

41484-8

**COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON**

State of Washington
Respondent

v.

KAREN L. MOWER

Appellant

41484-8

On Appeal from the Superior Court of Mason County

08-1-00018-4

The Honorable Amber Finlay

REPLY BRIEF

Jordan B. McCabe, WSBA No. 27211
Attorney for Appellant Karen L. Mower

MCCABE LAW OFFICE
P. O. Box. 6324, Bellevue, WA 98008
425-746-0520•mccabejordanb@gmail.com

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II. SUMMARY OF THE CASE

The State charged Karen Mower and John Reed with possession with intent to deliver marijuana. A jury acquitted the couple¹ of intent to deliver, but rejected their medical use affirmative defense and convicted them of unlawful cultivation.² These consolidated appeals followed.

III. ARGUMENTS IN REPLY

1. THE SEARCH AND SEIZURE OF MOWER AND REED VIOLATED CONST. ART. I, § 7 AND THE FOURTH AMENDMENT.

When a platoon of armed police invaded Mower and Reed's property with a warrant to search for unlawfully cultivated marijuana, Mower and Reed immediately announced that they had medical marijuana authorization. The police ignored this and proceeded to ransack their home and out-buildings and arrest them. This was unlawful, and the resulting physical evidence should have been suppressed.

Mason County police received an anonymous tip that Mower and Reed were growing marijuana on their property. RP 352. They detected the odor of green marijuana from the perimeter. RP 362. They obtained a search warrant, and several car-loads of them swarmed the property with

¹ Reed and Mower were married in 1996. RP 756.

² This was before the Legislature overhauled the Medical Marijuana Act. (See Chapter 181, Laws of 2011, eff. date 7/22/2011.)

guns drawn. RP 528-29. When Mower and Reed emerged from their travel trailer home, the police immediately seized them at gunpoint and handcuffed them. RP 291-92; RP 589.³ Mower and Reed were afraid the police would open fire, and begged them not to shoot their dogs. RP 291.

The State claims Mower was seized in the course of a lawful search. This is wrong. The medical marijuana statute, at least implicitly, requires the police to conduct an inquiry before a search when a citizen claims to be cultivating marijuana lawfully under a medical use authorization.

Mr. Reed and Ms. Mower immediately informed these officers that they were authorized to grow marijuana for medical use. RP 359-60, 402, 523, 589. The police simply ignored this information. They did not release Mower and Reed and did not inquire about their medical authorization status. Instead, they kept the pair in handcuffs and proceeded to search for marijuana plants. RP 531, 589.

Both the federal and state constitutions prohibit warrantless arrests unless the arrest is supported by probable cause. *State v. Solberg*, 122 Wn.2d 688, 696, 861 P.2d 460 (1993). Probable cause to arrest exists where reasonably trustworthy facts and circumstances within the knowledge of police are sufficient to merit a belief in the mind of a

³ It was standard procedure to enter property with weapons drawn when serving a search warrant. RP 292, 295.

reasonably cautious person that an offense has been committed. *State v. Terrovona*, 105 Wn.2d 632, 643, 716 P.2d 295 (1986). Const. art.1, § 7 and the Fourth Amendment mandate that evidence obtained in the course of unlawful government conduct must be suppressed.

As a matter of first impression, Mower contends that nothing in any version of the medical marijuana act, suggests that the Legislature intended to condition a medical use permit upon the *quid pro quo* that gravely ill people must relinquish their rights under Wash. Const. art. 1 and the Fourth Amendment to be free from home-invasion-style search and seizure. In practice, this means, that a search pursuant to a warrant based on an anonymous report of growing marijuana loses its authority and must be temporarily suspended and judicially reviewed when a claim of lawful medical use is asserted.

The version of the Medical Marijuana Act in existence in January, 2008, contained the following language:

Qualifying patients with terminal or debilitating illnesses who, in the judgment of their health care professionals, may benefit from the medical use of marijuana, shall not be found guilty of a crime under state law for their possession and limited use of marijuana.

