IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

STATE OF WASHINGTON, Respondent, v. KAREN L. MOWER, and JOHN REED, Appellants.	No. 41484-8-II Consolidated With No. 41485-6-II UNPUBLISHED OPINION

Worswick, C.J. — A jury convicted Karen Mower and John Reed of manufacturing marijuana despite their medical authorizations to use marijuana. Reed appeals his conviction, arguing that there was insufficient evidence to convict him because he proved his medical authorization defense. And in a statement of additional grounds (SAG),[1] Reed argues that counsel rendered ineffective assistance by failing to challenge the search warrant used to seize the evidence against him.

Mower appeals her conviction and sentence, arguing (1) there was insufficient evidence to sustain her conviction, (2) she was arrested without probable cause, (3) her counsel rendered ineffective assistance, (4) the trial court gave an erroneous instruction on the burden of proof for her medical authorization defense, (5) the trial court failed to give a proper unanimity instruction as to her medical authorization defense, (6) the trial court erroneously excluded evidence that

[1] RAP 10.10.

Reed sought legal advice about growing medical marijuana, (7) the trial court applied the wrong legal standard by ruling that it was mandatory to sentence her to community custody, and (8) the trial court erred in setting Mower's legal financial obligations. We affirm Reed's and Mower's convictions. But we vacate the trial court's imposition of community custody and certain costs on Reed and Mower, and remand for further proceedings.

FACTS

John Reed and Karen Mower were husband and wife. Police received an anonymous tip that marijuana was being grown on Reed and Mower's property. The police visited the property, where they could smell marijuana.

The police executed a search warrant on the property on January 14, 2008. Reed and Mower came out of a trailer on the property when the police arrived. The police detained Reed and Mower in handcuffs while executing the search warrant. Reed told the police that he had a medical authorization form for marijuana in a safe deposit box. Mower told the police that she had medical authorization to possess four ounces of marijuana. During a search of the trailer, the police found a document authorizing Reed to possess three ounces of marijuana for medical purposes.

The police also searched a house on Reed and Mower's property. Most of the house was taken up by a marijuana grow operation. The police discovered 38 mature marijuana plants and 36 juvenile plants in several rooms of the house. The police also discovered 34.7 ounces of processed marijuana in the house, as well as $3,100 in cash hidden in a DVD (digital versatile disc) case. The police additionally found rolling papers and a marijuana pipe. They did not find

any food that had been cooked using marijuana.

The State charged Reed and Mower with manufacturing marijuana and with possession of marijuana with intent to deliver.[2] Due to numerous continuances, Reed and Mower were not tried until March 2010. At their jury trial, police officers and detectives testified as to the facts we set out above.

Reed and Mower presented the testimony of Dr. Gregory Carter, an expert in medical marijuana. Dr. Carter testified that 70 ounces of marijuana and 99 marijuana plants constitute a 60 day supply for someone who ingests marijuana. But Dr. Carter testified that only one-fourth as much marijuana was required for a person who smoked it, rather than ingested it. On cross-examination, Dr. Carter agreed that 17.5 ounces and 25 plants would constitute a 60 day supply for someone who smoked marijuana.

Dr. Carter also testified that he had authorized Reed and Mower to use medical marijuana, and he testified about the health conditions that made them eligible for such medical use. Both Reed and Mower had hepatitis C. And Mower had other very serious conditions, including esophageal varices. Esophageal varices is a condition caused by poor liver function that can result in the sufferer bleeding to death or even choking on his or her own blood. Dr. Carter testified that without a liver transplant, Mower could be expected to live for only a year or two.

After Dr. Carter's testimony, Reed moved to admit evidence that before his arrest Reed had sought legal advice and obtained an attorney's opinion that he and Mower were in compliance with medical marijuana laws. Reed argued that this evidence would show his intent to follow the

[2] RCW 69.50.401(1).

law. The trial court excluded this evidence, ruling that this evidence was not relevant.

Reed testified and admitted to growing the marijuana. Reed further testified that he planned to smoke some of the marijuana and to process the rest to be ingested.

Regarding Mower's involvement, Reed testified that Mower had nothing to do with growing the marijuana. According to Reed, because of Mower's health conditions she was too weak to assist in growing the marijuana, unable to even clip marijuana buds or carry one-gallon milk jugs.

