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**A. Assignments of Error**

**Assignments of Error**

1. The trial court erred when it declined to allow Mr. Mullins to assert a medical marijuana defense under RCW 69.51A.

2. The trial court erred when it refused to give the following jury instruction: Defendant's Proposed Jury Instruction that is identified by annotation as WPIC 52.03. Delivery/Manufacture/Sale of a Controlled Substance Authorized by Law. CP 28.

3. The trial court erred when it refused to give the following jury instruction: Defendant's Proposed Jury Instruction that is identified by annotation as RCW 69.51A.040 and 69.51A.010--Medical Marijuana Act. CP 29.

4. The trial court erred when it refused to give the following jury instruction: Defendant's Proposed Jury Instruction that is identified by annotation as RCW 69.51A.010(3) and (4)(c)--Medical Marijuana Act. CP 30.

**Issue Pertaining to Assignments of Error**

1. Under the Washington State Medical Use of Marijuana Act, RCW 69.51A, did Mr. Mullins qualify as a primary

caregiver when he (1) took on the duty of arranging for a Green Cross grower to be a marijuana supplier for Mr. Bauman, (2) took on the duty of actually acquiring medical marijuana for Mr. Bauman, and (3) planned with Mr. Bauman to carry out physical activities for Mr. Bauman, such as mowing the lawn, and driving Mr. Bauman to places, such as the store, in the event that Mr. Bauman's sight failed or he went blind as a result of his glaucoma? (Assignments of Error 1-4.)

**B. Statement of the Case**

Jeffrey Bauman, the former uncle-in-law of Appellant Steven Matthew Mullins, has had glaucoma for about 15 years. RPI 68, 69 (RPI is an abbreviation for Verbatim Report of Proceedings, Volume I). Mr. Bauman used prescription medication to treat his glaucoma, including chemical drugs, eye drops and pills. RPI 70. These medications had undesirable side effects; For example, they caused blurred vision and headaches. RPI 70. One of medications essentially rendered Mr. Bauman legally blind. RPI 70. The medications caused Mr. Bauman to experience numbness in his hands and feet, dizziness and headaches. RPI 70.

After years of using drops and pills, and after undergoing laser surgery, the pressure in Mr. Bauman's eyes remained uncontrolled for the most part. RPI 69, 71. At that time, Dr. Howard Barnebey of Swedish Medical Center performed conventional knife surgery on both of Mr. Bauman's eyes. RPI 71.

After the surgery, the pressures in Mr. Bauman's eyes remained rather high. RPI 71. Mr. Bauman went for followup treatments as part of his surgery recovery. RPI 71, 72. He went three times a week for shots of a chemotherapy drug on the inside of his eyelids and had to perform hard pressure massages on his eyes to push fluid out through his eye drains. RPI 72.

Mr. Bauman began to use marijuana and found that it did away with his headaches and blurred vision, and though not normal, the pressure in his eyes remained within range and stable. RPI 72. Mr. Bauman found that marijuana did the same thing as the chemical drugs, eye drops and pills, but without the undesirable side effects. RPI 70. As a result, Mr. Bauman, for the most part, no longer used conventional medication, but rather consumed between 9 and 12 ounces of marijuana every 60 days, and his vision remained clear, without halos, shadows or blurriness. RPI

79, 80.

In order to obtain formal authorization to use marijuana, Mr. Bauman met with Dr. Leonard Albert during the summer of 2003. RPI 70, 72. Dr. Leonard discussed the risks and benefits of the medical use of marijuana with Mr. Bauman. RPI 79. Based on his examination of Mr. Bauman and a review of Mr. Bauman's medical records, as well as a consultation with Dr. Barnebey, Dr. Albert authorized Mr. Bauman to use marijuana for medical purposes by signing an authorization form. RPI 72, 73. Ex 1 (Defendant's Identification No. 1).

