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

COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON
By _____

NO. 35029-1-III

STATE OF WASHINGTON,
Respondent,

vs.

GABRIEL RUELAS, Jr.,
Appellant.

APPEAL FROM THE SUPERIOR COURT OF THE STATE OF
WASHINGTON FOR ADAMS COUNTY
CAUSE NO. 16-1-00017-7

BRIEF OF RESPONDENT



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I. RESPONSE TO ASSIGNMENTS OF ERROR

4. The Trial Court correctly admitted the statements made by the Appellant.
5. The Trial Court properly ruled that the defense of medical necessity does require medical expert testimony.
6. The Experienced Trial Judge properly exercised his discretion in excluding the surprise expert witness in this case.

II. ISSUES PRESENTED

4. Whether the statements made by the Appellant were outside the protections of *Miranda*.
5. Whether a medical expert is required to testify on a medical necessity defense on the question of no legally effective medical alternative.
6. Whether the experienced trial judge exercised proper discretion in excluding a surprise expert witness on the second day of a two-day trial as an appropriate sanction.

III. STATEMENT OF THE CASE

Factual History

On November 10, 2015, the Appellant, Gabriel Ruelas, Jr., was stopped for speeding by Washington State Patrol Sergeant Oscar Garcia, in Adams County, State of Washington.¹ As Sergeant Garcia approached the Appellant's vehicle he smelled marijuana.² After acquiring the Appellant's driver's license, registration, and

¹ RP 158-59.

² *Id.* at 160.

insurance, Sergeant Garcia inquired about the smell of marijuana.³ Sergeant Garcia asked if the Appellant had a joint or any kind of marijuana.⁴ The Appellant reached into the backseat of his truck for a white kitchen bag containing over four pounds of marijuana.⁵

Sergeant Garcia returned to his vehicle with the marijuana.⁶ The Appellant was then placed under arrest, handcuffed, and placed in the rear of the patrol vehicle.⁷ Sergeant Garcia began to fill out paperwork while waiting for a tow truck for the Appellant's vehicle.⁸

Sergeant Garcia asked the Appellant who owned the vehicle.⁹ He asked this question because he was trying to decide whether to seize the vehicle for forfeiture or just for impound.¹⁰ The Appellant stated that his sister owned the vehicle.¹¹ The Appellant then started discussing the marijuana found in his vehicle unprompted by Sergeant Garcia.¹² The Appellant stated that he kept the marijuana in one large bag instead of several smaller bags.¹³ Sergeant Garcia

³ *Id.*

⁴ *Id.* at 161.

⁵ *Id.* at 162, 187.

⁶ *Id.* at 162.

⁷ *Id.*

⁸ *Id.* at 14.

⁹ *Id.* at 14.

¹⁰ *Id.* at 22; See RCW 69.50.505.

¹¹ *Id.* at 14.

¹² *Id.*

¹³ *Id.*

than asked the Appellant where he was at.¹⁴ The Appellant responded by saying he was coming from his sister's house in Benton City and that she was helping him clean the product before taking it back to Edwall.¹⁵ After these volunteered statements, Sergeant Garcia read the Appellant his *Miranda* rights.¹⁶

Procedural History

On February 26, 2016, the Appellant was charged with one count of Possession of Marijuana over Forty Grams.¹⁷

On March 28, 2016, the Appellant was arraigned on the single charge.¹⁸ Trial was set for May 24, 2016.¹⁹

On May 9, 2016, the Appellant was granted a continuance of the trial to June 28, 2016 to review the offer and prepare motions.²⁰

On June 13, 2016, the Court held a CrR 3.5 hearing.²¹ The single witness at the CrR 3.5 hearing was Sergeant Garcia, who testified inline with the factual history set forth above.²² The Trial Court found that the Appellant was not in custody when he made the

¹⁴ *Id.* at 21.

¹⁵ *Id.*

¹⁶ *Id.*; *Miranda v. Arizona*, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966).

¹⁷ CP 1, RCW 69.50.4013.

¹⁸ CP 10.

¹⁹ *Id.*

²⁰ CP 13.

²¹ RP at 9-33.

²² *Id.* at 10.

statements while in his sister's car.²³ The Trial Court found that the pre-*Miranda* statements made by the Appellant were voluntary and spontaneous and not the result of questioning.²⁴ The Trial Court found that the question about who owns the vehicle was a routine processing identification question that does not fall within the protections of *Miranda*.²⁵ On July 22, 2016, the Trial Court entered written Findings of Fact and Conclusions of Law regarding the CrR 3.5 hearing.²⁶

At the conclusion of the CrR 3.5 hearing on June 13, 2016, the defense stated its intention of asserting a medical marijuana defense and a necessity defense.²⁷ The defense stated:

there's still the necessity defense and we have an expert witness that I have to retain yet, but who will testify that the amounts that my client had were consistent with the use for the – for himself and the two other people he was providing for. ... So I'm going to have to retain that expert. I anticipate we probably should bring some motions before the Court to be able (inaudible) these issues prior to trial. ... I think we're allowed under the most recent Washington Supreme Court ruling regarding necessity, arguing the various uses that my client and his other people that he was providing had the amount that he possessed was reasonable for those issues. ... I'll need to get the

²³ *Id.* at 27.

²⁴ *Id.* at 28.

²⁵ *Id.*

²⁶ CP 27.

