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State of Washington
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No. 350291-III

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

**State of Washington,
*Respondent, Plaintiff***

v.

**Gabriel Ruelas, Jr.
*Appellant, Defendant***

Appeal from the Superior Court of Adams County

BRIEF OF APPELLANT/DEFENDANT

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I. INTRODUCTION

The State of Washington charged Gabriel Ruelas by Information filed on February 26, 2016, with Possession of Marijuana over Forty (40) Grams RCW 69.50.4013. (CP 1-2) A Rule 3.5 hearing was held on June 13, 2016, with the Honorable David Frazier presiding. (RP 9-33) The matter proceeded to a jury trial on October 25, 2016, in Adams County Superior Court before the Honorable Judge David Frazier with a finding of guilty returned. (CP 118). Mr. Ruelas filed a Motion for New Trial on November 4, 2016. (CP 123-129) On November 15, 2016, the Court denied Mr. Ruelas's Motion for a New Trial. A timely notice of appeal was filed in Adams County Superior Court.

II. ASSIGNMENTS OF ERROR and ISSUE STATEMENTS

- 1. Did the trial court err when it admitted testimony related to the post-arrest but pre-Miranda statements of Defendant?**
- 2. Did the Court err when it denied the Defendant an opportunity to present the defense of necessity?**
- 3. Did the trial court err when it excluded the expert witness of Defendant despite having available other and less severe discovery violation remedies?**

III. STATEMENT OF THE CASE

On November 10, 2015, Gabriel Ruelas, Jr., was stopped by Washington State Patrol Sergeant Oscar Garcia for speeding. (RP 158-159) As Sergeant Garcia was approaching Mr. Ruelas's vehicle, he could smell marijuana emanating from the vehicle. (RP 160) Sergeant Garcia obtained Mr. Ruelas's

driver's license, registration and insurance information and then questioned Mr. Ruelas about the smell of marijuana. (RP 160) Mr. Ruelas initially "wasn't very responsive" and wouldn't answer Sergeant Garcia's questions about the marijuana smell. (RP 161) Sergeant Garcia testified at trial that he then asked if Mr. Ruelas had a joint or any marijuana in the vehicle and Mr. Ruelas reached toward a bag in the backseat. (RP 161) Sergeant Garcia asked Mr. Ruelas to roll down his back driver's seat window, which Mr. Ruelas complied. (RP 161) In the back seat, Sergeant Garcia noticed a large, white, kitchen-style garbage bag containing apparent marijuana buds. (RP 161) Sergeant Garcia immediately recognized the amount to be a felony amount of marijuana. (RP 18) Sergeant Garcia removed the bag from Mr. Ruelas's vehicle and walked it back to his patrol car, securing the bag in his front passenger seat. (RP 161) He then returned to Mr. Ruelas's vehicle and placed him under arrest, searched him and secured him in the back seat of Sergeant Garcia's patrol vehicle. (RP 161)

Sergeant Garcia testified he and Mr. Ruelas engaged in a conversation while Mr. Ruelas was handcuffed and in the back of the patrol vehicle. (RP 162) During this conversation, Mr. Ruelas stated the vehicle was his sisters, that he was returning to his home in Edwall, Washington, after having cleaned the marijuana. (RP 162) Sergeant Garcia asked Mr. Ruelas where he was cleaning the marijuana at. (RP 21) In response to this question and while handcuffed in the back of Sergeant Garcia's patrol vehicle, Mr. Ruelas stated he was coming from sister's

house in Benton City, Washington, and that she was helping him clean the product and he was now taking it back to his home in Edwall. (RP 21) Also during this conversation, Sergeant Garcia testified that Mr. Ruelas told him the marijuana was being transported in one big bag instead of multiple little bags because “of what it might appear to be.” (RP 162) Sergeant Garcia then decided to read Mr. Ruelas his Miranda warnings. (RP 21, 162) On cross-examination, Sergeant Garcia testified that Mr. Ruelas had stated his packaging of the marijuana in one large bag was due to the fact that Mr. Ruelas was using the marijuana medically and was not selling it. (RP 168-169) Mr. Ruelas also told Sergeant Garcia that he had a medical marijuana card. (RP 170, 171) Mr. Ruelas told Sergeant Garcia that he grows the marijuana at home, cleans it at his sister’s house with her help and then takes the marijuana back home. (RP 170-171)