During September of 2003, Mr. Mullins listened to a discussion between his father and Mr. Bauman. RPI 74, 75. The discussion concerned Mr. Bauman's authorization form and finding a supply source for marijuana, such as Green Cross. RPI 75. Mr. Mullins mentioned that he knew a person who produced marijuana for Green Cross. RPI 75. The following week, when Mr. Bauman's supply source fell through, Mr. Bauman contacted his nephew, Mr. Mullins, who said he would be willing to look into the supply of marijuana for Mr. Bauman. RPI 76. At that time, September 24, 2003, on the bottom of the authorization form issued by Dr. Albert,

Mr. Bauman created, and gave to Mr. Mullins, a handwritten note, wherein he designated Mr. Mullins as his caregiver with the specific purpose of securing marijuana for Mr. Bauman. RPI 74, 76. Ex 1 (Defendant's Identification No. 1).

Mr. Bauman and Mr. Mullins discussed Mr. Mullins' involvement as caregiver for Mr. Bauman, particularly in the event that Mr. Bauman's sight failed or he went blind. RPI 76. The plan was that Mr. Mullins would carry out physical activities for Mr. Bauman, such as mowing the lawn, and drive Mr. Bauman to places, such as the store. RPI 77. They discussed the possibility of Mr. Mullins using a spare room at Mr. Bauman's home on a regular basis. RPI 77. They also discussed arranging for the person that Mr. Mullins knew, that is, the person who produced marijuana for Green Cross, to be a supplier for Mr. Bauman. RPI 77.

In addition, Mr. Mullins was interested in Mr. Bauman's field of employment or his trade, which is tile setting. RPI 76, 77. Mr. Bauman planned to teach the trade to Mr. Mullins so that Mr. Mullins could earn a salary and fulfill Mr. Bauman's requirements or obligations at work. RPI 77.

On September 26, 2003, two days after receiving the written caregiver designation from Mr. Bauman, Centralia police officers stopped Mr. Mullins for a traffic violation. RPI 11. During contact with Mr. Mullins in his truck, the Centralia police officers smelled marijuana. RPI 15. The officers searched Mr. Mullins' truck and found six baggies of marijuana and documents that appeared to have been printed from the Internet and concerned the Medical Marijuana Act. RPI 17. EX 5. Based on this, the Centralia police officers arrested Mr. Mullins for possession of marijuana. RPI 20.

On September 29, 2003, the State of Washington, by information, charged Mr. Mullins with the crime of Possession of a Controlled Substance, to-wit: marijuana over 40 grams. CP 33, 34. The case proceed to trial by jury on July 6, 2004. RPI 1.

After the State completed its presentation of evidence, the State raised various motions and objections related to the Defense's affirmative medical marijuana defense. RPI 52, 63. In response to one of the objections, the court suggested that the Defense make an offer of proof. RPI 67. The Defense complied with the court's suggestion and called Jeffrey Bauman to testify. RPI 67.

During the offer of proof, Mr. Bauman testified that he and Mr. Mullins discussed Mr. Mullins' involvement as caregiver for Mr. Bauman, particularly in the event that Mr. Bauman's sight failed or he went blind. RPI 76. The plan was that Mr. Mullins would carry out physical activities for Mr. Bauman, such as mowing the lawn, and drive Mr. Bauman to places, such as the store. RPI 77. They discussed the possibility of Mr. Mullins using a spare room at Mr. Bauman's home on a regular basis. RPI 77. They also discussed arranging for the person that Mr. Mullins knew, that is, the person who produced marijuana for Green Cross, to be a supplier for Mr. Bauman. RPI 77.

Based on this testimony of Mr. Bauman, the State argued that Mr. Mullins was not the primary caregiver under RCW 69.51A.010(2)(b) because the plan of Mr. Bauman was that Mr. Mullins would ultimately be his caregiver in the future, if Mr. Bauman experienced problems, but not at the present time. RPI 85-87.

The court characterized the State's argument as a request that the court rule as a matter of law that the showing was insufficient to qualify Mr. Mullins as the primary caregiver for Mr.