²⁷ RP 29.

expert and get the affidavits to bring before the Court and deal with those issues.²⁸

The defense then moved to continue the trial to August 23, 2016 and set a motion hearing for July 25, 2016 to hear the defense's motion.²⁹

On July 20, 2016, a readiness hearing was held.³⁰ The defense requested a continuance of the trial to October 25, 2016 and a motion hearing for September 22, 2016.³¹ During that hearing the defense stated:

I think you understand that this is a medical marijuana case. We do plan on putting on the defense of necessity for going over the allowed limit. We have been in contact or trying to get in contact with Greg Carter. He is going to be our expert witness hopefully to testify at trial. ... Additionally, we're not able to file motions at this time because we'll need that medical examination from the doctor in order to prepare the briefing that we think is going to be necessity.³²

On October 7, 2016, a readiness hearing was held.³³ The defense informed the Trial Court that:

We would like to acquire an expert. There are some medical issues that I think will be coming to light at trial for which we will require an expert. ... we would move for one more continuance... If this is indeed going to be ramping up for trial then our search for an expert will actually be fruitful at this point. There was no point in

²⁸ *Id.* at 29-30.

²⁹ *Id.* at 30-31; CP 21.

³⁰ RP 35.

³¹ *Id.* at 36; CP 25.

³² RP 36-37.

³³ *Id.* at 44.

hiring an expert when we were anticipating a possible resolution. That would be an outlay of funds that is unnecessary if we were anticipating a settlement.³⁴

The Trial Court denied the continuance request.³⁵

On October 18, 2016, the defense filed its witness list, citing no medical expert.³⁶

On October 25, 2016, the trial began.³⁷ After seating a jury, the experienced trial judge took up motions in limine and inquired about the defense of necessity.³⁸ The defense stated that it intended to assert necessity, but was not going to assert the statutory defense under the Medical Use of Marijuana Act (MUMA).³⁹ The State objected to the defense of necessity contending that the defense could not lay proper foundation.⁴⁰ The defense proffered that it intended to call three lay witnesses who would testify that the Appellant's mother had cancer and that "[s]he took the medications that were prescribed for her, but they just supplemented that care and treatment with medical marijuana."⁴¹ The experienced trial

³⁴ *Id.* at 44-45.

³⁵ *Id.* at 46-47.

³⁶ CP 34.

³⁷ RP 49.

³⁸ *Id.* at 118.

³⁹ *Id.* at 122, 124.

⁴⁰ *Id.* at 119-20.

⁴¹ *Id.* at 123.

judge and the defense then began a lengthy discussion on whether the proper foundation to assert medical necessity could be laid.⁴²

The experienced trial judge looked to the four elements of necessity.⁴³

The defendant reasonably believed the commission of the crime was necessary to avoid or minimizing the harm; and, two, the harm sought to be avoided was greater than the harm resulting from a violation of the law; and the” – No. 3 in the necessity defense is, “The threatened harm was not brought about by the defendant; and, four, no reasonable legal alternative existed.⁴⁴

The Trial Court inquired how a lay person could testify to element four regarding some legal alternative.⁴⁵ The experienced trial judge opined that testimony of a legal medical alternative would require medical expert testimony.⁴⁶ The defense responded:

Well, yes, so I guess I would merely ask the defendant if he considered any other options, other than giving her marijuana, and I guess I would tell the Court that he indicated that he couldn't think of anything else to do for his mother other than give her the marijuana and that his mother appeared to get relief from that.

The medical – and he would testify that, again, that they were following all the medically suggested

⁴² *Id.* at 123-134.

⁴³ *Id.* at 134.

⁴⁴ *Id.*

⁴⁵ *Id.* at 135.

⁴⁶ *Id.*

courses of treatment. And this was the only thing that gave her the relief that they were able to observe.⁴⁷

The experienced trial judge affirmed the position of the defense that, “[w]e’re not dealing with the medical marijuana act; we’re dealing with the defense of necessity.”⁴⁸ The Trial Court noted that for element four of the necessity defense in medical cases that the term “equally effective” may need to be added to the instructions.⁴⁹ The experienced trial judge further quoted from *State v. Pittman*:⁵⁰

In cases for which a defense of medical necessity is still available, the defendant will be required to show that there is no equally effective legal drug.⁵¹

The experienced trial judge then ruled on the defense of medical necessity.⁵²

And from the offer of proof that’s been presented, the argument that’s been presented, it’s clear to me that the defense is not going to attempt to admit medical records. ...

And so it’s also been acknowledged here that the defense isn’t going to be calling a physician or any kind of an expert and I do not believe that any lay witnesses, the defendant or other family members that have been identified here in the offer of proof, are competent to testify.

⁴⁷ *Id.*

⁴⁸ *Id.* at 139.

⁴⁹ *Id.* at 139-40.

⁵⁰ 88 Wn. App. 188, 943 P.2d 713 (Div. I, 1997).

⁵¹ RP 140.

⁵² *Id.*

It says, "The defendant will be required to show that there is no equally effective legal drug." You would have to have, I believe, medical knowledge as to what legal drugs are out there on the market that may or may not be as effective as to treat the symptoms that marijuana has in the case. I feel that that element and perhaps one of the others would require the expert testimony. ...