Mr. Ruelas’s statements to Sergeant Garcia before the Miranda rights were read was the basis for a Rule 3.5 hearing held on June 13, 2016. (RP 9-33) The trial court made findings of fact and conclusions of law related to Mr. Ruelas’s statements. (CP 39-43) The trial court held that statements made by Mr. Ruelas while he was in his own car are admissible, as were the statements made to Sergeant Garcia while Mr. Ruelas was handcuffed in the back seat of Sergeant Garcia’s patrol vehicle. (CP 41)

On the day of trial, the trial court heard the parties’ motions in limine. (RP 118-) The court asked defense counsel if he wanted to raise a defense of

necessity and counsel stated the defendant would be raising a defense of necessity, and that even though Mr. Ruelas held a medical marijuana card he would defend on necessity. (RP 118) The defense sought introduction of its jury instruction related to medical necessity. (CP 98, 99) The State requested the court deny Mr. Ruelas the opportunity to raise the defense of necessity as irrelevant to possessing large amounts of marijuana. (RP 120)

Defense counsel made an offer of proof related to the defense of necessity: (a) that the defendant grew the marijuana in Benton City where his mother lived and then brought the marijuana back to Edwall to create butters, salves, teas and other marijuana-infused food products (RP 122, 129, 130) for his now-deceased mother (RP 137) who was at the time suffering from debilitating, life-ending cancer (RP 124), (b) that the mother had undergone chemotherapy and other modern medical treatments related to the cancer (RP 122, 123) but that the marijuana improved her quality of life significantly (RP 122); (c) that Mr. Ruelas's sister would testify that she prepared the mother's food with the infused products and they improved her quality of life (RP 123), and (d) that State v. Kurtz was controlling case law allowing for the defense of medical necessity. (RP 120-124)

The trial court believed that the defense's jury instruction related to the medical necessity defense (CP 98, 99) required expert medical testimony related to whether or not there is any drug as effective in minimizing the effects of the

disease or any reasonable legal alternative existed. (RP 125-126, 139) Defense counsel argued that expert testimony was not required but that lay testimony from the mother's caregivers and her son, the defendant, was sufficient to establish that Mr. Ruelas's mother followed all of her doctor's instructions, took her medication as prescribed, and used marijuana as supplemental assistance to improve her condition. (RP 126)

Further, that the standard under a necessity defense was whether or not the defendant reasonably believed that the use of marijuana was necessary to minimize the effects of the mother's terminal cancer, as opposed to a defense under medical marijuana which required a doctor to opine as to the nature of the disease being treated under the Medical Marijuana Act. (RP 127) Defense counsel provided the state with over 600 pages of medical records related to Mr. Ruelas's mother's terminal cancer. (RP 128) The production was in an attempt to provide the government with evidence that corroborated Mr. Ruelas's statements related to possessing marijuana so that he could create butter, salves and other food products for his mother's terminal cancer. (RP 131)

The trial court, while "wish[ing] i[t] had more time to give this matter consideration" ruled that State v. Diana was controlling and State v. Kurtz was not helpful. (RP 131) The trial court further ruled that the defendant could testify as to Element No. 1, reasonable belief, and that although the controlling cases used an expert on Element No. 2, whether the benefits derived from its use are

greater than the harm sought to be provided by the controlled substance, the trial court believed the “defendant and other witnesses could testify as to their observations as to how the mother benefited from the use of marijuana.” (RP 133) However, the trial court ruled there would have to be expert testimony on the last element (CP 99) related to medical knowledge for the defendant to show there is no equally effective drug. (RP 140) The trial court also opined that the prosecution could make a good point that because Mr. Ruelas was stopped in a vehicle with the marijuana, and his mother was not present, so the necessity defense would not apply. (RP 140-141)

The trial court then ruled, “I’m not going to be allowing evidence as to the medical necessity defense or allowing any evidence as to the medically beneficial effect of marijuana that isn’t backed up by [the mother’s] testimony, which I understand you don’t have” and that for the necessity defense to be used, it would require expert testimony. (RP 141)

IV. ARGUMENT

1. The trial court erred when it admitted testimony related to the post-arrest but pre-Miranda statements of Defendant.

The right of the people to be secure in their person, house, papers, and effects, against unreasonable searches and seizures, shall not be violated. U.S. Constitution, Amendment IV. No person shall be disturbed in his private affairs, or his home invaded, without authority of law. Washington State

Constitution, Article I, Section 7. No warrants shall issue, but upon probable cause, supported by oath or affirmation. U.S. Constitution, Amendment IV.

