

No. 41484-8

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

STATE OF WASHINGTON, RESPONDENT

V.

KAREN L. MOWER and JOHN REED,

APPELLANTS

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Appeal from the Superior Court of Mason County  
The Honorable Amber Finlay

No. 08-1-00018-4

No. 08-1-00022-2

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**BRIEF OF RESPONDENT**

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A. STATE'S RESTATEMENT OF DEFENDANTS'  
ASSIGNMENTS OF ERROR

1. The evidence was insufficient to convict Mower and Reed of manufacturing marijuana.
2. Mower's arrest was unlawful.
3. Evidence obtained after or during Mower's arrest should have been suppressed (if her arrest was unlawful).
4. Mower was denied effective assistance of counsel in violation of Wash. Const. art. 1, § 22.
5. The trial court erred by instructing the jury that Mower had the burden of proving her affirmative defense of medical marijuana authorization by a preponderance of the evidence rather than instructing the jury that the State had the burden of disproving Mower's affirmative defense of medical marijuana authorization beyond a reasonable doubt.
6. The trial court erred by failing to give an instruction to the jury that, if the jury rejected the defendants' affirmative defense of medical marijuana authorization, then the jury had to be unanimous in regard to which "element" of the affirmative defense had been disproved beyond a reasonable doubt.
7. In violation of the Sixth Amendment, Mower was denied the opportunity to present a complete defense because the court excluded evidence showing that prior to her arrest for manufacturing marijuana she had sought the advice of an attorney who opined that it was lawful for her to grow marijuana because she qualified for the affirmative defense of medical marijuana authorization.
8. The sentencing court exceeded its lawful authority (under the Sentencing Reform Act) when it sentenced Mower to community custody following her conviction for unlawful manufacturing of marijuana.

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9. The trial court erred by imposing subpoena service fees of \$2,129.00 (to be divided between Mower and Reed).

B. STATE'S COUNTERSTATEMENT OF DEFENDANTS' ISSUES  
PERTAINING TO DEFENDANTS' ASSIGNMENTS OF ERROR

1. Was there sufficient evidence presented at trial to sustain the jury's verdict finding Mower and Reed guilty of manufacturing marijuana as either a principal or an accomplice?
2. Executing a search warrant, police officer's searched Mower's and Reed's property for evidence of a marijuana grow operation. During the search, Mower was detained by police officers. After the search revealed evidence of a marijuana grow operation, Mower was formally arrested. Was Mower's arrest unlawful, and if so, should any evidence that was discovered after her arrest be suppressed even though the officers who discovered and seized the evidence had a valid search warrant to search for and seize the evidence?
3. Evidence was discovered and seized during the execution of a valid search warrant. Mower was detained by police during the execution of that search warrant and was formally arrested after the search was completed and evidence of a crime was discovered. Was Mower's trial counsel ineffective by failing to assert that the arrest was illegal and that all evidence discovered and seized during the execution of the search warrant should be suppressed as fruits of an unlawful arrest?
4. At trial, Mower and Reed asserted medical marijuana authorization as an affirmative defense to the charge of manufacturing marijuana. Did the trial court err when it instructed the jury that Mower and Reed had the burden of proving the affirmative defense by a preponderance of the evidence and that if they established the defense by a

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preponderance of the evidence then it was the jury's duty to find them not guilty?

5. Mower and Reed asserted the affirmative defense of medical marijuana authorization to the charge of manufacturing marijuana. Did the court err when it did not instruct the jury that to convict Mower or Reed of manufacturing marijuana it must be unanimous as to which "element" of the affirmative defense had been disproved by the State beyond a reasonable doubt?
6. Mower and Reed claimed that, within a few years before their arrest and trial for manufacturing marijuana, they had consulted an attorney who opined that it was legal for them to manufacture marijuana because they qualified for the affirmative defense of medical marijuana authorization. At trial they offered letters from their attorney as evidence. Did the trial court err when it excluded the letters and disallowed evidence of the attorney's opinion?
7. Following Mower's conviction for manufacturing marijuana, she was sentenced to a sentence that included a term of community custody. The court stated on the record that it was required to impose community custody. Was the court required to impose community custody, and if not, did the court err by imposing community custody?
8. Preliminary appearance in this case occurred on January 15, 2008, but due to numerous defense continuances of the trial date the trial did not occur until March of 2010. As a result, subpoena service fees totaled \$2,129.00. Did the trial court err when at sentencing it ordered Mower and Reed to pay the subpoena service fees?

C. STATEMENT OF THE CASE

On January 14, 2008, deputies with the Mason County Sheriff's Office executed a search warrant in Mason County at the home of Karen

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Mower and John Reed. RP 278, 300. Pursuant to the search warrant, the deputies searched for evidence of a marijuana grow operation. RP 285. During the search, both Mower and Reed were detained. The search revealed evidence of a large marijuana growing operation, including 38 growing adult marijuana plants, a comparative amount of juvenile plants, growing-equipment and supplies, and 34.7 ounces of processed marijuana. RP 304-305.