RCW 69.51A.005. Also, such persons “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.” RCW

69.51A.040(2). In 2011, the Legislature clarified its intent with regard to arresting medical marijuana patients as follows:

The medical use of cannabis in accordance with the terms and conditions of this chapter does not constitute a crime and a qualifying patient or designated provider in compliance with the terms and conditions of this chapter may not be arrested, prosecuted, or subject to other criminal sanctions or civil consequences, for possession, manufacture, or delivery of, or for possession with intent to manufacture or deliver, cannabis under state law[.]

New RCW 69.51A.140, Engrossed Second Substitute Senate Bill 5073, Chapter 181, Laws of 2011.⁴

The statute specifically commands the police to question suspected growers in order to elicit their status as medical marijuana patients or providers. RCW 69.51A.040(3)(c). Moreover, art. 1, § 7, and the Fourth Amendment — and simple logic — demand that the police conduct this inquiry before proceeding with a highly intrusive search.

A comparison with the requirement to produce proof on demand of motor vehicle insurance is instructive. RP 359-60.⁵ When pulled over, a driver must provide written proof of insurance. RCW 46.30.020(1)(a).

⁴ The latest legislative revision of the medical marijuana act requires medical cannabis users to register with the Department of Health. Engrossed Second Substitute Senate Bill 5073, Chapter 181, Laws of 2011. This appears to recognize the unworkability of the old practice whereby medical users could not be prosecuted but were nevertheless subject to the routine practice of the police to raid at gunpoint and arrest property-owners upon mere suspicion that marijuana was being grown.

⁵ Witnesses are supposed to testify solely to the facts, not the law. *State v. Clausing*, 147 Wn.2d 620, 628, 56 P.3d 550 (2002).

Failure to do so is an infraction that creates the presumption the driver is uninsured. RCW 46.30.020(1)(c) & (d). But this presumption is rebuttable. The driver simply comes to court in person and provides the requisite written evidence that he or she was in compliance at the time she was cited, and the failure-of-proof citation is dismissed. RCW 46.30.020(2).

Thus, it is not the act of producing a document, but the actual authorization that is the primary purpose of “produce on demand” statutes.

The police were on notice that Mower and Reed potentially were qualifying medical marijuana patients engaged in lawful activity.

Accordingly, under the statute and both constitutions, the burden was on the police to determine whether this couple were protected from arrest, prosecution, or other criminal sanctions.

The State justifies this intrusion by listing evidence discovered in the course of the search. Brief of Respondent (BR) at 20-21. But an intrusion into a citizen’s private affairs must be justified at its inception. *See, e.g., State v. Armenta*, 134 Wn.2d 1, 15, 948 P.2d 1280, 1286 (1997); *State v. Williams*, 102 Wn.2d 733, 739, 689 P.2d 1065 (1984) (warrantless stops).

The State complains that Mower did not cite to authority for the need for probable cause before invading a home. BR 20. That authority is

found in the Fourth Amendment and Wash. Const. art. 1, § 7. “The right of the people to be secure in their persons [and] houses . . . against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause . . .” U.S. Const. amend. IV. “No person shall be disturbed in his private affairs, or his home invaded, without authority of law.” Const. art. I, § 7. Here, that means the magistrate who issued the search warrant should have been informed that a medical marijuana authorization was potentially involved.

This preliminary inquiry by the police upon being presented with an alleged authorization is a significant distinguishing feature of *State v. Fry*, 168 Wn.2d 1, 3, 228 P.3d 1 (2010), on which the State heavily relies. BR at 18, et seq. The police first conducted an inquiry, then presented the result of that inquiry to a magistrate, and then executed a warrant based on the magistrate’s determination of probable cause. Only after observing that the purported authorization bore a questionable qualifying condition did the police proceed to request a search warrant. *Fry*, 168 Wn. at 4. Here, by contrast, the police did not conduct any inquiry, so that the magistrate issuing the search warrant was not informed that lawful authority was at issue. The police simply ignored that fact and invaded Mower’s home with no inquiry whatsoever.

Moreover, the purported qualifying condition in *Fry* was “anxiety, rage and depression related to childhood,” which are totally subjective. *Fry*, 168 Wn.2d at 3. On its face, this is a dubious diagnosis. Mower and Reed, by contrast, were diagnosed with unmanageable pain and distress caused by multiple chronic or terminal physical conditions.