In Miranda v. Arizona, 384 U.S. 436, 467, 86 S.Ct. 1602 (1966), the Supreme Court adopted a set of prophylactic measures to protect a suspect's Fifth Amendment right from the inherently compelling pressures of custodial interrogation. To counteract the coercive pressure, Miranda announced that police officers must warn a suspect prior to questioning that he has a right to remain silent, and a right to the presence of an attorney. Id. The Miranda requirement only affects the admissibility of statements obtained through "custodial interrogations." Rhode Island v. Innis, 446 U.S. 291, 297 (1980). Custodial interrogation consists of "questioning initiated by law enforcement officers after a person has been taken into custody or otherwise deprived of his freedom of action in any significant way." Miranda, 384 U.S. at 444.

A determination of whether officers placed an individual into custody under Miranda depends upon an evaluation of the circumstances by a reasonable person in the suspect's position. Stansbury v. California, 511 U.S. 318, 323 (1994). "Interrogation" includes any activity by law enforcement officers "reasonably likely to elicit an incriminating response." Innis, 446 U.S. at 300. Any statements made by law enforcement officers which they know are reasonably likely to elicit an incriminating response from the suspect constitutes interrogation. Id.

Certainly the statements Mr. Ruelas made after being handcuffed and in the backseat of Sergeant Garcia's locked patrol vehicle constitutes statements made while in custody. Sergeant Garcia's continued questioning of Mr. Ruelas as to where he was coming from, what he was doing with marijuana and who helped him clean the marijuana are statements made while in custodial interrogation and were made before Mr. Ruelas's rights under Miranda were read. The court should have suppressed those statements and erred when it did not.

2. The Court erred when it denied the Defendant an opportunity to present the defense of necessity due to lack of an expert.

The United States Constitution, Amendments VI and XIV, as well as the Washington State Constitution, Article I, § 22, guarantee an accused person the right to a meaningful opportunity to present a defense to criminal charges. Holmes v. South Carolina, 547 U.S. 319,324, 126 S. Ct. 1727, 164 L. Ed. 2d 503 (2006); State v. Maupin, 128 Wn.2d 918, 924, 913 P.2d 808 (1996). A defendant must receive the opportunity to present his version of the facts to the jury so that it may decide "where the truth lies." Washington v. Texas, 388 U.S. 14, 19, 87 S. Ct. 1920, 18 L. Ed. 2d 1019 (1967); Chambers v. Mississippi, 410 U.S. 284, 294-95, 302, 93 S. Ct. 1038, 35 L. Ed. 2d 297 (1973).

Consistent with these rights, a defendant is entitled to have the jury instructed on his theory of the case where it is supported by the law and

evidence. State v. May, 100 Wn. App. 478, 482, 997 P.2d 956, review denied, 142 Wn.2d 1004 (2000). "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, 878-79, 117 P.3d 1155 (2005).

A defendant may assert the common law defense of necessity "when circumstances cause the accused to take unlawful action in order to avoid greater injury." State v. Jeffrey, 77 Wn.App. 222, 224, 889 P.2d 956 (1995)(citing State v. Diana, 24 Wn.App. 908, 913, 604 P.2d 1312 (1979)). Even after the legalization of medical marijuana use in Washington State, the common law medical necessity defense is still available. State v. Kurtz, 178 Wn.2d 466, 309 P.3d 472 (2013). To establish a necessity defense, the defendant must establish that (1) he or she believed the commission of the crime was necessary to avoid or minimize harm, (2) the harm sought to be avoided was greater than the harm caused by the violation of the law, (3) the circumstances have not been brought about by the accused, and (4) no equally effective legal alternative existed. Jeffrey, 77 Wn.App. at 225 (citing State v. Gallegos, 73 Wn.App. 644, 651, 871 P.2d 621 (1994); State v. Pittman, 88 Wn.App. 188, 943 P.2d 713 (1997)("equally effective" added to element #4).