After the evidence was discovered, Mower and Reed were arrested, and both were subsequently charged with manufacture of a controlled substance (marijuana) and possession with intent to deliver marijuana. RP 1, 6, 294, 588.

In a joint trial, both Mower and Reed were acquitted of possession with intent to deliver and were convicted of manufacture of a controlled substance (marijuana). RP 995-996.

The parties appealed their convictions. Because each party filed a separate brief, the State is answering both briefs separately. Additional facts that are relevant to the issues raised by Mower are as follows:

**1. Facts relevant to sufficiency of the evidence.**

Mower and Reed lived at the property where the search warrant was executed and the marijuana grow operation was maintained. RP 291.

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When deputies arrived to execute the search warrant, Mower and Reed came out of a trailer on the property. RP 291. Their dogs came out also and were acting aggressively toward officers. RP 291. Mower and Reed referred to the dogs as “their” dogs. RP 291. Reed testified and referred to Mower as his wife. RP 784.

Mower and Reed lived in a trailer on the property because the house was used to grow marijuana. RP 774, 776.

Referring to the marijuana grow operation, Reed testified – apparently referring to himself and Karen Mower – that “we were going to try a new strategy....” RP 778. Speaking of the marijuana, Reed testified that “Karen was going to get her pick of the litter. If she doesn’t get what she wants, then my wife’s not good, right?” RP 784. Mower used the shower in the house, but she lived in the trailer so that the house could be used to grow marijuana. RP 803.

Reed said during his testimony: “And then Karen had – because we have five different kinds – or I mean there was four different kinds – several.” RP 774.

Later Reed said that Karen didn’t do any of the gardening and that she didn’t do anything except “smoke it all; ingest it.” RP 788.

The State accepts Reed’s statement of facts for the purposes of the issue presented, except that the State asserts that the facts alleged by Reed

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and Mower are merely alleged facts that are not conclusively proved. For example, Reed states that during execution of a search warrant officers "found a medical marijuana authorization." Reed's brief at 1. The State counters that whether Reed and Mower proved the validity of the purported medical marijuana authorization by a preponderance of evidence is a question of fact for the finder of fact. Each and every fact alleged by Reed and Mower was subjected to the jury's determination of what was proved or unproved. Thus, there are no facts (except for those found by the finder of fact); there are only assertions of fact.

**2. Facts relevant to the detention of Mower during execution of the search warrant and her arrest after evidence was discovered.**

The sheriff's department searched the premises and seized evidence because they were executing a search warrant. RP 290-292, 294, 300-301. Officers received an anonymous tip about the marijuana grow operation, subsequently walked by the property, and from the street were able to smell the strong smell of growing marijuana. RP 301, 413-416. During, or at the initiation of, the execution of the search warrant, Mower and Reed were detained. RP 583, 588-589. During execution of the search warrant, substantial amounts of marijuana plants and processed

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marijuana were discovered. RP 404, 582. This amount of marijuana was too excessive to have been a personal use medical supply. RP 404, 582. After the excessive quantity was determined, Mower and Reed were formally arrested. RP 583.

**3. Facts relevant to Mower's claim that her trial attorney was ineffective for not objecting to evidence obtained pursuant to her arrest.**

Because the evidence that was seized was discovered and seized pursuant to a search warrant, rather than an arrest, and because Mower was not arrested until after the evidence had been discovered during execution of the search warrant, no additional facts are necessary here.

**4. Facts relevant to Defendants' issue regarding a jury instruction on the asserted affirmative defense of medical marijuana authorization.**

The trial court permitted Mower and Reed to assert the affirmative defense of medical marijuana authorization, and when instructing the jury prior to deliberations the trial court instructed the jury as follows:

The defendant has the burden of proving this defense by a preponderance of the evidence.... If you find the defendant has

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established this defense, it will be your duty to return a verdict of not guilty.

RP 906.

- 5. Facts relevant to defendants' argument that it was error for the trial court not to instruct the jury that before it could find the defendants guilty it must be unanimous as to which specific one of the "elements" of the affirmative defense (of medical marijuana authorization) that the State had disproved beyond a reasonable doubt.**

The facts outlined in section one, above, regarding the quantity of growing and processed marijuana found in and around Mower's and Reed's residence are relevant to this section. Because this is primarily a legal argument, however, no further citation to the record is helpful to the reviewing court in regard to this issue.

- 6. Facts relevant to defendants' argument that they were denied the opportunity to present a defense because the court excluded as evidence a letter purported to be from an attorney who had opined that it was legal for them to grow marijuana because they were qualified medical marijuana patients.**

Defendants proffered as evidence a letter that was purported to be a letter from an attorney who they had contacted for advice – because they wanted the jury to know that back in 2004 they had sought the advice of a

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lawyer to find out whether in that lawyer's opinion it was legal for them to grow marijuana. RP 748-749. Counsel proffered that "[t]he purpose that I would be admitting it for goes to intent. You know, this – intent's a big issue in this case; whether Mr. Reed intended to, you know, commit a crime and deliver marijuana or something." RP 749

In an apparent offer of proof, defense counsel informed the court and the record that "[a]n additional letter dated May 28<sup>th</sup> relates to Ms. Mower." RP 751. The defendants proffered that the attorney's letters opined that the defendants were qualified medical marijuana patients. RP 751. Defense counsel asserted that the letters were being offered only to show that the defendants had intended to follow the law. RP 751.