The State again cites to *Fry* in claiming that a medical use authorization has no effect until a dying patient’s prosecution reaches the point of trial. BR at 26. This invokes the recognition by the *Fry* court that the medical marijuana defense is in the same category of affirmative defenses as self-defense. *Fry*, 168 Wn.2d at 8, citing *City of Kennewick v. Day*, 142 Wn.2d 1, 10, 11 P.3d 304 (2000). With respect to the burden of proof, that is correct. (Although disputed by the State in that context. Please see Issue 2 at page 8.)

As to probable cause to enter a suspect’s home, however, a medical marijuana authorization is glaringly distinguishable from a claim of self defense: An assault or homicide suspect’s self-defense claim is asserted after the fact, and an investigating officer has no way to evaluate it. *Fry*, at 8, citing the domestic violence case of *McBride v. Walla Walla County*, 95 Wn. App. 33, 40, 975 P.2d 1029 (1999). A medical marijuana authorization, by contrast, preexists the accusation of crime. Unlike a claim of self defense, a magistrate can evaluate it without a jury before

ruling on probable cause and issuing a warrant to proceed with the home invasion. Moreover, its purpose, Mower contends, is to carry out the intent of the people of Washington and the legislature to prevent the harassment and prosecution of desperately ill and dying citizens.

The *Fry* search was lawful because the police took the trouble to establish the probability of criminal activity — not merely a prima facie showing — sufficient to justify an intrusion. *Fry*, 168 Wn.2d at 6. The *Mower* search was not lawful because the State omitted the vital step of developing probable cause from a mere prima facie showing.

Evidence tainted by government illegality is inadmissible for any purpose. *State v. Chenoweth*, 160 Wn.2d 454, 473, 158 P.3d 595 (2007); *Wong Sun v. United States*, 371 U.S. 471, 83 S. Ct. 407, 9 L. Ed. 2d 441 (1963). Therefore, a defense motion to suppress would have resulted in suppression of the physical evidence, without which the State had no case.

This establishes the performance and prejudice prongs of the *Strickland* test for effective assistance of counsel under the Sixth Amendment, such that this Court may address the error, despite counsel's failure to file a CrR 3.6 motion to suppress. RAP 2.5(a)(3); *State v. Soonalole*, 99 Wn. App. 207, 215, 992 P.2d 541 (2000).

The Court should review the constitutional implications of the search and hold that suppression was required.

2. MOWER'S AFFIRMATIVE DEFENSE OF AUTHORIZED MEDICAL MARIJUANA USE SHIFTED THE BURDEN TO THE STATE TO PROVE BEYOND A REASONABLE DOUBT THAT CULTIVATION WAS UNLAWFUL.

The trial court instructed the jury that Mower and Reed had the burden to prove the affirmative defense of medical use by a preponderance of the evidence. Instr. 14, CP 45. This was wrong. The court unambiguously stated that the defense had made a prima facie showing of each element of the medical use defense to the satisfaction of the court. RP 221, 846. Once that happened, the burden shifted to the prosecution to prove the absence of every element of the defense beyond a reasonable doubt.

The State must prove each essential element of a crime beyond a reasonable doubt. U.S. Const. amends. V, XIV; *In re Winship*, 397 U.S. 358, 364, 90 S. Ct. 1068, 25 L. Ed. 2d 368 (1970); *State v. Baeza*, 100 Wn.2d 487, 488, 670 P.2d 646 (1983). Erroneously placing the burden of persuasion on the defense violates due process under the Sixth and Fourteenth Amendment and Const. art 1, § 22. *State v. Deal*, 128 Wn.2d 693, 698, 911 P.2d 996 (1996); *State v. Hanna*, 123 Wn.2d 704, 710, 871 P.2d 135, *cert. denied*, 513 U.S. 919 (1994).