So I feel you need an expert to establish that fourth element. And so 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...⁵³

After ruling on the remaining Motions in Limine, the trial began.⁵⁴

On cross-examination of Sergeant Garcia, the defense was able to open the door to discuss the medical marijuana reasons behind the Appellant's actions.⁵⁵ The defense was able to use the Appellant's statements that were made prior to being read his *Miranda* rights to discuss medical marijuana.⁵⁶

At the beginning of the second day of trial, October 26, 2016, the defense informed the Trial Court that it was attempting to obtain a medical expert to testify.⁵⁷

I wanted to let you know, too, that I'm awaiting a proffer from Dr. Carter in Spokane. Dr. Greg Carter is a – medical doctor, director, at St. Luke's Hospital. He

⁵³ *Id.* at 140-41.

⁵⁴ *Id.* at 152.

⁵⁵ *Id.* at 169-70.

⁵⁶ *Id.* at 169-72.

⁵⁷ *Id.* at 180.

reviewed the medical records that we had and he's preparing a letter that I would submit to the Court as a proffer of what he would testify to regarding the necessity defense and the medical records. ... I don't have it quite yet.

But he indicated to me that he would – he would prepare what he would testify to related to the medical necessity defense and the need for marijuana given to condition that my client's mother was dealing with at the time of this – time of his arrest. I don't have it yet, so it's a little premature...

I have asked if he would be available, perhaps today, or if he might be even available telephonically. ... I haven't got a response yet on that.⁵⁸

The Trial Court did not make any rulings at this time.⁵⁹

At the conclusion of the State's case, after the State indicated it intended to rest, the defense again brought up the medical expert.⁶⁰

Your Honor, I talked to my – I did get a text from Mr. Hyatt. He indicated that he was working with the doctor and he – they should have the proffer prepared shortly, and then also that he believed – I haven't got an exact time yet, but that the doctor would be available for telephonic – he would be available for testimony. ...

He would testify that the medical use of marijuana was appropriate given the medical condition in this case. ... Also, he's talked to my client and that given the medical condition that there was no other alternative – excuse me, in his mind, for treating the symptoms and the condition that – that the patient had at the particular time.⁶¹

⁵⁸ *Id.* at 180-81.

⁵⁹ *Id.* at 181.

⁶⁰ *Id.* at 217.

⁶¹ *Id.* at 217-18.

The defense indicated that the doctor might be able testify that day by telephone, but he was not sure.⁶² The State strongly objected.⁶³

The State clearly objects. ... He's had eight months with the case. We have no discovery with regard to this potential witness being even an option or that he's going to testify. This is the first we've ever heard of him. We have no discovery with regards to anything he would testify to and this is the first time we're hearing it. So the Court can easily exclude an expert witness with regards to that.

So – and I believe the Court did order briefing on this particular issue and Defense Counsel clearly chose not to do that at this time. Only when he was about ready to present his part of the case does he come up with a random name ...

He's going to testify that it relieved symptoms. That's not what a necessity defense is. He cannot testify to the prongs that is required for a necessity defense. ...

It is quite shocking that he wants to throw this name out and surprise the second day of trial.⁶⁴

The defense argued that the Trial Court could continue the trial to give the State time to prepare or impose sanctions on defense.⁶⁵

The experienced trial judge again ruled on the availability of necessity.

I did take a look at that – close look at this case, State versus Pittman, 88 Wn. App. 188, 1997, which confirms the decision I had here yesterday.

⁶² *Id.*

⁶³ *Id.* at 219.

⁶⁴ *Id.* at 219-20.

⁶⁵ *Id.* at 221-22.

... one of the elements of that defense is to show that there is – to show the absence of a legal alternative. And I felt that that would require expert testimony, most likely medical testimony...

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. ... 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. ...

I know one of those the issue was not having – defense not having been able to obtain an expert yet or unavailability of an expert or something, but I think this trial was scheduled in June, maybe July. ...

Well, the issue really comes down to whether the Court should allow this witness to testify. ... [i]f the witness could testify as to what I've been told he'll testify. That would make the defense available. The necessity defense.

But, I don't know, I'm obviously frustrated here. I think it comes – we started out with State had a problem with, I think, Friday was the date they said they would be available to have the witness that just testified from the crime lab and I was shocked, but now I'm shocked with the defense approach.

There wasn't much of a delay with respect to this crime lab witness, but there's a real problem here with this doctor testifying. ... This isn't a new case. This case has been going on forever. The issue of medical marijuana necessity, whatnot, has not been a secret.

And I think when two sides handed up their motions in limine yesterday after we had selected the jury, that's the first I was caught with what the specific issues

would be. And it really is an issue that should have been determined before trial, a pretrial hearing, before the jury was selected. Has it been done in that fashion we wouldn't be in the problem that we have here today.

And I do think it's a big problem and I don't think the Court has any alternative but to exclude this witness. I appreciate that would not, 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... And it would be – impose an extreme burden on the Court to have a delay and it would result in a substantial delay. ...

The problem is there's two sides in the case that should have a right to a fair trial, and that would include the prosecution. The prosecution hasn't had – first they heard about, we all know, this witness and they may want to bring in their own witness. They may want to think about after they talk to this witness, what he says, and conduct some discovery to see whether there may be some other witness that might disagree with Dr. Carter.

And to allow the witness to testify and proceed with trial is unfair to the prosecution in the case here. ...