The trial court excluded these letters from evidence. RP 749, 752.

**7. Facts relevant to defendants' assertion that the trial court abused its discretion by imposing community custody as a part of the sentence imposed after the defendants were found guilty.**

After the jury found both defendants guilty of manufacturing marijuana, the matter was before the court for sentencing. At sentencing the trial court stated that "[t]he court also is required to impose a term of community custody. The community custody the court will indicate is required in this case." RP 1047.

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**8. Facts relevant to defendants' argument that the court imposed excessive costs when it ordered Mower and Reed to jointly pay \$2,129.00 in subpoena service fees.**

Arraignment occurred in this case on February 11, 2008. RP 9-12.

On Monday, June 23, 2008, the defense asked for a continuance of the trial, stating that Ms. Mower needed surgery. RP 28. On the same date, Reed also asked for a continuance. RP 29. The court granted the defendants' request for a continuance. RP 30-32.

On September 8, 2008, the defendants filed an affidavit of prejudice to remove one of the two elected Superior Court judges, leaving only one judge who could hear the case. RP 36. The remaining judge was planning an imminent retirement. RP 40.

On September 22, 2008, the defendants appeared in court and each filed waivers of speedy trial so as to extend the time available to bring a suppression motion. RP 39-40. When resetting the court dates to accommodate the defendants' request, the retiring judge said "I'm going to take the full time that's being allocated. And the reason I'm doing that obviously is that until we have an election, we won't know who the judge is." RP 41.

On December 8, 2008, another attorney, Douglas Hiatt, appeared in the case -- formally on behalf of John Reed (though he frequently appeared to represent both defendants). RP 42. Through his new attorney, Reed requested a continuance of the trial date. RP 43-45. Mowers joined in the request for a continuance. RP 45. The prosecution objected to the continuance. RP 45. The defense argued for a continuance. RP 46-48. The court granted the defense request for a continuance. RP 49. Both defendants presented additional speedy trial waivers. RP 50.

On February 9, 2009, the defendants appeared in court and sought an additional continuance. RP 57-59. The prosecution objected to the continuance. RP 60-61. The court granted the defense request for an additional continuance. RP 64. The court set the new trial date as March 31, 2009. RP 65.

On March 2, 2009, the defendants appeared for a pretrial hearing. RP 70. The defense asked to move the trial to April. RP 71. The prosecution, though ambiguous, agreed to the new trial date. RP 71-72. The court established a new trial date for the week of April 14. RP 72.

On April 17, 2009, the trial had not begun but the parties appeared in court for pretrial motions. RP 88-90. The case was delayed because the defendants were pursuing issues for which discovery had not been timely

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provided to the prosecution. RP 143-157. When the prospect of a further continuance became a concern to the court, Mr. Hiatt (the attorney for the defendants) said: "I've been in cases three years, your honor; that it takes three years to get to trial on with these issues." RP 149. To facilitate the exchange of discovery from the defense, the court reset the trial date to the week of May 5, 2009. RP 151-152.

On May 4, 2009, the parties appeared in court to confirm the case for trial. RP 158. The defense sought a continuance of the trial due to Mr. Hiatt's sickness. RP 163-164. Both defendants waived time for trial. RP 167. The court continued the trial to the week of July 21, 2009. RP 169.

On June 30, 2009, the parties appeared for a pretrial hearing. RP 170. In regard to the approaching trial date, Mr. Hiatt informed the court that:

In terms of the trial date that's coming up, we're prepared to waive -- you know, I think we've got a waiver in through the end of the year.... But we are prepared to waive. This is not a speedy trial case. Both my clients are prepared to waive 'till the cows come home.

RP 201-202. The court proposed to set the trial in September. RP 204. The prosecutor said that he did not object to that but that he would be out of state during September 21 through 25. RP 204-205. The court then set an October trial date. RP 205.

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At a pretrial hearing on September 14, 2009, the court ruled that Mower and Reed would be permitted to raise a medical marijuana defense at trial. RP 221. At the trial readiness hearing that occurred on October 5, 2009, the prosecution informed the court that in light of the court's ruling, the State was weighing whether to go forward, and the prosecutor suggested a resetting of the trial date. RP 226. The defense said it had no objection. RP 227. The court set a trial date of the week of January 19, 2010. RP 228.