It is reversible error to instruct the jury in a manner that relieves the State of its burden to prove every essential element of a criminal

offense beyond a reasonable doubt. *State v. Pirtle*, 127 Wn.2d 628, 656, 904 P.2d 245 (1995). Mower's counsel did not object to the burden of proof instruction below. But an instruction that shifts the burden of proof from the State is a constitutional error that a party may raise for the first time on appeal. RAP 2.5(a)(3); *State v. Scott*, 110 Wn.2d 682, 688, n.5, 757 P.2d 492 (1988). This Court will consider a claimed error in the jury instructions where, as here, instructional error invades a fundamental right of the accused. *State v. Green*, 94 Wn.2d 216, 231, 616 P.2d 628 (1980).

The State does not respond to Mower's argument distinguishing affirmative defenses the defendant must prove by a preponderance from those the State must defeat beyond a reasonable doubt.

Examples of defenses the Legislature expressly requires the defendant to prove include: insanity, RCW 9A.12.010(2); felony murder, RCW 9A.32.030(1)(c); kidnapping, RCW 9A.40.030(2); sexual offenses, RCW 9A.44.030; reckless burning, RCW 9A.48.060; and compounding a crime, RCW 9A.76.100. Without exception, those statutes include unequivocal language that the defendant must prove the defense by a preponderance. The operative rule of statutory construction is that, where the Legislature does not clearly impose the burden of proving an affirmative defense on criminal defendants, the obligation to prove the absence of the defense remains with the prosecution. *State v. McCullum*,

98 Wn.2d 484, 494, 656 P.2d 1064 (1983), citing *State v. Roberts*, 88 Wn.2d 337, 345, 562 P.2d 1259 (1977).

But the burden of disproving other affirmative defenses falls to the State. Homicide committed in self-defense, for example, is lawful. RCW 9A.16.050; *State v. Box*, 109 Wn.2d 320, 329, 745 P.2d 23 (1987) (self-defense is a lawful act). Therefore, once a defendant makes out a prima facie case of self defense, the burden shifts to the State to prove the absence of self-defense beyond a reasonable doubt. *McCullum*, 98 Wn.2d at 493. The State suggests that *State v. Camara*, 113 Wn.2d 631, 781 P.2d 483 (1989), overruled *McCullum* and its progeny by rejecting outright the concept that an affirmative defense may negate an essential element of a crime. BR at 26. But the holding of *Camara* is limited to the burden of proving the consent defense to rape versus the forcible compulsion element. *Camara*, 113 Wn.2d at 640. Consent and forcible compulsion are mutually exclusive. Either a sex act was consented to or it was forced. The notion of consenting to forcible compulsion is meaningless.

Homicide and self-defense, by contrast, can and do exist together, which is why self-defense is also called the lawful use of force. RCW 9A.16.020. Accordingly, the State has the burden to prove the defendant's use of force was not lawful. That is still the law in Washington. *State v. Walden*, 131 Wn.2d 469, 473-74, 932 P.2d 1237 (1997); *See, e.g., State v.*

Slaughter, 143 Wn. App. 936, 942, n.4, 186 P.3d 1084 (2008), citing *McCullum* on this point.

Likewise, cultivating or possessing marijuana with a valid medical use authorization is lawful. The Legislature unambiguously states that otherwise culpable conduct — such as cultivating and possessing marijuana — is lawful if it is done for medical purposes. RCW 69.51A.005. Therefore, the defense is in the same category as self-defense. The Act does not impose the burden of proving the defense on defendants.

Accordingly, once Mower and Reed made a prima facie showing that their cultivation of marijuana was lawful under the medical use statute, the burden was squarely upon the State to prove otherwise beyond a reasonable doubt. Accordingly, it was error to instruct the jury that the defendants had to prove by a preponderance that their conduct was lawful once they established their prima facie case to the satisfaction of the court.

The remedy is to reverse.

Continued → →

3. JURY UNANIMITY WAS REQUIRED ON WHICH ASPECT OF LAWFUL USE THE STATE REFUTED BEYOND A REASONABLE DOUBT.

As a corollary to the State's burden to prove that Mower and Reed did not act lawfully, the State also had the burden to ensure that the jury was unanimous on which aspect of lawful use they found lacking. This jury was not instructed that it must be unanimous as to which element of the medical use defense it found the State had proved the absence of beyond a reasonable doubt.