Under the circumstances of this case, if they [Court of Appeals] think it's appropriate to reverse the Court's decision to exclude this witness, well, that's what they're there for. A decision like that, I think, would almost render it impossible for a Trial Court to effectively manage a court calendar and do their job. It would, I think, encourage lawyers to not do their job.⁶⁶

⁶⁶ *Id.* at 223-33.

After the Trial Court ruled both the State and the defense rested.⁶⁷

The Jury found the Appellant guilty.⁶⁸

On November 4, 2016, the Appellant filed a Motion for New Trial.⁶⁹ On November 15, 2016, the Trial Court denied the Appellant's Motion for New Trial.⁷⁰ The Appellant appealed the Trial Court's denial of his Motion for New Trial. On April 5, 2017, Division III of the Court of Appeals Commissioner Wasson denied the appeal.⁷¹ On June 14, 2017, Chief Judge Fearing of the Court of Appeals, Division III denied the Appellant's Motion to Modify the Commissioner's Ruling.⁷² On September 15, 2017, the Washington State Supreme Court Commissioner denied the Appellant's Petition of Discretionary Review.⁷³

On June 20, 2018, the State received the Appellant's Brief in this matter.

⁶⁷ *Id.* at 236-37.

⁶⁸ *Id.* at 258.

⁶⁹ CP 50.

⁷⁰ CP 53.

⁷¹ See Court of Appeals, Division III, Cause Number 35029-1-III, filed April 5, 2017.

⁷² See Court of Appeals, Division III, Cause Number 35029-1-III, filed June 14, 2017.

⁷³ See Supreme Court, Cause Number 94745-7, filed September 15, 2017.

IV. ARGUMENT

The Trial Court Correctly Admitted the Statements Made by the Appellant.

The Appellant contends that the Trial Court erred by admitting the pre-*Miranda* statements made to Sergeant Garcia.⁷⁴ The Appellant's contention is incorrect.

The Fifth Amendment to the United States Constitution and Article 1, Section 9, of the Washington State Constitution protects individuals from being compelled to give testimony against themselves in a criminal proceeding.⁷⁵ Whether statements from a defendant can be used at trial depends on the circumstances set forth in *Miranda*⁷⁶ and its progeny. Two prongs have been recognized under *Miranda*, the defendant must be in custody and subject to interrogation by the State.⁷⁷ Unless both prongs are satisfied the protections under *Miranda* do not apply.⁷⁸ Questions

⁷⁴ Brief of Appellant, pages 6-8.

⁷⁵ The Appellant cites to the Fourth Amendment to the U.S. Constitution and Article I, Section 7, of the Washington State Constitution as authority. These two constitutional principles only apply to confession if the initial arrest was unlawful. See *State v. Nogueira*, 32 Wn. App. 954, 956, 650 P.2d 1145 (Div. I, 1982). No such assertion is made in this case. The Court should not give weight to this inapplicable authority.

⁷⁶ *Miranda*, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966).

⁷⁷ *Id.*

⁷⁸ *State v. Warness*, 77 Wn. App. 636, 639, 893 P.2d 665 (Div. O, 1995).

regarding *Miranda* are a mixed question of law and fact.⁷⁹ Such questions are reviewed de novo.⁸⁰

It is undisputed that the Appellant was handcuffed at the time he made the statements. The Appellant was in custody.

The statements made by the Appellant were not the result of interrogation. "A suspect who is in custody but not being interrogated does not have *Miranda* rights."⁸¹ "(S)ince the police surely cannot be held accountable for the unforeseeable results of their words or actions, the definition of interrogation can extend only to works or actions on the part of police officers that they should have known were reasonably likely to elicit an incriminating response."⁸²

In this case, Sergeant Garcia testified both at the CrR 3.5 and at trial that he asked the Appellant two questions after placing him in the patrol vehicle. He asked Appellant where he was and who owned the vehicle.⁸³ The Appellant volunteered information about where he was growing the marijuana, where he was taking it, and what he was

⁷⁹ *In re Cross*, 180 Wn.2d 664, 681, 327 P.3d 660 (2014) (citing *United States v. Poole*, 794 F.2d 462, 465 (9th Cir. 1986)).

⁸⁰ *Poole*, 794 F.2d 465.

⁸¹ *Id.* (citing *United States v. LaGrone*, 43 F.3rd 332, 339 (7th Cir. 1994)).

⁸² *State v. Grisby*, 97 Wn.2d 493, 505, 647 P.2d 6 (1982) (quoting *Rhode Island v. Innis*, 446 U.S. 291, 301-02, 100 S.Ct., 1682, 64 L.Ed.2d 297 (1980)).

⁸³ RP 14, 21, 163.

doing with it.⁸⁴⁸⁵ Sergeant Garcia testified that his questions were only aimed at determining whether to impound Appellant's vehicle or seize it for forfeiture.⁸⁶ Sergeant Garcia did not ask any other questions.