On December 14, 2009, the parties appeared for a pretrial hearing. RP 231. The prosecutor in charge of the case was not present, and a different prosecutor covered the hearing. RP 231. Mr. Hiatt offered to continue the trial to February or March to give the prosecutor's office more time to consider the case. RP 232. The prosecutor who was present asked to merely set a new pretrial date rather than to change the trial date, so that new trial subpoenas would not be needed. RP 232. The trial court proposed several choices for pretrial dates, and Mr. Hiatt chose January 11, 2010, and then said, "I'd be perfectly happy to move the trial date too, your Honor, to tell you the truth." RP 233. The court set a pretrial date of January 4, 2010, but did not change the trial date. RP 233-234.

The parties appeared in court on January 4, 2010, and again on January 11, 2010, and then informed the court that negotiations were in

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progress and that a new pretrial might benefit the parties. RP 235-241. Mr. Hiatt informed the court that he was optimistic regarding an agreement that would avoid a trial, and he told the court that he didn't have any objection to setting the case out a couple of weeks. RP 241-242. The court offered to set the case out to February 15th, to which Mr. Hiatt responded, "February 15th is fine with me your Honor." RP 242. However, February 15 was a holiday, so the court offered other days. RP 242. Mr. Hiatt proposed, "[w]e could go the week after, your Honor. The more time it gives them to think, it's... fine." RP 242. The court set a pretrial hearing for February 16, 2010. RP 243.

When the parties appeared for pretrial hearing on February 16, 2010, neither party expressed hope that the matter would resolve without trial, and the court set the trial date for the week beginning March 2, 2010. RP 244-245.

On March 24, 2010, the matter was called to trial, and jury selection began. RP 252, 267.

After the case went to the jury, the jury returned guilty verdicts against Reed and Mower for the offense of manufacture of a controlled substance. RP 995-996.

At sentencing, the court ordered the convicted defendants to pay subpoena service fees in the amount of \$2,129.00, to be split between the

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two defendants. RP 1049. Counsel for the defendants objected. RP 1049. Counsel specifically agreed , and waived objections, to any other item of costs or fees that were imposed, but he disputed whether it was proper to impose subpoena fees for each time subpoenas were issued following each of the continuances. RP 1050-1051. Counsel expressed surprise that new subpoenas were issued by the state each time the defense asked for and received a continuance in the case. RP 1051. Counsel for the defendants calculated that “that’s a charge of \$213 for the defendant to request a continuance.” RP1051. The prosecutor said that there were “fifteen packets of subpoenas that went out over the course of two years.” RP 1053. Mower’s attorney asked to be included in the objection to subpoena fees. RP 1060.

D. ARGUMENT

1. Was there sufficient evidence presented at trial to sustain the jury’s verdict finding Mower and Reed guilty of manufacturing marijuana as either a principal or an accomplice?

Evidence is sufficient to sustain a jury verdict of guilty if “any rational trier of fact could find guilt beyond a reasonable doubt” when “viewing the evidence in the light most favorable to the State.” *State v. Salinas*, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992). “All reasonable

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inferences from the evidence must be drawn in favor of the State and interpreted most strongly against the defendant.” *Id.* at 201. The reviewing court defers to the jury and its findings in regard to resolving conflicting testimony and weighing the persuasiveness of evidence. *State v. Thomas*, 150 Wn.2d 821, 874-75, 83 P.3d 970 (2004). Still more, by asserting that the evidence is insufficient as a matter of law, the defendant “admits the truth of the State’s evidence and all inferences that reasonably can be drawn therefrom.” *Salinas*, 119 Wn.2d at 201, citing *State v. Theroff*, 25 Wn. App. 590, 593, 608 P.2d 1254, *aff’d*, 95 Wn.2d 385, 622 P.2d 1240 (1980).

The jury was instructed that:

A person is an accomplice in the commission of a crime, if with knowledge that it would promote or facilitate the commission of a crime, he or she either:

- (1) solicits, commands, encourages or requests another person to commit the crime; or
- (2) aids or agrees to aid another person in planning or committing a crime.

The word aid means all assistance, whether given by words, acts, encouragement, support or presence. A person who is present at the scene and ready to assist by his or her presence is aiding in the commission of the crime. However, more than mere presence and knowledge of the criminal activity of another must be shown to establish that a person present is an accomplice.

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RP 903-904. This jury instruction correctly expresses the statutory liability of an accomplice as defined by RCW 9A.08.020.

The evidence shows that Mower and Reed were romantic partners who had been together for many years. Mowers used some of the marijuana that was grown, and the inference from Reed's testimony is that some of the marijuana specifically belonged to Mower. Although she shared the property with Reed, lived in the trailer -- rather than the house -- and assented to the use of the house for the grow operation, which was grown in multiple rooms.

Reed's testimony, although attempting to distance Mower from the marijuana grow operation, nevertheless occasionally created a reasonable inference that she was involved in it.

From these facts, the jury -- because it is the jury's province to weigh the persuasiveness of evidence and to judge the credibility of witnesses, could reasonably have found that Mower aided and encouraged the cultivation or that she was guilty as a principal. Thus, the facts are sufficient for a jury to find, by either accomplice liability or liability as a principal, that Mower is guilty of the crime of cultivation.