Whenever the State must prove a fact beyond a reasonable doubt, the jury must be unanimous as to that finding. That means they must receive a unanimity instruction. Failing to require a unanimous verdict is a manifest constitutional error that can be raised for the first time on appeal. *State v. Carothers*, 84 Wn.2d 256, 262, 525 P.2d 731 (1974).

The State argued that Mower, although indisputably desperately ill, did not prove that she was a qualifying patient due to intractable pain or nausea that was unresponsive to standard therapies. The State also claimed that Mower did not prove she had valid documentation by spontaneously presenting an authorization to the police during the invasion of her home. Finally, the State claimed that Mower failed to prove that she and Reed possessed no more than a 60-day supply of marijuana. RP 837, 914, 976-77, 978, 980, 981.

First, as a matter of simple logic, failure by a party to prove a fact does not constitute proof by the other party that the converse is true beyond a reasonable doubt. Second, as discussed above, Mower and Reed had no obligation to prove any element of the defense, other than making a prima facie case.

Finally, this Court cannot discern from the verdict which element of lawful use the jury found the State had disproved. At sentencing, defense counsel had no idea: “The jury may have believed that they had too much marijuana or something like that, I don’t know what the problem was.” RP 1035. The court opined that the jury found that Mower and Reed had exceeded the permissible amounts of marijuana. RP 1046. But the jury was not polled. RP 996. This is pure speculation.

Cannot be Deemed Harmless: “Instructional error is presumed to be prejudicial unless it affirmatively appears to be harmless.” *State v. Stein*, 144 Wn.2d 236, 246, 27 P.3d 184 (2001). Where, as here, an instructional error favors the prevailing party, prejudice is presumed unless it affirmatively appears that the error was harmless. *State v. Bray*, 52 Wn. App. 30, 34-35, 756 P.2d 1332 (1988); *State v. Chino*, 117 Wn. App. 531, 540, 72 P.3d 256 (2003). Without an instruction, this Court has no reason to suppose that twelve jurors unanimously agreed that any

particular specific elements of the defense was absent beyond a reasonable doubt.

Accordingly, the convictions cannot stand. The Court should reverse and dismiss the prosecution with prejudice.

4. THE EVIDENCE WAS INSUFFICIENT TO CONVICT MOWER FOR MANUFACTURING MARIJUANA.

At the close of the State's case, the court erroneously denied Mower's motion to dismiss for insufficient evidence. Even if the affirmative defense fails, the evidence recited by the State shows no more than mere presence and assent. BR 17.

Evidence is not sufficient to support a conviction unless any rational fact finder could find the essential elements of the crime beyond a reasonable doubt when viewing the evidence in the light most favorable to the State. *State v. Thomas*, 150 Wn.2d 821, 874, 83 P.3d 970 (2004). A sufficiency challenge admits the truth of the State's evidence and all inferences reasonably to be drawn from it. *Thomas*, 150 Wn.2d at 874. As a matter of law, insufficient evidence requires dismissal with prejudice. *State v. Stanton*, 68 Wn. App. 855, 867, 845 P.2d 1365 (1993).

No Proof of Participation as a Principal: The State presented no evidence that Mower committed a single act that could be construed as active participation in cultivating marijuana.

Reed testified that, not only was Mower incapable of keeping a plant alive, she was also too sick for any of the physical labor that cultivation entails. RP 764. The State produced no evidence to refute Reed's testimony that he did everything. RP 764, 788, 802. No evidence linked Mower to a single activity in the grow house except showering and watching TV. RP 803. Every item associated with Mower was inside the trailer, not the grow house. RP 328.⁶

No Evidence of Accomplice Liability: Where evidence is devoid of any suggestion that a defendant did any act that constituted a crime, it may charge the person as an accomplice. RCW 9A.08.020. A person is an accomplice if, with knowledge that it will promote or facilitate the commission of a crime, she "aids or agrees to aid" another person in planning or committing it." RCW 9A.08.020(3) (a) (i –ii). Proof that an accused was aware of an ongoing crime — even that she assented to it — and that she was physically present at the scene are insufficient as a matter of law to establish accomplice liability. Rather, the person must stand "ready to assist" in the crime. *In re Welfare of Wilson*, 91 Wn.2d 487, 491, 588 P.2d 1161 (1979).