However, in this case, the defendant was not even allowed to present any evidence to assert the defense because the trial court ruled the necessity defense

was unavailable due to Mr. Ruelas not having an expert witness. The right for a defendant to present his own witnesses to establish a defense is a right “fundamental element of due process of law.” Washington v. Texas, 388 U.S. 14, 19, 87 S. Ct. 1920, 18 L. Ed. 2d 1019 (1967) cited with approval in State v. Smith, 101 Wn.2d 36, 41, 677 P.2d 100 (1984). In Diana, the Court held “corroborating medical testimony” was required to support a defendant’s assertion that he reasonably believed his actions were necessary to protect his health. Diana, 24 Wn.App. at 916.

Here, the trial court interpreted “corroborating medical testimony” as held in Diana to require a medical doctor or physician for Element No. 4. However, that is an improper interpretation of Diana’s requirement for medical testimony. Further, in some cases of necessity relating to Element No. 4, no such medical testimony is required because the Medical Use of Marijuana Act, enacted by the initiative of Washington State voters in 1998 and renamed the “Washington State Medical Use of Cannabis Act” in 2011, establishes a statutory right to use marijuana as a legal alternative. RCW 69.51A.900; RCW 69.51A.005.

In light of the Medical Use of Cannabis Act, there has been a general acceptance of medical marijuana. The Medical Use of Cannabis Act sets out various diseases that are accepted for medical treatment by marijuana, cancer is one of them. RCW 69.51A.005(1)(a)(i). If the trial court would have allowed a defense on necessity, testimony as outlined in counsel’s offer of proof would

have established that all of the witnesses were patients who used marijuana legally under the Act. When there is a statutory right to use marijuana for various diseases, such as cancer, no such medical expert should be required. The statute sets out who can use medical marijuana and for what reasons, and these reasons in this case fell under the statute. None of the cases interpreting Diana post-MUMA legislation in 1998 specifically require a medical “expert” to testify; rather, they require medical evidence, which Mr. Ruelas submits could have been done through his own testimony and the testimony of his mother’s caregivers.

In State v. Browne, 181 WnApp. 756 (Wash.App. Div. 3 2014), 327 P.3d 63 (2014), this appellate court analyzed the statutory language in the Washington Administrative Code determining marijuana plant limits related to medical marijuana. This Court found that a 15-plant limit under the WAC can be exceeded “when there has been a demonstrated medical need.” Browne, 627 P.3d at 66-67. In demonstrating medical need, this Court held that a defendant “would be able to present appropriate testimony that a patient’s 60-day supply could exceed 24 ounces of marijuana if the amount was medically necessary.” Id. at 66. In order to establish this, the Court also found that medical testimony “would be essential” and “an appropriate medical expert would appear to be essential.” However, here, the defendant’s rights to possess marijuana was created by RCW 69.51A.005(1)(a)(i), evidence of this readily available to the

government during pretrial discovery in the form of Mr. Ruelas's mother's medical records. Of course, in order to have the information contained in those records admitted into evidence would require testimony. However, because Mr. Ruelas and his identified witnesses were caregivers for their mother, their testimony should have been sufficient to establish the medical evidence.

Therefore, the trial court erred when it required defendant to obtain a medical expert to present evidence which could have been presented by the defendant and his identified witnesses.

3. The trial court erred when it excluded the expert witness of Defendant despite having available other and less severe discovery violation remedies.

After requiring Mr. Ruelas to present an expert to establish the defense of necessity, Mr. Ruelas presented a proposed expert, Dr. Carter of St. Luke's Hospital in Spokane, Washington. The trial court excluded Dr. Carter's testimony due to his identification being late and its prejudicial effect to the government's case.