Reed freely admitted in his testimony that he was growing marijuana, but he claims that he cannot be convicted for growing

marijuana because the amount of marijuana that he grew was permissible for him to grow as a medical marijuana patient.

To qualify for the medical marijuana affirmative defense, Reed and Mower were required to prove with a preponderance of evidence that they qualified for the defense by having satisfied each and every one of the provisions of Chapter 51A of Title 69 of the Revised Code of Washington. RCW 69.51A.040(1); *State v. Fry*, 168 Wn.2d 1, 228 P.3d 1 (2010).

RCW 69.51A.010(3) sets forth several criteria that a person must satisfy before qualifying for the affirmative defense of a "qualifying patient." The quantity of marijuana, growing or processed, that a "qualifying patient" may possess is a separate restriction. RCW 69.51A.040.

Whether Reed and Mower were qualifying patients who had established the affirmative defense of medical marijuana authorization by preponderance of the evidence was a question of fact for the jury. *State v. Fry*, 168 Wn.2d 1, 18, 228 P.3d 1 (2010) (concurring opinion).

The jury heard the evidence offered by Reed to establish his affirmative defense of medical marijuana authorization, rejected it, and found him guilty of manufacturing marijuana. The appellate court defers to the jury's assessment concerning the credibility of witnesses. *State v. Camarillo*, 115 Wn.2d 60, 71, 794 P.2d 850 (1990). The fact that Reed

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presented testimony from experts, other witnesses, or other evidence does not mean that the jury was required to assume the truth of the defendant's evidence or to weigh it in any particular way favorable to him. *Id.*

Reed purported to have a qualifying disease or medical condition and a doctor's recommendation or authorization, and he had 38 mature marijuana plants, 36 juvenile plants, and 34.7 ounces of processed marijuana, all of which he contended to be an amount appropriate for him. The jury was properly instructed regarding the affirmative defense. RP 906-908.

After hearing the evidence, the Jury found Reed and Mower guilty. Reed and Mower were entitled to have their defense presented to the jury, but the jury was not required to believe it. *State v. Camarillo*, 115 Wn.2d 60, 71, 794 P.2d 850 (1990).

2. Executing a search warrant, police officer's searched Mower's and Reed's property for evidence of a marijuana grow operation. During the search, Mower was detained by police officers. After the search revealed evidence of a marijuana grow operation, Mower was formally arrested. Was Mower's arrest unlawful, and if so, should any evidence that was discovered after her arrest be suppressed even though the officers who discovered and seized the evidence had a valid search warrant to search for and seize the evidence?

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Because defendants failed to preserve this issue at trial, they are barred from bringing it for the first time on appeal. RAP 2.5(a); *State v. Mierz*, 127 Wn.2d 460, 468, 901 P.2d 286 (1995). Even if the issue had been preserved, however, it is without merit.

The defendants do not dispute the validity or legal sufficiency of the search warrant that was executed at their residence and resulted in the discovery of evidence that led to their arrest and subsequent criminal charge and conviction of growing marijuana. Instead, Mower argues that her arrest was illegal, and she mischaracterizes the evidence lawfully seized during the execution of the search warrant as having been seized as a result of her subsequent arrest, which she mischaracterizes as an unlawful arrest. Mower states, as the basis of her argument, that her arrest was unlawful because, when police arrived to execute the search warrant, “Reed announced immediately that this was medical marijuana and that he and Ms. Mower were authorized to grow it.” Defendant’s Brief at 11. Mower does not offer any legal authority or citation to support this assertion.

It is first important to note that the police were not at the grow operation to search for evidence of a legal medical marijuana grow operation but, instead, to search for evidence of an illegal marijuana grow

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operation. The evidence seized, the record of the subsequent trial, and the jury's verdict all establish that the grow operation went beyond a medical marijuana grow – to which the affirmative defense of medical marijuana authorization would apply – and was actually an illegal marijuana grow operation. A marijuana grow operation of this size was illegal even if one might fairly speculate that some part of the grow operation might have benefited either Mower or Reed, or both, as legitimate medical marijuana patients.

To legally qualify as a medical marijuana patient, however, requires more than to merely possess medical marijuana-patient documentation or the purported recommendation of a doctor or qualifying medical professional. *State v. Fry*, 168 Wn.2d 1, 6, 228 P.3d 1 (2010).

Merely claiming medical authorization to possess or grow marijuana, or merely presenting an authorization document to officers executing a search warrant, does not negate probable cause or the validity of the search warrant. *Id.* at 6. Even if Mower or Reed, or both, asserted authorization or possessed or presented documentation purporting to be authorization:

[T]he authorization only created a potential affirmative defense that would excuse the criminal act. The authorization does not, however, result in making the act of possessing and using marijuana noncriminal or negate any elements of the charged offense.

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*Id.* at 7-8.

