

NO. 46215-0-II

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

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STATE OF WASHINGTON,

Respondent,

v.

LAURI SPANGLER,

Appellant.

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

The Honorable Nelson Hunt, Judge

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BRIEF OF APPELLANT

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A. ASSIGNMENT OF ERROR

Spangler's due process right to present a defense was violated when the trial court refused to permit Spangler to present the medical marijuana affirmative defense available under RCW 69.51A.

Issue Pertaining to Assignments of Error

Where Spangler presented evidence that she complied with the criteria RCW 69.51A for presenting a medical marijuana affirmative defense; specifically, that she only served one patient at a time, examined qualified patient certificates for authenticity and insisted the patient provide a Washington State identification card, did the trial court commit reversible error by weighing disputed issues of fact and denying the request for an affirmative defense instruction, rather than sending the matter to the jury to decide?

B. STATEMENT OF THE CASE

1. Procedural Facts

Lauri Spangler was charged with and convicted of maintaining a premises for using controlled substances under RCW 69.50.402(1)(f). CP 23-25, 299. Spangler unsuccessfully moved to raise a medical marijuana affirmative defense. RP 240-241. This timely appeal follows. CP 380-392.

## 2. Facts Pertaining to Appeal

In January 2011 Spangler obtained a business license to operate Hub City Natural Medicine (Hub). RP 65-66. Spangler designated the business purpose “for the education and sales of natural medicine” RP 65-66. Spangler paid the license fee and police chief Berger ‘s office, without reservation, signed off on the application. RP 69-70. The police believed that Spangler was involved in the business as a manger based on her having signed the lease, bank account, and she was involved in removing an employee. RP 209. The police also had surveillance video from the Hub that showed Spangler locking the doors on several occasions. RP 191-192.

At some point the Hub started selling marijuana and edibles<sup>1</sup>. RP 103. Daniel Mack started working at the Hub and was the primary person assisting patients. RP 101, 103, 132. Mack testified that Spangler knew the Hub was selling marijuana but did not work at the store selling products or assisting patients. RP 117, 139. Colby Cave, Spangler’s boyfriend, Mack and a person named and Dave who was fired, established the procedure to comply with the law for selling marijuana to authorized patients. RP 104, 131, 140, 142. Mack explained that one of the legal requirements directed the provider to serve only one patient at a time. RP 132. Mack took patient’s information, and

verified their documents and certifications to determine if they were “qualified patients” under the Medical Marijuana Act (MUMA). RP 103-115, 132.

Mack refused to sell to anyone who did not possess the proper certification and identification and checked each certificate to make sure that it was printed on tamper-proof paper as required by law. RP 131. Mack also only served one person at a time as required by law. RP 132, 137-138.

Although Chief Berger signed off on Spangler’s business license, after hearing the Hub was selling marijuana he decided to investigate the Hub which led to his revoking Spangler’s business license on March 2, 2011. RP 74, 216-219.

In exchange for lenient treatment on criminal matters, Devin Edens and Joshua Myers agreed to work with the police as confidential informants. RP 77-78, 85, 93. Mack too agreed to testify in exchange for a favorable plea bargain. RP 118. The police provided Edens with a forged qualified patient certificate on tamper-proof paper that contained all of the necessary information needed to appear indistinguishable from a genuine certificate. RP 80, 94. Mack inspected the forged certificate that Edens used to purchase marijuana at the Hub. RP 80, 89.

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<sup>1</sup> Edible products containing THC.

Before obtaining the forged certificate, Edens tried to purchase marijuana but Mack refused to sell to he because he did not have the proper documents. RP 85-86. On two occasions, Myers also used forged a certificate prepared by the police to purchase marijuana at the Hub. RP 94-95, 153. Mack examined this certificate too certificate to make sure that it was legitimate and prepared on tamper-proof paper. RP 95, 98. The certificate prepared for Meyers used the name of an actual physician obtained from a Google search of Seattle medical marijuana doctors. RP 95, 98.

After the two controlled buys from Eden, Sergeant Jane Shannon applied for and obtained a warrant to search the Hub. RP 153. More than one year later, Shannon obtained a warrent to search Spangler's residence. RP 176. During the search of the Hub, the police retrieved several "designated provider" agreements dated for April 20, 2011. One of the certificates was for Richard Vandevort and the other was for his wife Linda Vandevort. RP 183-184. The dates on the provider agreements began and expired on April 20, 2011 but did not include information regarding the precise hour services were delivered. RP 185.