Q. Okay. Did you – so did you ask any other questions after you arrested him but before you Mirandized him?

A. Not that I remember.⁸⁷

The two questions were not investigative, they were routine questions in determining what to do with Appellant's vehicle. "The routine question exception recognizes that such questions rarely elicit an incriminating response and do not involve the 'compelling pressures which ... undermine the individual's will to resist and compel him to speak where he would not otherwise do so freely.'"⁸⁸

The Trial Court correctly concluded that the questions were not designed to illicit incriminating responses from the Appellant.⁸⁹ As such, Appellant's statements were voluntarily given and not

⁸⁴ *Id.*

⁸⁵ The Appellant argues that Sergeant Garcia questioned the Appellant regarding where he was coming from, what he was doing with marijuana, and who helped him clean the marijuana. The record is completely devoid of any evidence that Sergeant Garcia asked the Appellant any of these questions. The Court should not permit the injection of facts into the case.

⁸⁶ CP 22-23; See also RCW 69.50.505.

⁸⁷ *Id.* at 23.

⁸⁸ *State v. Denney*, 152 Wn. App. 665, 671, 218 P.3d 633 (Div. II, 2009) (quoting *United States v. Booth*, 669 F.2d 1231, 1237 (9th Cir. 1981)).

⁸⁹ CP 27.

protected by *Miranda*. This Court should uphold the Trial Court's determination. The statements were admissible.

In addition, the Appellant relied on these statements in cross-examining Sergeant Garcia to open the door to talk about medical marijuana. The disputed statements were beneficial to the Appellant at trial. As such, any error in admitting the statements was harmless.

The Trial Court properly ruled that the defense of medical necessity does require a medical expert.

The Appellant contends that the Trial Court erred in precluding him from asserting the necessity defense because he did not have a medical expert to address whether no legal alternative exists.⁹⁰ The Trial Court correctly applied the law.

A defendant has the constitutional right to present a defense.⁹¹ This right is not unlimited.⁹² "In general, the court must instruct on the party's theory of the case, if the law and the evidence supports it, and its failure to do so is reversible error."⁹³

In this case, the Appellant sought to assert the defense of medical necessity in possessing over four pounds of marijuana. The

⁹⁰ Brief of Appellant, pgs. 8-12.

⁹¹ *Holmes v. South Carolina*, 547 U.S. 319, 324, 126 S.Ct. 1727, 164 L.Ed.2d 503 (2006).

⁹² See *State v. Donald*, 178 Wn. App. 250, 263, 316 P.3d 1081 (Div. I, 2013).

⁹³ *State v. May*, 100 Wn. App. 478, 482, 997 P.2d 956 (Div. III, 2000) (citing *State v. Birdwell*, 6 Wn. App. 284, 297, 492 P.2d 249 (Div. I, 1972)).

necessity defense has four elements that the defense must prove by a preponderance of the evidence.⁹⁴

1. The defendant reasonably believed the commission of the crime was necessary to avoid or minimize a harm; and
2. Harm sought to be avoided was greater than the harm resulting from a violation of the law; and
3. The threatened harm was not brought about by the defendant; and
4. No reasonable legal alternative is available that is as effective as marijuana.⁹⁵

The Trial Court held that lay witness testimony could address the first three elements, but that element four required expert testimony. “To support the defendant’s assertions that he reasonably believed his actions were necessary to protect his health, corroborating medical testimony is required.”⁹⁶ “[I]t would only make sense that this element (element 4) be expressed by an expert who knew the qualities of other drugs, not just the preference of the defendant.”⁹⁷ “We hold that implicit in the *Diana* test is that there also needs to be corroboration by expert testimony that no legal drug is as effective.”⁹⁸

⁹⁴ WPIC 18.02.

⁹⁵ *Id.*; *State v. Pittman*, 88 Wn. App. 188, 194, 943 P.2d 713 (Div. I, 1997).

⁹⁶ *State v. Diana*, 24 Wn. App. 908, 916, 604 P.2d 1312 (Div. III, 1979).

⁹⁷ *State v. Williams*, 93 Wn. App. 340, 347, 968 P.2d 26 (Div. II, 1998) (abrogated by *State v. Kurtz*, 178 Wn.2d 466, 309 P.3d 472 (2013) on other grounds).

⁹⁸ *Id.* at 349.

Appellant contends that he or his witnesses could have testified about element four.⁹⁹ However, the Appellant provides no legal authority to support his contention. During trial, the Appellant attempted to make this claim with anecdotal observation of marijuana's effects on his mother. The Appellant made no offer of proof of consulting with a physician about legal alternatives or even conducting his own research on legal alternatives. The Appellant and his lay witnesses were not qualified to testify about the medical effects and availability of legal drugs regarding of the treatment of his mother¹⁰⁰.

The Appellant asserts that he does not need an expert regarding reasonable legal alternative that is as effective as marijuana because of the Medical Use of Cannabis Act.¹⁰¹ The Appellant relies on the purpose and intent language in RCW 69.51A.005(1)(a)(i) to support his assertion.¹⁰² This is misplaced. RCW 69.51A.005(1)(a) starts off by stating:

⁹⁹ Brief of Appellant, pg. 11.

¹⁰⁰ See ER 701 (If the 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 (a) rationally based on the perception of the witness, (b) helpful to a clear understanding of the witness' testimony or the determination of a fact in issue, and (c) not based on scientific, technical, or other specialized knowledge within the scope of rule 702.).

¹⁰¹ Brief of Appellant, pg. 10; Chapter 69.51A RCW.