After officers received an anonymous tip that Reed and Mower were operating an illegal grow operation, they went to the property and from the street could smell green marijuana. They obtained a warrant and searched the property. While the warrant was being executed, Mower and Reed were detained.

Even without probable cause or reasonable suspicion of criminal activity, it is reasonable for an officer executing a search warrant at a residence to briefly detain occupants of that residence, to insure officer safety and an orderly completion of the search.

*State v. King*, 89 Wn. App. 612, 618-619, 949 P.2d 856 (1998), citing *Michigan v. Summers*, 452 U.S. 692, 702-703, 101 S.Ct. 2587, 69 L.Ed.2d 340 (1981). Mowers and Reed were not arrested until after the search revealed evidence of a large marijuana grow operation, cash, and an intent to deliver marijuana.

However, the fact remains that neither Mower nor Reed have identified any evidence that they can claim to have flowed from their arrests, because the evidence that led to their arrests flowed from execution of a valid search warrant rather than from their detention or arrest.

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3. Evidence was discovered and seized during the execution of a valid search warrant. Mower was detained by police during the execution of that search warrant and was formally arrested after the search was completed and evidence of a crime was discovered. Was Mower's trial counsel ineffective by failing to assert that the arrest was illegal and that all evidence discovered and seized during the execution of the search warrant should be suppressed as fruits of an unlawful arrest?

Mower's argument that her trial attorney was ineffective is without merit. Mower contends that her trial attorney should have asserted that the evidence used against her was discovered and seized as the fruits of an unlawful arrest. However, the facts show that the evidence was actually discovered and seized during the execution of a valid search warrant.

To prevail on her ineffective assistance of counsel claim, Mower must show her trial counsel's performance was ineffective and must also show that counsel's ineffective performance resulted in prejudice to her. *State v. Thomas*, 109 Wn.2d 222, 225-26, 743 P.2d 816 (1987) (adopting the test from *Strickland v. Washington*, 466 U.S. 668, 689, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984)).

Mower cannot make the showing required by *Thomas* because the facts do not support her contention. "Prejudice occurs when, but for counsel's deficient performance, there is a reasonable probability that the outcome would have differed." *State v. Pearsall*, 156 Wn. App. 357, 361,

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231 P.3d 849 (2010), citing *State v. Reichenbach*, 153 Wn.2d 126, 130, 101 P.3d 80 (2004). Counsel cannot be deficient for not misconstruing facts, and there is not a reasonable probability that on the facts of this case the outcome would have differed had counsel brought the motion to suppress that Mower advances now for the first time on appeal.

“Possession of marijuana, even in small amounts, is still a crime in the state of Washington.” *State v. Fry*, 168 Wn.2d 1, 7, 228 P.3d 1 (2010). Sheriff’s deputies had probable cause to believe a crime had been committed when they smelled marijuana wafting from the grow operation at Mower’s residence. *Id.* at 7. Mower was lawfully detained while deputies conducted a lawful search pursuant to a valid search warrant. Mower’s assertion that she had medical authorization notwithstanding,

[i]t is difficult to imagine how a law enforcement officer, having been presented with a medical marijuana authorization, would be able to determine that the marijuana is otherwise being lawfully possessed (and take a sample) without some kind of search.

*Id.* at 10.

4. At trial, Mower and Reed asserted medical marijuana authorization as an affirmative defense to the charge of manufacturing marijuana. Did the trial court err when it instructed the jury that Mower and Reed had the burden of proving the affirmative defense by a preponderance of the evidence and that if they established the defense by a

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preponderance of the evidence then it was the jury's duty to find them not guilty?

“The defendant must prove an affirmative defense by a preponderance of the evidence.” *State v. Fry*, 168 Wn.2d 1, 7, 228 P.3d 1 (2010), citing *State v. Frost*, 160 Wn.2d 765, 773, 161 P.3d 361 (2007).

The trial court instructed the jury that if by a preponderance of the evidence Mower or Reed proved that he or she was entitled to the affirmative defense of medical marijuana then the jury was required to find them not guilty. The trial court's instructions are an accurate statement of the law, and neither Mower nor Reed can show any prejudice from this lawful instruction. Whether or not the State disproved the affirmative defense beyond a reasonable doubt, if Mower or Reed proved it by a preponderance of the evidence, then the jury was instructed that it was required to find him or her not guilty.

At page 20 of her brief, Mower cites *State v. McCullum*, 98 Wn.2d 484, 493, 656 P.2d 1064 (1983) to support her assertion that the State must disprove her affirmative defense beyond a reasonable doubt. *McCullum*, cited by Mower, discusses statutory affirmative defenses as follows:

There are two ways to determine if the absence of a defense is an ingredient of the offense: (1) the statute may reflect a legislative intent to treat absence of a defense as one “of the elements included in the definition of the offense of which the defendant is charged”; or (2) one or more elements of the defense may “negate”

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one or more elements of the offense which the prosecution must prove beyond a reasonable doubt.