During trial, Spangler moved to permit the use of the medical marijuana affirmative defense. RP 233-235. The trial judge denied the motion

because the judge believed that Spangler did not offer enough evidence that she or an accomplice was the primary caregiver for only one person at a time. RP 238, 240-241. Spangler reminded the court that Mack's uncontroverted testimony demonstrated that the Hub only served one patient at a time. RP 236-237. The court also ruled that *State v. Shupe*<sup>2</sup> was incorrectly decided and invited Division Two to correct him. RP 238-240.

C. ARGUMENT

THE TRIAL COURT ERRED BY DENYING SPANGLER THE RIGHT TO PRESENT A MEDICAL MARIJUANA AFFIRMATIVE DEFENSE.

This Court should reverse Spangler's conviction because the trial court erroneously denied her motion to present a medical marijuana affirmative defense where Spangler met the criteria for the affirmative defense under the Medical Use of Marijuana Act (MUMA) chapter 69.51A. The trial court improperly weighed the evidence and held that Spangler did not establish that she was a specified provider to just one patient at a time, one of the criteria for enlisting MUMA as a defense. *State v. Brown*, 166 Wn.App. 99, 104, 269 P.3d 359 (2012); RCW 69.51A.

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<sup>2</sup> *State v. Shupe*, 172 Wn.App. 341, 289 P.3d 741 (2012)

a. MUMA

MUMA is codified in RCW 69.51A. The purpose of the Act is to allow patients with terminal or debilitating illnesses to use marijuana when authorized by their treating physician. RCW 69.51A.005; *State v. Ginn*, 128 Wn.App. 872, 877–78, 117 P.3d 1155 (2005). RCW 69.51A ( Former Laws 2007, ch. 371, § 5) applies to this case because the amendments to this provision did not take effect until July, 2011, after Spangler was charged. CP 23-25. In *Brown*, 166 Wn.App. 99, this Court held that the 2011 amendments to RCW 69.51A do not apply retroactively. *Id.* RCW 69.51A.40 Former Laws 2007, ch. 371, § 5 provides as follows:

“(1) If a law enforcement officer determines that marijuana is being possessed lawfully under the medical marijuana law, the officer may document the amount of marijuana, take a representative sample that is large enough to test, but not seize the marijuana. A law enforcement officer or agency shall not be held civilly liable for failure to seize marijuana in this circumstance.

“(2) If charged with a violation of state law relating to marijuana, any qualifying patient who is engaged in the medical use of marijuana, or any designated provider who assists a qualifying patient 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.

“(3) A qualifying patient, if eighteen years of age or older, or a designated provider shall:

“(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.

“(4) A qualifying patient, if under eighteen years of age at the time he or she is alleged to have committed the offense, shall demonstrate compliance with subsection (3)(a) and (c) of this section. However, any possession under subsection (3)(b) of this section, as well as any production, acquisition, and decision as to dosage and frequency of use, shall be the responsibility of the parent or legal guardian of the qualifying patient.”

Id.

b. Medical Marijuana Affirmative Defense.

MUMA provides an affirmative defense for patients and providers against Washington criminal laws relating to marijuana. *State v. Shepherd*, 110 Wn.App. 544, 549, 41 P.3d 1235 (2002). In order to affirmatively defend a criminal prosecution under RCW 69.50.402(1)(f), a defendant must show by a preponderance of evidence that he has met the requirements of MUMA. *Brown*, 144 Wn.App. at 104; *Shepherd*, 110 Wn.App. at 550; *Ginn*, 128 Wn.App. at 878.