The admission or exclusion of expert testimony is within the discretion of the trial court and will not be disturbed on appeal absent a showing of an abuse of discretion. Walker v. State, 121 Wash.2d 214, 218, 848 P.2d 721 (1993); State v. Mak, 105 Wash.2d 692, 715, 718 P.2d 407, cert. denied, 479 U.S. 995, 107 S.Ct. 599, 93 L.Ed.2d 599 (1986). The constitutional right to present a defense is implicated when the trial court excludes admissible evidence. State v.

Aguirre, 168 Wn.2d 350, 362-63, 229 P.3d 669(2010); State v. Maupin, 128 Wn.2d 918, 925, 913 P.2d 808 (1996). Sanctions available to the Court for a discovery violation are governed by CrR 4.7(7). However, the trial court cannot suppress evidence as a remedy for discovery violations. State v. Glasper, 12 Wash.App. 36, 38, 527 P.2d 1127 (1974); see also, State v. Ray, 116 Wash.2d 531, 538, 806 P.2d 1220 (1991); State v. Laureano, 101 Wash.2d 745, 762, 682 P.2d 889 (1984), overruled by State v. Brown, 111 Wash.2d 124, 761 P.2d 588 (1988); State v. Thacker, 94 Wash.2d 276, 280, 616 P.2d 655 (1980).

Prior to evidence being presented at trial, the trial court—on the morning of trial—denied the defense of necessity absent testimony from an expert. At the conclusion of the State’s case, defense counsel requested the trial court allow an expert to testify by telephone in support of Mr. Ruelas’s defense. The trial court excluded the expert witness for failure to timely identify the witness, concluding it would be prejudicial to the State’s case to allow expert testimony when the State had no opportunity to interview the expert prior to his trial testimony.

However, our Supreme Court has held that violations of timely disclosing information to the opposing party “are appropriately remedied by continuing trial to give the nonviolating party time to interview a new witness or prepare to address new evidence.” State v. Hutchinson, 135 Wn.2d 863, 959 P.2d 1061, (1998). As noted above, exclusion of evidence is an extraordinary remedy for a discovery violation. Glasper, Hutchinson, *supra*.

The factors to be considered in deciding whether to exclude evidence as a sanction are: (1) the effectiveness of less severe sanctions; (2) the impact of witness preclusion on the evidence at trial and the outcome of the case; (3) the extent to which the prosecution will be surprised or prejudiced by the witness's testimony; and (4) whether the violation was willful or in bad faith. Hutchinson, 135 Wn.2d at 883 (citing Taylor v. Illinois, 484 U.S. 400, 412-13, 108 S.Ct. 646, 98 L.Ed.2d 798 (1988); Fendler v. Goldsmith, 728 F.2d 1181, 1188-90 (9th Cir.1983)).

Here, the facts weigh in favor of allowing the expert witness to testify, particularly because the trial court had previously ruled that without expert testimony, Mr. Ruelas would not be able to put on a defense to the very serious charges. At the beginning of the second day of trial, defense counsel informed the Court that he was awaiting a proffer from Dr. Greg Carter, the medical director of St. Luke's Hospital, regarding his review of Mr. Ruelas's mother's medical records and opinion relating to the equal effectiveness of marijuana compared to the legally available alternatives, pursuant to the Court's ruling on the defense of necessity. (RP 180) The trial court inquired as to when Dr. Carter would be available to testify and counsel indicated it would be that day, perhaps telephonically if possible due to the distance between Spokane and Ritzville, where the proceedings were occurring. (RP 181)

The trial court held a ruling on Dr. Carter's testimony until the defense's presentation of its case. (RP 181) At the conclusion of the State's evidence, the defense presented a motion to dismiss for insufficiency of evidence, which the trial court denied. The defense then proposed to bring in Dr. Carter telephonically that afternoon and the State objected, arguing Dr. Carter was a "random name" presented by the defense and a "surprise witness." (RP 219) In opposition, defense counsel presents for the record his disagreement, again, that a necessity defense would require an expert witness. (RP 220) Counsel had not recognized the necessity of having an expert to present the defense and had he recognized the necessity of an expert he would have disclosed Dr. Carter and retained him as an expert much earlier. (RP 221) Additionally, defense counsel proposed other less extreme measures available to the trial court over exclusion of Dr. Carter, including the trial court sanctioning him for failure to timely disclose the witness. (RP 221) A portion of counsel's statement to the trial court is as follows:

Judge, I apologize to the Court for not having him available. I still believe - and I know the Court disagrees and I respect the Court's opinion -- that a necessity defense would not require an expert witness, but I respect the Court's opinion. I understand the Court's ruling...I apologize again for not getting Dr. Carter ahead of time, had I been able to do that I would have done that or had I recognized the necessity of that I would have done that.