¹⁰² *Id.*

There is medical evidence that **some patients** with terminal or debilitating medical conditions, **may, under their health care professional's care**, benefit from the medical use of marijuana.¹⁰³

Nothing in the statute supports the Appellant's argument that every person suffering from cancer is permitted or will even benefit from or is medically appropriate for them to use marijuana. Further, the statute requires that the use of marijuana be under the supervision of the patient's health care provider.¹⁰⁴ The proffer by the defense, in this case, was that the marijuana was not prescribed by his mother's doctor.

She took the medications that were prescribed for her, but they just supplemented that care and treatment with medical marijuana.¹⁰⁵

RCW 69.51A.005 creates a pathway for some to be permitted to possess marijuana, it does not create an absolute statutory right. The Appellant's claim is not the law.

The Appellant claims that he or his witnesses should have been sufficient to get his mother's medical records into evidence.

¹⁰³ RCW 69.51A.005(1)(a) (*Emphasis added*).

¹⁰⁴ It is important to note that the Appellant tactically chose at the trial level to not assert a defense under MUMA and explicitly told the Trial Court he was proceeding on common law necessity. RP 124. The Appellant now seeks to rely on the very law that he tactically chose not to rely on at the trial level. The Court should reject this argument.

¹⁰⁵ RP 123.

Appellant cites no authority of how his mother's medical records would have been admissible without his mother's testimony or the treating physician.¹⁰⁶

The Appellant asserts that no case law after the passage of MUMA has held that a medical expert is required to testify in a common law necessity case.¹⁰⁷ The Appellant has cited no legal authority that the case law requiring medical expert testimony has been overturned since MUMA. In fact, the Supreme Court in *Kurtz*, in holding that the common law necessity defense was still available post MUMA, specifically rejected the contention that MUMA changed the case law surrounding the common law defense.¹⁰⁸ The Appellant further recognizes that under MUMA a medical expert is required to testify.¹⁰⁹ The Appellant attempts to mislead this Court by arguing that he has a statutory right under MUMA to possess marijuana, while only relying on the common law at trial. The Appellant cannot now rely on the authority of MUMA now after rejecting it at trial.

¹⁰⁶ See ER 802.

¹⁰⁷ Brief of Appellant, pg. 11.

¹⁰⁸ *Kurtz*, 178 Wn.2d at 473.

¹⁰⁹ *Id.* at 11; *State v. Brown*, 181 Wn. App. 756, 763, 327 P.3d 63 (Div. III, 2014) (“We agree that medical testimony would be essential to establishing the medical need for exceeding the presumptive limits. To meet the exception, there must be a showing of ‘necessary medical use.’ Former WAC 246-75-010(3)(c). An appropriate medical expert would appear to be essential in order to opine on the medical necessity of the amount of marijuana used...”)

Either way, both the common law and MUMA require medical expert testimony. This Court should reject the Appellant's request to ignore the established case law and uphold the Trial Court.

It is further important to note that the Appellant was not prevented from presenting a defense to the Jury. The Appellant engaged in a lengthy cross-examination of the State's crime lab expert, attacking the credibility and accuracy of their testing of the marijuana.¹¹⁰ In closing arguments, the Appellant again argued to the Jury the unreliability of the testing of the marijuana.¹¹¹ The Appellant was not denied the ability to present a defense.

The Experienced Trial Judge properly exercised his discretion in excluding the expert witness in this case.

The Appellant asserts that the Trial Court exercised an extreme remedy in excluding his expert witness.¹¹² The experienced trial judge acted properly within his discretion in excluding the Appellant's surprise witness on the second day of trial and after the State had rested.

"The decision whether to admit expert testimony under ER 702 is within the discretion of the trial court and will be not disturbed

¹¹⁰ RP 190-214.

¹¹¹ *Id.* 250-54.

¹¹² Brief of Appellant, pgs. 12-17.

absent a showing of an abuse of that discretion.”¹¹³ “Washington courts have broad authority under ER 611 to control trial proceedings.”¹¹⁴ “Discovery decisions based on CrR 4.7 are within the trial court’s sound discretion.”¹¹⁵ Discretion is abused when it is based upon untenable¹¹⁶ grounds or for untenable reasons. “The ‘deems just’ language [in CrR 4.7(h)(7)] gives a trial court discretion to exclude a defense witness as a sanction for a discovery violation.”¹¹⁷ “Excluding evidence is an ‘extraordinary remedy’ under CrR 4.7(h) that ‘should be applied narrowly.’”¹¹⁸ Before a Trial Court excludes a witness as a discovery sanction it should weigh four factors.¹¹⁹

- (1) The effectiveness of less severe sanctions;¹²⁰
- (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

¹¹³ *Walker v. State*, 121 Wn.2d 214, 218, 848 P.2d 721 (1993).

¹¹⁴ *State v. Cayetano-Jaimes*, 190 Wn. App. 286, 296, 359 P.3d 919 (Div. I, 2015).

¹¹⁵ *State v. Venegas*, 155 Wn. App. 507, 521, 228 P.3d 813 (Div. II, 2010) (citing *State v. Hutchinson*, 135 Wn.2d 863, 882, 959 P.2d 1061 (1998)).

¹¹⁶ *Id.*

¹¹⁷ *Id.* (citing *Hutchinson*, 135 Wn.2d at 881-84).

¹¹⁸ *Id.*

¹¹⁹ *Hutchinson*, 135 Wn.2d at 881-82.

¹²⁰ It is important to note that the Appellant only addresses one factor in his brief regarding less severe sanctions and ignores the other three factors.