*State v. Camara*, 113 Wn.2d 631, 638, 781 P.2d 483 (1989), quoting *State v. McCullum*, 98 Wn.2d 484, 490, 656 P.2d 1064 (1983), quoting *Patterson v. New York*, 432 U.S. 197, 210, 97 S.Ct. 2319, 2327, 53 L.Ed.2d 281 (1977))(further citations omitted).

RCW 69.50.401(1) states that “[e]xcept as authorized by this chapter, it is unlawful for any person to manufacture... a controlled substance.” It follows that the affirmative defense found in Title 69, chapter 51A, of the Revised Code of Washington does not indicate the absence of a medical marijuana authorization as an element of the offense of manufacturing marijuana. Nor does the affirmative defense of medical marijuana-authorization negate any element of the offense of manufacturing marijuana. *State v. Fry*, 168 Wn.2d 1, 7, 228 P.3d 1 (2010).

*McCullum* once stood for a rule of law that imposed upon the State a burden of disproving affirmative defenses beyond a reasonable doubt where those affirmative defenses were judged to negate an element of the charged offense. See, e.g., *State v. Camara*, 113 Wn.2d 631, 639, 781 P.2d 483 (1989). Ruling in the context of a consent defense to the charge of rape, *Camara* effectively overruled *McCullum*, as follows:

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In light of a recent decision by the United States Supreme Court, we have substantial doubt about the correctness of this “negates” analysis and thus decline to apply it in this case. In *Martin v. Ohio*, 480 U.S. 228, 230, 107 S.Ct. 1098, 1100, 94 L.Ed.2d 267 (1987), the Supreme Court upheld an Ohio law assigning the burden of proving self-defense to the defendant in the context of a prosecution for aggravated murder (defined as “purposely, and with prior calculation and design, caus[ing] the death of another”). Acknowledging an overlap between self-defense and the elements of purpose and prior calculation and design, the Court nevertheless held that the State's burden to prove the elements of the crime was unrelieved.

Following *Martin*, it appears that assignment of the burden of proof on a defense to the defendant is not precluded by the fact that the defense “negates” an element of a crime. Thus, while there is a conceptual overlap between the consent defense to rape and the rape crime's element of forcible compulsion, we cannot hold that for that reason alone the burden of proof on consent must rest with the State. Rather, we now hold that that burden lies, as we understand the Legislature to have intended, with the defendant.

*State v. Camara*, 113 Wn.2d 631, 639-640, 781 P.2d 483 (1989).

5. Mower and Reed asserted the affirmative defense of medical marijuana authorization to the charge of manufacturing marijuana. Did the court err when it did not instruct the jury that to convict Mower or Reed of manufacturing marijuana it must be unanimous as to which “element” of the affirmative defense had been disproved by the State beyond a reasonable doubt?

Mower's argument on this point is premised upon her assertion that the State must disprove her affirmative defense of medical marijuana-authorization beyond a reasonable doubt. As argued by the State above,

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however, it is Mower's burden to prove her statutory affirmative defense by a preponderance of the evidence. In the instant case, irrespective of any evidence proffered by the State, the jury was instructed that if Mower proved her statutory defense by a preponderance of the evidence, the jury was required to find her not guilty.

No Washington or other jurisdiction case was located where a jury was required to return a special verdict in regard to their reason for rejecting an affirmative defense, and no such case has been cited by the defense.

6. Mower and Reed claimed that, within a few years before their arrest and trial for manufacturing marijuana, they had consulted an attorney who opined that it was legal for them to manufacture marijuana because they qualified for the affirmative defense of medical marijuana authorization. At trial they offered letters from their attorney as evidence. Did the trial court err when it excluded the letters and disallowed evidence of the attorney's opinion?

On review, a trial court's ruling to admit or exclude evidence is reviewed for an abuse of discretion. *State v. Finch*, 137 Wn.2d 792, 810, 975 P.2d 967 (1999).

At trial, Mower and Reed proffered as evidence letters they purported to have obtained years before from an attorney, who they asserted had opined that it was legal for them to operate a marijuana grow

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operation. The defendants asserted that the attorney's letters were not offered for the attorney's purported opinion that their conduct was legal, but were instead offered to prove that the defendants intended to follow the law.

The defendants' or any witness's opinion of the law is not evidence in the case and is not admissible in the trial of facts to the jury. *Ball v. Smith*, 87 Wn.2d 717, 722-723, 556 P.2d 936 (1977).

It is also a well established rule of law that, in a jury trial, determining the facts of the case is the exclusive province of the jury and that declaring the law is the exclusive province of the judge. See, e.g., *Hartigan v. Washington Territory*, 1 Wash. Terr. 447 (1874); *State v. Harlowe*, 174 Wash. 227, 235, 24 P.2d 601 (1933); *State v. McDaniels*, 30 Wn.2d 76, 88, 190 P.2d 705 (1948), partially overruled on other grounds by *State v. Partridge*, 47 Wn.2d 640, 289 P.2d 702 (1956); *Ball v. Smith*, 87 Wn.2d 717, 723, 556 P.2d 936 (1977).