These requirements include both a qualifying patient or designated provider to (1) meet all criteria for status as a qualifying patient or designated provider; (2) possess no more marijuana than is necessary for the patient's personal medical use, not exceeding a 60-day supply; and (3) present his or her valid documentation to any law enforcement official who questions the patient or provider. RCW 69.51A.040(2) (2007) ( Former Laws 2007, ch. 371, § 5). Valid documentation includes a Washington State identification card and a medical marijuana certificate prepared by a physician on tamper proof paper that contains specified statutory language. *Id.*

To be a “designated provider” under the chapter, a person must be over 18, designated in writing by a qualified patient to be that patient's provider, and be **“the designated provider to only one patient at any one**

**time.”** (Emphasis added) Id.

An affirmative defense that does not negate an element of the crime, but excuses the conduct, must be proved by a preponderance of the evidence. *State v. Riker*, 123 Wn.2d 351, 368, 869 P.2d 43 (1994)). The MUMA affirmative defense does not negate an element of the crime and therefore must be proved by a preponderance of the evidence. *State v. Markwart*, 329 P.3d 108, 118 (2014) (citing *Riker*, 123 Wn.2d at 368). Preponderance of the evidence means that considering all the evidence, the proposition asserted must be more probably true than not true. *Shepherd*, 110 Wn.App. at 550; *Ginn*, 128 Wn.App. at 878.

Once a defendant produces a medical marijuana certificate, the trial court may not weigh conflicting issues of fact to deny a defendant the opportunity to present a medical marijuana defense. *Brown*, 166 Wn.App. at 104; *State v. Fry*, 168 Wn.2d 1, 18–19, 23, 228 P.3d 1 (2010) (Chambers, J., concurring; Sanders, J., dissenting). To the extent that RCW 69.51A is ambiguous, the reviewing court “must resolve the ambiguity in the defendant's favor under the rule of lenity” *Brown*, 166 Wn.App. at 104 (citing *State v. Jacobs*, 154 Wn.2d 596, 601, 115 P.3d 281 (2005)).

To raise a medical marijuana defense, the defendant bears the burden

of offering sufficient evidence to make a prima facie showing. *Fry*, 168 Wn.2d at 11, 228 P.3d 1; *State v. Adams*, 148 Wn.App. 231, 236, 198 P.3d 1057 (2009); *State v. Butler*, 126 Wn.App. 741, 744, 109 P.3d 493 (2005) *overruled on other grounds by State v. Kurtz*, 178 Wn.2d 466, 475, 309 P.3d 472 (2013).

c. Standard of Review For Denial Of Affirmative Defense.

Whether the trial court erred in disallowing a medical marijuana defense is a legal question this court reviews de novo. *Fry*, 168 Wn.2d at 10–11; *State v. Tracy*, 158 Wn.2d 683, 687, 147 P.3d 559 (2006); *Brown*, 166 Wn.App. at 104.

d. Spangler Denied Right to Present Affirmative Defense.

Spangler met the criteria for the affirmative defense in MUMA to RCW 69.50.402(1)(f) which prohibits maintaining a shop for using controlled substances. It provides as follows:

(1) It is unlawful for any person:

(f) Knowingly to keep or maintain any store, shop, warehouse, dwelling, building, vehicle, boat, aircraft, or other structure or place, which is resorted to by persons using controlled substances in violation of this chapter for the purpose of using these substances, or which is used for keeping or selling them

in violation of this chapter.

Id. The trial court here denied the MUMA defense because it believed that Spangler served more than one patient at a time. RP 238, 240-241. This was incorrect under *Brown, supra, Shupe, supra* and *State v. Markwart*, 329 P.3d 108, 120-121 (2014). The Court in *Shupe*, determined that this phrase “**the designated provider to only one patient at any one time**”, meant that the qualified provider may only serve one patient at a time but permits successive sales. *Shupe*, at 354-356. The Court in *Markart* agreed with this interpretation. *Markwart*, 329 P.3d at 120-121.

In *Shupe*, the defendant conducted his business in the open but the state nonetheless charged Shupe with delivery, possession with intent to deliver, and manufacture of marijuana. *Shupe*, 172 Wn.App. at 347. During trial, Shupe testified that he served only one patient at a time and sold only to patients with medical marijuana documentation. *Shupe*, 172 Wn.App. at 356. Shupe's receipts showed the time to the minute as to when he served each patient but did not have an expiration date. *Id.* The state did not present any evidence to rebut Shupe's evidence that he complied with MUMA. *Id.*

In *Shupe* the Court explained that the term “designated provider” implied an ongoing relationship with a user, but determined that the word

“at” means temporally immediate which indicates that “ ‘only one patient at any one time’ means one transaction after another so that each patient gets individual care.” *Shupe*, 172 Wn.App. at 356. The Court in *Shupe* reversed the conviction and dismissed the prosecution because *Shupe* complied with MUMA, specifically the successive assisting of patients met the requirement for ‘one patient at a time’. *Id.*

In *Markwart*, Division Three again affirmed that “only one patient at a time” permitted successive sales. *Markwart*, 329 P.3d at 120-121. The Court in *Markwart* reversed *Markwart*’s conviction for possession with intent to sell because *Markwart* complied with MUMA by refusing to serve an undercover officer who did not have proper identification and who presented a certificate that was not prepared on tamper-proof paper. *Markwart*’s uncontroverted testimony like that in *Shupe*, also indicated that *Markwart* only served one person at a time. *Markwart*, 329 P.3d at 120-121.