(4) Whether the violation was willful or in bad faith.¹²¹

“Generally, findings are views as verities, provided there is substantial evidence to support the findings.¹²²

1. The effectiveness of less severe sanctions

The Appellant argues that less severe sanctions were available and that the experienced trial judge abused his discretion in not applying lesser sanctions. The sanction imposed by the Trial Court was justified in this case. Discovery sanctions are controlled by CrR 4.7(h)(7).

If at any time during the course of the proceedings it is brought to the attention of the court that a party has failed to comply with an applicable discovery rule or an order issued pursuant thereto, the court may order such party to permit the discovery of material, and information not previously disclosed, grant a continuance, dismiss the action or even such other order as it deems just under the circumstances.

Willful violation by counsel of an applicable discovery rule or an order issued pursuant thereto may subject counsel to appropriate sanctions by the court.¹²³

The experienced trial judge rejected the Appellant's argument that any less severe sanctions were appropriate for the violation. The Trial Court rejected the notion of continuing the trial after the State

¹²¹ *Id.* at 882. (citing *Taylor v. Illinois*, 484 U.S. 400, 415 n. 19, 108 S.Ct. 646, 98 L.Ed.2d 798 (1988)).

¹²² *State v. Hill*, 123 Wn.2d 641, 645, 870 P.2d 313 (1994).

¹²³ CrR 4.7(h)(7).

was going to rest and after eight months of defense requested continuances.¹²⁴ The Trial Court correctly concluded that continuing the trial would entail much more than simply giving the State the opportunity to interview the Appellant's expert witness.¹²⁵ The experienced trial judge further rejected the notion that monetary sanctions would be sufficient to counter the violation.¹²⁶ The Trial Court could not dismiss the case for the violation. Ordering disclosure of the information would not remedy the violation. The experienced trial judge specifically found that excluding the Appellant's witness was not only the appropriate sanction, but one it deemed just under the circumstances.¹²⁷

Under the circumstances of this case, if they [the Court of Appeals] think it's appropriate to reverse the Court's decision to exclude this witness, well, that's what they're there for. A decision like that, I think, would almost render it impossible for a Trial Court to effectively manage a court calendar and do their job. **It would, I think, encourage lawyers to not do their job.**¹²⁸

The Trial Court properly weighed the less severe sanctions and found that those sanctions would not be effective in response to the

¹²⁴ RP 229-32.

¹²⁵ *Id.* at 231.

¹²⁶ *Id.* at 221, 232.

¹²⁷ *Id.* at 230-32.

¹²⁸ *Id.* at 232 (*Emphasis Added*).

discovery violation. This factor weighs in favor of exclusion of the witness. The experienced trial judge did not abuse his discretion.

2. The impact of witness preclusion on the evidence at trial and the outcome of the case.

The State concedes that permitting the defense expert to testify at trial may have had an impact on the evidence at trial, but it would not have changed the outcome. The Trial Court concluded that admitting the expert's testimony would have permitted the defense of necessity under the defense's theory.¹²⁹ However, the State would have easily attacked the necessity defense. The expert would only testify that marijuana was beneficial to the Appellant's mother. The Appellant proffered no evidence that it was necessary to transport four pounds of marijuana in a kitchen bag across county lines.

The Appellant argued to the Trial Court that the harm that was being avoided under necessity was the suffering of Appellant's mother.¹³⁰ Under that theory, the Appellant had to illegally transport marijuana in order to avoid the harm of his mother suffering from cancer. But, that harm is far too remote to the actions of the

¹²⁹ *Id.* at 229.

¹³⁰ *Id.* at 120-25.

Appellant. In fact, the Appellant was transporting the marijuana away from his mother and her home.¹³¹

The appellant was trying to avoid the harm of not have to process the marijuana at his mother's home, or avoid legally purchasing marijuana locally, or taking his mother to get marijuana. The financial harm of having to process the marijuana at his mother's home or purchase it may have been greater than transporting the marijuana. But, that threatened harm was brought about by the Appellant's own choice not to choose those options. The Appellant had numerous legal alternatives to his actions.

The Appellant cannot prove that his actions were necessary. His actions were not necessary to his mother's treatment. It was not necessary to transport marijuana across the state. The State would have easily overcome any argument of necessity. This factor weighs in favor of exclusion. The excluded testimony would have been of little weight to the jury. The experienced trial judge did not abuse his discretion.

¹³¹ *Id.*

3. The extent to which the prosecution will be surprised or prejudiced by the witness's testimony.

The record clearly establishes that the prosecution was in fact surprised in this case.

The State clearly objects. The Court should not be shocked or surprised at this. He's had eight months with the case. We have no discovery with regards to this potential witness being even an option ... We have no discovery with regards to anything he would testify to ...¹³²

The experienced trial judge was likewise surprised by the expert witness.

...[B]ut there's a real problem here with this doctor testifying. First anybody heard about it, the Court, as well as, the prosecution was today, in the middle of trial here."¹³³

The State would also be prejudiced by the witness's testimony. The State is prejudiced when it has the inability to counter testimony with any affirmative evidence.¹³⁴ The experienced trial judge found that the State would be prejudiced by the expert testifying.