Article IV, sec. 16, of the Washington Constitution provides that the court shall declare the law. To present the attorney's letters to the jury as evidence of the law or to allow either defendant "to testify to the jury on the law usurps the role of the trial judge." *State v. Clausing*, 147 Wn.2d 620, 628, 56 P.3d 550 (2002), citing *Ball v. Smith*, 87 Wn.2d 717, 722-723, 556 P.2d 936 (1977).

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“ ‘Each courtroom comes equipped with a “legal expert,” called a judge, and it is his or her province alone to instruct the jury on the relevant legal standards.’” *Clausing* at 628, quoting *Burkhart v. Wash. Metro. Area Transit Auth.*, 112 F.3d 1207, 1213 (D.C. Cir. 1997).

A good faith belief in a misapprehension of law is not a defense in a criminal case. *State v. Locati*, 111 Wn. App. 222, 43 P.3d 1288 (2002); *State v. Semakula*, 88 Wn. App. 719, 946 P.2d 795 (1997); *State v. Reed*, 84 Wn. App. 379, 928 P.2d 469 (1997). Likewise, a mistake of law is no defense. *State v. Patterson*, 37 Wn. App. 275, 679 P.2d 416 (1984); *State v. Takacs*, 35 Wn. App. 914, 671 P.2d 263 (1983). Ignorance of the law is not a defense. *State v. Krzeszowski*, 106 Wn. App. 638, 24 P.3d 485 (2001); *State v. Warfield*, 103 Wn. App. 152, 5 P.3d 1280 (2000).

Neither ignorance nor mistake of law constitute a defense in a criminal case. *State v. Minor*, 462 Wn.2d 796, 174 P.3d 1162 (2008). The trial court did not abuse its discretion by excluding the attorney's letters from evidence.

7. Following Mower's conviction for manufacturing marijuana, she was ordered to serve a sentence that included a term of community custody. The court stated on the record that it was required to impose community custody. Was the court required to impose community custody, and if not, did the court err by imposing community custody?

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Because Mower was convicted of manufacturing marijuana in violation of RCW 69.50.401 and was sentenced to a term of commitment of less than one year, the court had discretionary authority to impose up to one year of community custody. RCW 9.94A.702. When sentencing Mower, the trial court judge said on the record that the court was required to impose community custody. A plain reading of RCW 9.94A.702 indicates that the sentencing judge had discretion – but was not required – to impose up to one year of community custody.

However, the State disputes Mower's contention that, if the court orders her to serve community custody, she must be permitted to use medical marijuana while serving community custody. Marijuana use, possession, or manufacture is not legal, and medical marijuana authorization does not legalize marijuana but, instead, creates an affirmative defense. *State v. Fry*, 168 Wn.2d 1, 228 P.3d 1 (2010). The statutory authority establishing the affirmative defense states as follows:

(4) Nothing in this chapter diminishes the authority of correctional agencies and departments, including local governments or jails, to establish a procedure for determining when the use of cannabis would impact community safety or the effective supervision of those on active supervision for a criminal conviction, nor does it create the right to any accommodation of any medical use of cannabis in any correctional facility or jail.

RCW 69.51A.005.

Mower's contention that her use of marijuana while on community custody is legal is both premature and an erroneous statement of law. Her contention is premature because it assumes that she qualifies now and will also qualify at some undetermined future time for the affirmative defense of medical marijuana authorization. Her assertion is erroneous because marijuana is not legal under federal or state law; there is an affirmative defense (applicable only to violations of Washington law) available to those who qualify, which is not the same thing as the legalization of marijuana. *State v. Fry*, 168 Wn.2d 1, 228 P.3d 1 (2010).

8. Preliminary appearance in this case occurred on January 15, 2008, but due to numerous defense continuances of the trial date the trial did not occur until March of 2010. As a result, subpoena service fees totaled \$2,129.00. Did the trial court err when at sentencing it ordered Mower and Reed to pay the subpoena service fees?

RCW 10.01.160 authorizes the sentencing court to impose costs against a convicted defendant. Mower disputes only the imposition of subpoena service fees incurred by the State. Mower asserts that these fees are excessive. However, the trial of this case was continued many times

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by the defense over a period of two years. Where subpoenas were caused to be reissued many times over a period of two years due to multiple continuances of the trial date due to the defendants' desire to prolong the case, the subpoena service fees are foreseeable and reasonable.

The State respectfully requests that the court affirm the trial court's imposition of costs in this case.

D. CONCLUSION

The State respectfully requests the court to affirm the rulings of the trial court, affirm the jury verdicts of guilty, and affirm the convictions of the trial court. The State further requests that the court return this matter to the trial court for imposition of sentence and to preserve to the defendants the ability to move the court to modify the community custody term of the sentence and to preserve to the court the discretion to impose community custody or not, in deference to the trial court's discretion.

DATED: October 10, 2011.

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