Bauman. RPI 87. The court found that Mr. Mullins was not presently responsible for the housing or health or care of Mr. Bauman; The sole duty of Mr. Mullins was to secure marijuana for Mr. Bauman as designated in the designation writing. RPI 88. The court concluded that the procurement of marijuana was not an act of providing present care. RPI 89. The court stated that the statute must be strictly construed. RPI 88, 89. Accordingly, the court granted the State's motion to exclude the testimony. RPI 88.

The court acknowledged its decision precluded the Defense from asserting the medical marijuana defense. RPII 10 (RPII is an abbreviation for Verbatim Report of Proceedings, Volume II). The court suggested that the Defense let the jury render a verdict and then take the matter up to the Court of Appeals for ruling on the court's interpretation of the statute. RPII 11. The court recessed to prepare jury instructions. RPII 12.

Among various other jury instructions, the Defense proposed that the court give three jury instructions to support the medical marijuana defense. CP 28, 29 and 30. RPII 13. Based on its earlier ruling to exclude testimony in support of the medical marijuana defense, the court declined to give the three medical

marijuana jury instructions. RPII 14.

The court instructed the jury, counsel for the parties presented closing argument, and after deliberation, the jury returned a verdict of guilty. RPII 15. CP 2.

**C. Argument**

**1. MR. MULLINS QUALIFIED AS A PRIMARY CAREGIVER FOR MR. BAUMAN.**

Under RCW 69.51A, the Washington State Medical Use of Marijuana Act, a primary caregiver is a person who:

- (a) Is eighteen years of age or older;
- (b) Is responsible for the housing, health, or care of the patient;
- (c) Has been designated in writing by a patient to perform the duties of primary caregiver under [RCW 69.51A].

RCW 69.51A.010(2). Persons who act as primary caregivers to patients shall not be found guilty of a crime under state law for assisting with the medical use of marijuana. RCW 69.51A.005.

In addition to the age requirement, Mr. Mullins satisfied the remaining elements of the statute, as shown below.

**a. Mr. Mullins was responsible for aspects of Mr. Bauman's health or care needs.**

Mr. Mullins took on the duty of arranging for a Green Cross grower to be a supplier for Mr. Bauman, and took on the duty of actually acquiring medical marijuana for Mr. Bauman. RPI 76, 77. In addition, Mr. Mullins planned with Mr. Bauman to carry out physical activities for Mr. Bauman, such as mowing the lawn, and driving Mr. Bauman to places, such as the store. RPI 77.

When Mr. Mullins took on these present duties and planned to carry out physical activities and provide driving services for Mr. Bauman, he was responsible for Mr. Bauman's health and care. Even though he had not yet performed physical activities for Mr. Bauman, nor had he chauffeured Mr. Bauman, he was responsible for those duties in the event that Mr. Bauman's eyesight declined.

To be responsible does not require that the responsible person presently fulfill a duty when the duty is contingent on circumstances which may yet to occur. For example, lawyers are responsible for preparing responses to motions from the opposing party when and if they are filed, appearing in court if hearings are scheduled and drafting legal documents if the need arises.

In another example, when parents leave their children to the care of a nanny, the nanny is responsible for feeding the children in

the event that they become hungry. The nanny is also responsible for transporting the children to school, sporting and social events if the events occur while the nanny is looking after the children. In addition, if a child becomes sick or is injured, then the nanny is responsible for administering medication or treatment to the child, or obtaining a higher level of care for the child from medical professionals if necessary.

Similarly, Mr. Mullins was responsible for carrying out physical activities for Mr. Bauman, such as mowing the lawn, and driving Mr. Bauman to places, such as the store, in the event that Mr. Bauman's sight failed or he went blind. RPI 76. Moreover, Mr. Mullins was presently responsible for arranging for a Green Cross grower to be a supplier for Mr. Bauman, and for actually acquiring medical marijuana for Mr. Bauman. RPI 76, 77.