⁶ The court erroneously believed that Mower and Reed came out of the grow house together when the police arrived to conduct the raid. RP 640. They came out of the trailer. RP 279, 290.

The State did not establish accomplice liability. Accepting the truth of the State's evidence and all reasonable inferences from it, the State showed merely that Mower was present, knew about the grow, and assented to it. This is insufficient to convict her as an accomplice. Moreover, the State could not have proved that she stood ready to assist, because overwhelming evidence established that she was physically incapable of doing so.

Retrial following reversal for insufficient evidence is prohibited and the Court should dismiss with prejudice. *State v. Hickman*, 135 Wn.2d 97, 103, 954 P.2d 900 (1998), quoting *State v. Hardesty*, 129 Wn.2d 303, 309, 915 P.2d 1080 (1996).

5. MOWER AND REED WERE DENIED THE
RIGHT TO PRESENT A COMPLETE DEFENSE.

The defense moved in limine to admit evidence that within the last few years Mr. Reed had obtained legal advice in an effort to make sure that he and Mower were conducting themselves within the law. The court categorically refused to consider admitting this evidence. This was error.

First, the court erred by rejecting the proffered evidence sua sponte without an objection from the State. All evidence is admissible unless the opposing party objects to it. ER 401; ER 403.

Second, the proposed evidence was not hearsay. It was not offered to prove the truth of matter asserted. It was relevant without regard whether it contained sound legal advice.

Third, the State is correct that the documents were inadmissible to prove what the law is or was. BR 29. But these documents tended to prove that Mower and Reed had a long-standing good-faith belief that they were bona fide medical marijuana patients and that they were making a good faith effort to abide by the law. This was relevant to disprove the State's pervasive accusations, express and implied, that the defendants fabricated the medical use story only after they were arrested.

Finally, the prosecutor opened the door to this evidence by impugning the professional integrity of Dr Orvald and Dr. Carter. RP 701, 703, 727. In light of the erroneous omission of a unanimity instruction, keeping this evidence from the jury was exceedingly prejudicial, because the Court can only speculate why the jury rejected the medical use defense. The remedy is to reverse.

6. THE SENTENCING COURT LACKED
STATUTORY AUTHORITY TO IMPOSE
COMMUNITY CUSTODY.

The court erroneously imposed 12 months of community custody.
CP 10. The State persists in failing to recognize the significance of the

words, “in the custody of the Department of Corrections” in the applicable part of the Sentencing Reform Act that empowers a court to impose community custody. Mower was sentenced to the custody of the County jail, not the DOC.

The court’s sentencing authority is the Sentencing Reform Act (SRA), Chapter 9.94A RCW; *State v. Murray*, 118 Wn. App. 518, 521, 77 P.3d 1188 (2003). Reversal is required when a decision “was reached by applying the wrong legal standard.” *State v. Rohrich*, 149 Wn.2d 647, 654, 71 P.3d 638 (2003). That is the case here.

Mower was sentenced solely on Count 1. CP 7. Her offender score was zero, so her standard range sentence was 0 to 6 months. RP 1031. The court imposed 20 days in the County jail, all converted to electronic monitoring or community service. CP 9; RP 1047. That is, she was not sentenced to any sort of custody whatsoever.

The court must strictly follow statutory provisions, otherwise, the sentence is void. *State v. Phelps*, 113 Wn. App. 347, 354-55, 57 P.3d 624 (2002), quoting *State v. Theroff*, 33 Wn. App. 741, 744, 657 P.2d 800, review denied, 99 Wn.2d 1015 (1983). The law authorizing the court to impose community custody is RCW 9.94A.701 and 9.94A.702. RCW 9.94A.505(1) and (2)(a)(ii). RCW 9.94A.701 requires the court to impose one year of community custody if the defendant is sentenced to the

custody of the DOC on a conviction under RCW 69.50. RCW 9.94A.701(3)(c). RCW 9.94A.702, by contrast, says the court MAY impose community custody for one year if the defendant is sentenced to less than one year of confinement (no custodian specified) for violating RCW 69.50. RCW 9.94A.702(1)(d).