The State in *Markart* unsuccessfully argued that *Markart* violated the one person at a time because the police found 15 provider forms in *Markwart*’s possession and nearly all of the patients served by *Markwart* signed the designation on one of two days but did not have an expiration date. The Court held that MUMA did not require an expiration date on each

provider agreement, and the statutory language in MUMA in effect during the charging period, unlike the later amendments, did not require the provider note the precise minute or hour the service was delivered. *Markwart*, 329 P.3d at 119 *Shupe*, 172 Wn.App. at 356; RCW 69.51A.040(5) (effective date July 2011- not applicable in Spangler's case).

Here, the state also argued that Spangler violated the one patient at a time rule by possessing more than one provider agreement at a time, each dated for April 20, 2011. RP 183-184, 205-206. The provider agreements provided a beginning and end date of April 20, 2011, but not the precise time of the individual service. RP 184-185.

In *Brown*, the defendant admitted he provided medical marijuana to three different people. Brown provided documentation to support his right to present a MUMA defense with medical marijuana prescriptions and signed forms designating Brown as the designated provider for two different people. *Brown*, 166 Wn.App. at 105. This Court held that these facts raised a material issue of fact whether Brown was the designated provider to the different patients at one time. 166 Wn.App. at 106. *Id.* Whether and when someone is a designated provider to a particular patient is a factual issue to be determined by a jury and possession of designated provider forms is only circumstantial

evidence that does not determine the one patient at a time issue. *Id.* This Court held that Brown was entitled to present an affirmative defense for the jury to determine the whether Brown was a designated provider to one person at a time. *Brown*, 166 Wn.App. at 105-106.

Here as in *Brown*, once Spangler presented the written authorizations, uncontroverted testimony that Mack properly scrutinized the authorizations to make sure they were on tamper –proof paper, insisted the patients present a Washington state identification, and Mack testified that he only served one patient at a time, Spangler made a prima facie case which entitled her to present an affirmative defense under MUMA. Both *Shupe* and *Markart* also support this conclusion.

The individual and combined facts of *Brown*, *Shupe* and *Markart* are similar to Spangler’s case and present variations on the same theme. Significantly, each of these Courts held that notwithstanding the trial court’s opinion about the evidence in support of a MUMA defense, a defendant is entitled to present that defense when he or she offers evidence that she complied with MUMA.

Here Spangler did just that. In fact, the uncontroverted evidence established that: (1) the certificates and authorizations were properly prepared

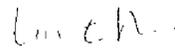
on tamper proof paper using the correct statutory language and a physician's name; (2) each qualified patient presented a Washington State identification card; and (3) Mack's uncontroverted testimony indicated that he only served one patient at a time. Under these cases Spangler met her burden requiring the trial court to give an affirmative defense instruction. The trial court's denial requires this Court reverse Spangler's conviction and remand for a new trial with the affirmative defense under MUMA. *Brown*, 166 Wn.App. at 106

D. CONCLUSION

Lauri Spangler respectfully requests this Court reverse her conviction and remand for a new trial with the right to present an affirmative defense under MUMA.

Dated: October 7, 2014

Respectfully submitted,



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I, Lise Ellner, a person over the age of 18 years of age, served the Lewis County Prosecutor [appeals@lewiscountywa.gov](mailto:appeals@lewiscountywa.gov) and Lori Spangler 627 Bostfort Rd. C. Curtis, WA 98538 a true copy of the document to which this certificate is affixed, on October 7, 2014. Service was made by depositing in the mails of the United States of America, properly stamped and addressed to Ms. Spangler and electronically and via U.S. mail to the prosecutor.

*Lise Ellner*

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Signature

**ELLNER LAW OFFICE**

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