The problem is there's two sides in the case that should have a right to a fair trial, and that would include the prosecution. The prosecution hasn't had – first they heard about, we all know, this witness and they may want to bring in their own witness. They may want to

¹³² *Id.* at 219. (The defense did mention that they were attempting to contact Dr. Greg Carter during their motion to continue on July 20, 2016, but still did not list him as a witness nor provided discovery on him. See *Id.* at 37-38; CP 34).

¹³³ *Id.* at 230.

¹³⁴ *Hutchinson*, 135 Wn.2d at 883.

think about after they talk to this witness, what he says, and conduct some discovery to see whether there may be some other witness that might disagree with this Dr. Carter.

And to allow the witness to testify and to proceed with trial is unfair to the prosecution in the case here.¹³⁵

Like in *Hutchinson*, the State was prejudiced by a surprise witness that it was unable to counter with affirmative evidence in the middle of trial after the State rested. The State was surprised and prejudiced by the introduction of the defense's expert witness. This factor weighs in favor of exclusion. The experienced trial judge did not abuse his discretion.

4. Whether the violation was willful or in bad faith.

The defense's conduct in this case was willful or in bad faith. The Appellant continued this case several times to obtain an expert witness. The Appellant early on informed the Trial Court he was proceeding under the necessity defense to medical use of marijuana and that would require a medical expert. The Appellant set several pre-trial hearings to address the use of the necessity defense, but then struck those hearings. On the day of trial, the defense attempted to proceed without the expert witness they had insisted

¹³⁵ RP at 231.

they needed. On the second day of trial, the defense attempted to surprise the State and the Trial Court with an expert witness. "... [n]ow I'm shocked with the defense approach."¹³⁶ The defense clearly knew that they needed to obtain an expert witness, based upon all the assertions requesting continuances to obtain one. When one acts knowingly they also act willfully.¹³⁷ Mr. Phelps even acknowledged that his actions were willful. "I guess I could be sanctioned for the failure to timely disclose this witness."¹³⁸

The experienced trial judge found that the defense acted willfully or in bad faith by the failure to bring the matter before the Trial Court at an earlier time.

This isn't a new case. This case has been going on forever. The issued of medical marijuana necessity, whatnot, has not been a secret.

It was – that issue, quite frankly, was – well, we had scheduled to have a hearing some time ago, the hearing didn't take place. And I think when two sides handed up their motions in limine yesterday after we had selected the jury, that's the first I was caught with what the specific issues would be. And it really is an issued that should have been determined before trial, a pretrial hearing, before the jury was selected. Had it been done in that fashion we wouldn't be in the problem that we have here today.¹³⁹

¹³⁶ *Id.* at 230.

¹³⁷ WPIC 10.05.

¹³⁸ RP 221. ("Willful violation by counsel of an applicable discovery rule ... may subject counsel to appropriate sanctions by the court." CrR 4.7(h)(7)).

¹³⁹ *Id.* 230.

The Appellant acted willful or in bad faith in his failure to obtain or disclose of his expert witness.¹⁴⁰ This factor weighs in favor of exclusion. The experienced trial judge did not abuse his discretion.

The *Hutchinson* factors weigh in favor of excluding the expert witness's testimony. Lesser sanctions would not have been effective in stopping the defense's behavior and would hamstring trial court's ability to control trials. The prosecution was clearly surprised by the Appellant's witness and highly prejudiced by the springing an expert witness on the second day of trial after the State rested its case. The violation was clearly willful on the part of the Appellant. The Appellant had ample time to obtain an expert and choose not to acquire one. The second *Hutchinson* factor could weigh in favor of the Appellant, but that factor does not weigh stronger or lighter against the other three. The experienced trial judge correctly determined that exclusion of the witness was appropriate. The experienced trial judge did not abuse his discretion. This Court should reject the Appellant's argument.

¹⁴⁰ See *State v. Kipp*, 171 Wn. App. 14, 33, 286 P.3d 68 (2012) (reversed on other grounds) ("And, as to the fourth *Hutchinson* factor, 'whether the violation was willful or in bad faith,' the trial court found that Kipp could have avoided the late disclosure of Alan T.").

V. CONCLUSION

The State respectfully requests this Court deny the Appellant's arguments and uphold the Appellant's conviction. The statements made to Sergeant Garcia were properly admitted as voluntary statements. The Trial Court did not error in ruling that the necessity defense required medical expert testimony. The experienced trial judge did not error in excluding the witness and the only appropriate sanction that could be imposed in this case. The experienced trial judge did not abuse his discretion in this case. This Court should uphold the decisions made by the Trial Court. The Appellant's arguments do not warrant reversal.

The State respectfully requests this Court deny the Appellant's appeal.

DATED this 30 day of JULY, 2018.

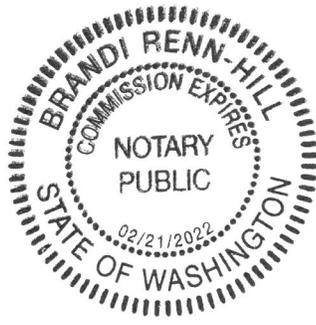
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containing a copy of the Respondent's Brief.

DATED this 30 day of July, 2018.



Helen Kenyon
HELEN KENYON, Legal Assistant

SUBSCRIBED AND SWORN to before me this 30 day of July, 2018.

Brandi Renn-Hill
NOTARY PUBLIC in and for the State of Washington, residing in Ritzville WA.
My commission expires: 2-21-2022.