**b. Mr. Mullins performed the duties of a primary caregiver as designated in the writing by Mr. Bauman.**

Under the Washington State Medical Use of Marijuana Act, caregivers can have three types of duties: Responsibility for the housing, health or care of a patient. RCW 69.51A.010(2)(b). The word "or" is a coordinating conjunction. Consequently, a person

can be a caregiver if he or she has been designated in writing to perform housing duties or health duties or care duties for a patient.

Although Washington appellate courts have issued only two published opinions that concern the Washington State Medical Use of Marijuana Act, one of these opinions suggests that procuring and then providing marijuana to a patient is an aspect of the duty of being responsible for the health or care of a patient. See *State v. Shepherd*, 110 Wash. App. 544, 547, 548, 553, 41 P.3d 1235, 1236, 1237, 1239 (2002). Specifically, in *Shepherd*, a patient named Mr. Wilson designated Mr. Shepherd to be his caregiver. *Shepherd*, 110 Wash. App. at 547. However, Mr. Shepherd's only contribution to Mr. Wilson's care was to raise and supply marijuana. *Shepherd*, 110 Wash. App. at 547. The State charged Mr. Shepherd with felony possession of marijuana. *Shepherd*, 110 Wash. App. at 548.

The trial court found that Mr. Shepherd was Mr. Wilson's primary caregiver and satisfied the Act's requirements for primary caregiver. *Shepherd*, 110 Wash. App. at 548. The Court of Appeals did not address this finding in its majority opinion, but stated in the concurring opinion that "[t]here is no dispute that,

under the Medical Use of Marijuana Act (the Act), Mr. Shepherd was a 'primary caregiver' who provided marijuana to a 'qualifying patient.'" *Shepherd*, 110 Wash. App. at 553 (Kato, J., concurring).

In this case, Mr. Mullins received a written designation from Mr. Bauman to secure marijuana for Mr. Bauman's use. RPI 74, 76. Ex 1 (Defendant's Identification No. 1). Thus, when Mr. Mullins arranged for a supply and then acquired and transported the marijuana for Mr. Bauman, he served functions that were rather similar to those performed by Mr. Shepherd for Mr. Wilson.

These functions were directly related to the care or health duties for Mr. Bauman. By acquiring marijuana for Mr. Bauman, Mr. Mullins was enabling Mr. Bauman to eliminate his headaches, blurred vision, halos, shadows and stabilize the pressure in his eyes, while avoiding the side effects of conventional medication. RPI 70, 72, 79, 80. In the conventional health care system, these functions are similar to some of those performed by a pharmacist, although they are certainly less sophisticated. Accordingly, Mr. Mullins acted as a caregiver to Mr. Bauman by arranging for a Green Cross grower to be a supplier for Mr. Bauman, and by acquiring medical marijuana for Mr. Bauman. RPI 76, 77.

**2. THE WASHINGTON STATE MEDICAL USE OF MARIJUANA ACT SHOULD NOT BE STRICTLY CONSTRUED AGAINST MR. MULLINS.**

**a. The Washington State Medical Use of Marijuana Act contains no requirement that it be construed against caregivers.**

The only guidance in the Washington State Medical Use of Marijuana Act concerning construction of its terms is contained in RCW 69.51A.020. This statute requires only that the terms of Chapter 69.51A shall not be construed to supersede Washington State law that prohibits the acquisition, possession, manufacture, sale, or use of marijuana for nonmedical purposes. RCW 69.51A.020. This language does not require that the Medical Use of Marijuana Act be construed against caregivers; Nor does it impose restrictions or limitations on the application of the Medical Use of Marijuana Act to caregivers. Thus, based on the absence of any plain language requirement in the statute to the contrary, the statute should not be strictly construed against Mr. Mullins.

**b. Washington appellate courts have not imposed a requirement that the Washington State Medical Use of**

**Marijuana Act be strictly construed against patients and caregivers.**

The only two published Washington appellate court opinions that address the Medical Use of Marijuana Act do not require that it be strictly construed against patients and caregivers, but rather, simply require compliance with the terms of the statute. In one of these cases, a patient designated Larry Phelps as his primary caregiver after Mr. Phelps had been charged with attempt to possess marijuana. *State v. Phelps*, 118 Wash. App. 740, 742, 77 P.3d 678, 679 (2003). Mr. Phelps was convicted and appealed. *Phelps*, 118 Wash. App. at 742.