Clearly his testimony is relevant. Certainly he's a qualified expert. So -- and I don't say this flippantly, but I think where we're at is that either I would be ineffective, which might mean that this case would then be tried again because I hadn't properly prepared the case and we would be back here doing this all over again, or

alternatively what the Government's asking the Court to do is exclude an expert witness that is available to testify in this matter.

And I -- I'm not inviting this, but I think the appropriate remedy is not the exclusion of the witnesses, that might be viewed as being an extraordinary remedy and should not be taken. I think the Government, if they need time to prepare for this witness, can ask for a continuance to adequately prepare for the witness. And there are other sanctions available. I guess I could be sanctioned for the failure to timely disclose this witness. I'm not inviting that.

I'm just candidly setting out for the Court what I believe the case law would indicate are the appropriate options for the Court at this time. Excluding the witness would be an extraordinary remedy that would invite a reversal if my client were to be convicted, and we were to -- and somebody else is doing the appeal or something of that nature. So I would ask the Court to -- and I recognize I don't have all the answers. If I can have some time I could -- the other two witnesses that I intend to call in the necessity defense are here. I've had them wait in the hallway because the Court ordered witnesses not to be in the courtroom.

(RP 220-222) There were available a wealth of less severe sanction which could have been more effective for a discovery violation, the first of which was addressed by defense counsel at argument on the matter. The court then made its ruling, in part as follows:

Now, I'm told, and was told just now, for the first time by defense counsel that -- we just heard about this Dr. Carter this morning, and the offer of proof here that was made. I feel if he would testify to those things, that would be enough to give the jury -- to raise the defense, put the issue before the jury. And I believe it was specifically represented that one thing the doctor would testify to is that given the defendant's mother's medical condition, there isn't any other alternative for treating the mother's symptoms. And that was, I felt, the element that required medical testimony to lay a foundation.

So I do feel if the doctor could testify to these things, if that foundation was established and that would justify giving the jury the instruction making the defense available, then it would be up to the jury to determine whether the defense carried the burden of proof. But now, again, we just heard about this doctor this morning, day two of trial, and I do think it's significantly late. The case was filed in February, I believe. It was eight months ago. This case has been continued over and over again. I don't have the specific date, but I know there was early on a hearing scheduled based on the defense representation that it's the medical use of marijuana in some fashion would be an issue in the case.

(RP 223-224). Defense counsel again attempted to provide an alternative to witness exclusion but the trial court declined the opportunity, stating:

I don't think the Court has any alternative but to exclude this witness. I appreciate that would now, today, prejudice the defendant's ability to present a defense, but it's not any type of an unfair prejudice to the defendant because he and his counsel have had a long time with which to get the witnesses, get prepared, have an advanced ruling by the Court at a pretrial hearing to determine whether an expert would be necessary.

(RP 230-231).

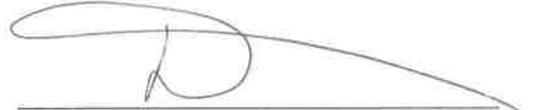
The use of extraordinary sanctions such as excluding the defense's only available expert is an abuse of discretion. There were various other methods the trial court should have used to remedy a discovery violation. The decision of the trial court should be overruled.

V. CONCLUSION

As set forth above, Mr. Ruelas requests this Court remand this case back to the trial court for a new trial. The above-discussed violations of Mr. Ruelas's

rights were erroneous and he should be afforded an opportunity to present a defense against the charges against him.

Respectfully submitted this 19th day of June, 2018.

A handwritten signature in black ink, appearing to be 'D. Phelps', written over a horizontal line.

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