P.2d 610 (1994). At common law, no testimonial privilege existed for communications or information

[8] *Otis*, 151 Wn. App., 582 stated "valid documentation" merely requires a written statement that generally conveys a physician's professional opinion that the benefits of the medical use of marijuana outweigh the risks for a particular patient. *Otis* was addressing the question of strict compliance with the form of the language in medical documentation offered, in a case where both physician statements and medical records were provided. In *Otis*, the medical records could have sufficed for valid documentation.

exchanged between patient and physician. *Id.* As a statute in derogation of common law, RCW 5.60.060(4) is to be construed strictly, and limited to its purposes. *Id.* Existing Washington case law holds that waiver occurs even without the patient's express consent. Specifically, the State Supreme Court has held that introduction by the patient of medical testimony describing the treatment and diagnosis of an illness waives the privilege as to that illness, and the patient's own testimony to such matters has the same effect. *Id.*

Asserting an affirmative defense operates as waiver of underlying records. In the case of *In re Rice*, 118 Wn.2d 876, 894, 828 P.2d 1086 (1992), the Court held there was no violation of medical privilege where the State obtained defendant's jail mental health records and interviewed jail mental health personnel without notifying his counsel, obtaining his permission, or obtaining a ruling on his psychotherapist-patient privilege. Where defendant has placed his mental condition at issue, he waives his privileges. *In re Rice*, 118 Wn.2d at 897 (citing, State v. Nuss, 52 Wn. App. 735, 742-43, 763 P.2d 1249 (1988); *State v. Brewton*, 49 Wn. App. 589, 591-92, 744 P.2d 646 (1987)).

There was no privilege associated with the medical condition defendant claimed established her (or Mr. Gilbert) as a qualifying patient. The defendant simply chose not to provide the necessary information despite having over two years before trial to do so.

5. Jury costs should have been assessed at $250 and booking fees were properly assessed.

In light of *State v. Moreno*, 173 Wn. App. 479, 499, 294 P.3d 812, 823 (2013) *review denied*, 177 Wn.2d 1021, 304 P.3d 115 (2013), the State concedes the jury cost of $2343.48, exceeded the statutory maximum of $250, and the jury fee should have been capped at $250

Booking fees may be assessed pursuant to RCW 70.48.390. *Huss v. Spokane Cnty.*, 464 F.Supp.2d 1056 (E.D. Wash. 2006) *order withdrawn*, CV-05-180-FVS, 2007 WL 1115296 (E.D. Wash. Apr. 13, 2007), initially found that assessing booking fees at the time of arrest (and prior to a conviction) violated due process. The order was later withdrawn. In the present case, the booking fee was properly assessed at the time of sentencing.

E. CONCLUSION

The reviewing trial court properly found the issuing magistrate did not abuse his discretion in issuing the search warrant for evidence of manufacture of marijuana and/or possession with intent to deliver, where officers observed approximately 20 growing plants in the a greenhouse.

The trial court properly denied the defendant's motion to suppress where there was a nexus between the greenhouse containing growing marijuana and the closely connected residence and shed that were located on the same tax parcel

where the defendant lived (and owned by her husband) and that was accessible only by traveling down the residence's driveway and past the nearby residence.

The trial court properly excluded argument about the affirmative defense where the defendant failed to carry her burden. The defendant presented vague forms that failed to establish a factual basis to assert the affirmative defense. The defendant failed to present any admissible evidence that she (or Mr. Gilbert) was a qualifying patient, or that if she had been a qualified patient, that the amount of marijuana in excess of the presumptive 60 day supply was medically necessary. Additionally, the defendant denied responsibility for the manufacture of marijuana and was not entitled to assert an affirmative defense.

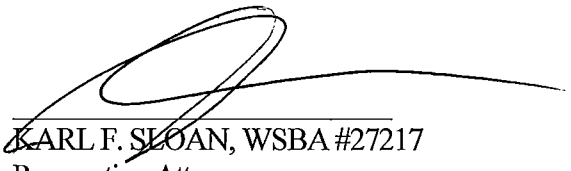
The Appellant's claim that the bare authorization form was sufficient to assert the affirmative defense was without support. Other evidence and argument in pretrial motions further undercut any facts the Appellant could claim to raise the affirmative defense.

The trial court should have imposed no more than the $250 jury cost. However, the booking fee imposed following conviction was property assessed.

The Appellant's conviction should be affirmed and her case remanded on the issue of jury costs assessed after her conviction.

Dated this 1 day of Oct 2013

Respectfully Submitted by:



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PROOF OF SERVICE

I, Karl F. Sloan, do hereby certify under penalty of perjury that on October 1, 2013, I provided email service by prior agreement (as indicated), a true and correct copy of the Brief of Respondent, to:

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