Here, the court did not sentence Mower either to one year or to the custody of the DOC. By the plain language of the Judgment and Sentence, the court imposed 20 days confinement in the county jail. CP 9, para. 4.1(a). Therefore, the applicable community custody provision was the permissive subsection, RCW 9.94A.702, whereby the court has discretion to waive community custody.

Mower also asked the court for permission to continue the therapeutic use of marijuana if the court did impose community custody. RP 1041. The court erroneously believed that community custody was mandatorily subject to standard conditions under the supervision of the Department of Corrections (DOC). CP 10. This also was error. The conditions the court imposed only precluded the unlawful possession of a controlled substance. CP 10, para. 4.2(5). Nothing in the judgment forbids any lawful conduct such as possessing medical marijuana.

By the terms both of the SRA and the Judgment and Sentence, therefore, the court had the discretion either to waive community custody

entirely, or to authorize Mower to possess marijuana lawfully under RCW 69.51A.

The remedy is to remand for resentencing with instructions to strike the community custody provisions.

7. THE COURT IMPOSED EXCESSIVE COSTS
IN VIOLATION OF RCW. 10.01.160(2).

Over a defense objection, the court imposed a legal financial obligation of \$2,129.00 to reimburse the Sheriff's Office for serving serial subpoenas. CP 12, para 4.3(a); RP 1050. This was error.

RCW 10.01.160(2) authorizes the court to impose certain prosecution costs. But the State may not recoup costs associated with maintaining government agencies, unless those costs are specific to a particular case. *Utter v. Dep't of Soc. & Health Servs.*, 140 Wn. App. 293, 309-11, 165 P.3d 399 (2007).

In *Utter*, the Department of Social and Health Services tried to bill a defendant for costs expended in determining his competency to stand trial. This contravened RCW 10.01.160(2) which unequivocally bars costs for expenditures the State incurs "in connection with the maintenance and operation of government agencies that must be made by the public irrespective of specific violations of law." *Utter*, 140 Wn. App. at 309-10.

That rule precludes the State from recouping the routine costs of running the Sheriff's Office from indigent criminal defendants. The Sheriff's Office receives a publicly-financed budget that includes the cost of maintaining personnel at a fixed hourly or monthly rate to perform routine tasks such as serving subpoenas. Those employees are paid irrespective of any particular prosecution.

This Court should hold that it is contrary to the legislative intent in RCW 10.01.160(2) for the State to bill defendants for serving dozens of subpoenas on the same police witnesses in cases with multiple continuances, especially where the Sheriff could serve multiple subpoenas in a single visit to the police department, which presumably has an agent to receive service of process, without requiring a deputy Sheriff to track down each individual officer.

The Court should remand for resentencing with instructions to strike the costs of subpoenas served by Sheriff's Office staffers whose salaries have already been paid by the tax payers.

IV. CONCLUSION

For the foregoing reasons, Karen L. Mower asks this Court to reverse her conviction, vacate the judgment and sentence, and dismiss the prosecution.

Respectfully submitted this 7th day of November, 2011.

Jordan McCabe

Jordan B. McCabe, WSBA No. 27211
Counsel for Ms. Mower

CERTIFICATE OF SERVICE

Jordan McCabe certifies that opposing counsel was served with this Reply brief via Division II's electronic filing portal: timh@co.mason.wa.us

Tim Higgs, Mason County Prosecutor's Office

A paper copy of the brief along with a copy of the State's brief was deposited in the U.S. mail, first class postage prepaid, addressed to:

Karen L. Mower
301 Wallace-Kneeland Blvd., Suite 224-257
Shelton, WA 98584

Jordan McCabe

November 7, 2011

Jordan B. McCabe, WSBA No. 27211
Bellevue, Washington

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Sender Name: Jordan B McCabe - Email: **mccabejordanb@gmail.com**

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timh@co.mason.wa.us