The Court of Appeals noted that “[a]lthough the statute is silent as to when a person must produce written evidence of his primary care status, it does require a caregiver who ‘has been designated in writing by a patient.’” *Phelps*, 118 Wash. App. at 745 (emphasis added by court). The Court of Appeals reasoned that use of the past tense suggested that the patient must designate the primary caregiver before the caregiver may assist with the medical use of marijuana. *Phelps*, 118 Wash. App. at 745. Thus, the Court concluded that the designation must be made before a criminal

charge is made. *Phelps*, 118 Wash. App. at 745.

In *Phelps*, the Court of Appeals did not require that the Washington State Medical Use of Marijuana Act be strictly construed, but rather, performed a reasoned analysis of the language of the statute. Once the Court reached a conclusion about the language of the statute, it simply required compliance with the statutory terms.

In the second case, Arthur Shepherd, the caregiver for Mr. Wilson, was convicted of felony possession of marijuana. *State v. Shepherd*, 110 Wash. App. 544, 546, 547, 41 P.3d 1235, 1236 (2002). The authorization to use marijuana of Mr. Wilson, the patient, contained a statement from a doctor, which stated that it was the doctor's opinion that "the potential benefits of the medical use of marijuana may outweigh the health risks for [Mr. Wilson]". *Shepherd*, 110 Wash. App. at 547.

On appeal, the Court of Appeals noted that the statute uses the language "would likely outweigh". *Shepherd*, 110 Wash. App. at 551. The Court of Appeals reasoned that the required proof in an authorization is tantamount to the level certainty required of experts in court. *Shepherd*, 110 Wash. App. at 551. The Court

noted that expert testimony should express a reasonable probability rather than mere conjecture or speculation. *Shepherd*, 110 Wash. App. at 551. The Court further reasoned that legal consequences attach to scientific opinions, and therefore, a level of medical certainty is required. *Shepherd*, 110 Wash. App. at 551. Accordingly, the Court concluded that the statutory language, “would likely outweigh”, must be used instead of the phrase “may outweigh”. *Shepherd*, 110 Wash. App. at 551, 552.

In *Shepherd*, as in *Phelps*, the Court of Appeals did not require that the Washington State Medical Use of Marijuana Act be strictly construed, but rather, performed a reasoned analysis of the language of the statute. Once the Court reached a conclusion about the language of the statute, it simply required compliance with the statutory terms.

Neither the Washington State Medical Use of Marijuana Act nor the case law that interprets the statute require that it be strictly construed. Accordingly, the Washington State Medical Use of Marijuana Act should not be strictly construed against Mr. Mullins.

**3. A COURT ERRS BY DECLINING TO GIVE  
AFFIRMATIVE DEFENSE INSTRUCTIONS WHEN A PARTY IS**

**ENTITLED TO ISSUANCE OF THE INSTRUCTIONS.**

A trial court errs by declining to give affirmative defense instructions when a party is entitled to issuance of instructions. *State v. Votava*, 194 Wash.2d 178, 181, 66 P.3d 1050, 1052 (2003). *State v. Belasco*, 113 Wash. App. 211, 217, 56 P.3d 618, 622 (2002).

**D. Conclusion**

Mr. Mullins requests that the Court of Appeals find that the trial court erred when it declined to allow Mr. Mullins to assert a medical marijuana defense under RCW 69.51A, and declined to give instructions to the jury that supported the defense. Mr. Mullins requests that the Court reverse his conviction, remand the case for a new trial and direct the trial court to allow Mr. Mullins to assert a medical marijuana defense under RCW 69.51A.

Respectfully submitted,

Dated: \_\_\_\_\_

\_\_\_\_\_  
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