However, Reed also testified that he tried to show Mower how to take clones of marijuana plants, but she was "dumb as a rock" in that regard and "couldn't do it." 5 Report of Proceedings (RP) at 764. Reed also testified that some of the marijuana was for Mower:

> And then Karen had—because we have five different kinds—or I mean there was [sic] four different kinds—several. Anyway, I had the Blueberry and the—and the Durban. But the other two, I can't remember what they were. So she had a connoisseur—little bit of each kind, you know, to try it out or whatever. And that's her little stash out there. And whenever she needed any, I'd give it to her.

5 RP at 774-75. Reed later testified, "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?" 5 RP at 784. Mower testified that she smoked and cooked with marijuana.

The jury found Reed and Mower not guilty of possession of marijuana with intent to deliver. But the jury found Reed and Mower guilty of manufacturing marijuana.

The trial court sentenced Mower to 20 days' confinement, with all 20 days converted to electronic home monitoring or community service. The trial court sentenced Reed to 45 days' confinement with 30 days converted to electronic home monitoring or community service. The

trial court also imposed what it believed to be a mandatory 12 months of community custody on Mower and Reed. And the trial court imposed legal financial obligations on Mower and Reed including $2,129 in sheriff's service fees for serving subpoenas, which were incurred due to the repeated continuances in the case. Reed appeals his conviction. Mower appeals her conviction and sentence.

ANALYSIS

I. John Reed

A. *Sufficient Evidence*

Reed argues that the evidence was insufficient to convict him of manufacturing marijuana in light of his medical authorization defense. Reed does not dispute that there was sufficient evidence to find that he manufactured marijuana contrary to RCW 69.50.401. But he argues that he proved the affirmative defense of medical authorization under former RCW 69.51A.040 (2007), precluding the jury from finding him guilty of manufacturing marijuana. We disagree.

In evaluating the sufficiency of the evidence, we review the evidence and all reasonable inferences that can be drawn from it in the light most favorable to the State. *State v. Drum*, 168 Wn.2d 23, 34-35, 225 P.3d 237 (2010). "The relevant question is 'whether any rational fact finder could have found the essential elements of the crime beyond a reasonable doubt.'" *Drum*, 168 Wn.2d at 34-35 (quoting *State v. Wentz*, 149 Wn.2d 342, 347, 68 P.3d 282 (2003)). When a defendant asserts an affirmative defense that must be proved by a preponderance of the evidence, we ask whether a rational trier of fact could have found that the defendant failed to meet this burden. *State v. Lively*, 130 Wn.2d 1, 17, 921 P.2d 1035 (1996). Circumstantial and direct

evidence are equally reliable, and this court defers to the trier of fact on conflicting testimony, witness credibility, and the persuasiveness of the evidence. *State v. Thomas*, 150 Wn.2d 821, 874-75, 83 P.3d 970 (2004).

Reed asserted the affirmative defense under former RCW 69.51A.040 that he was "engaged in the medical use of marijuana." In order to prove said affirmative defense, Reed was required to show that he did the following:

> (a) Meet all criteria for status as a qualifying patient . . . ;
> (b) Possess no more marijuana than is necessary for the patient's personal, medical use, not exceeding the amount necessary for a sixty-day supply; and
> (c) Present his or her valid documentation to any law enforcement official who questions the patient . . . regarding his or her medical use of marijuana.

Former RCW 69.51A.040(3). Under former RCW 69.51A.010(3)(e) (2007), "qualifying patient" included those with hepatitis C "with debilitating nausea or intractable pain unrelieved by standard treatments or medications."

Under former RCW 69.51A.080 (2007), the Department of Health was directed to establish rules defining what constitutes a presumptive 60 day supply for qualifying patients. The department promulgated former WAC 246-75-010 (2008), which provided that no more than 24 ounces of usable marijuana and no more than 15 plants would constitute a presumptive 60 day supply. But former WAC 246-75-010(3)(c) also provided that the presumption of a 60 day supply could be overcome "with evidence of a qualifying patient's necessary medical use."

Reed argues that the State bore the burden of proof to disprove his medical authorization defense. But in *State v. Fry*, 168 Wn.2d 1, 7, 228 P.3d 1 (2010), our Supreme Court held that medical authorization to use marijuana is an affirmative defense that the defendant must prove by

a preponderance of the evidence. As such, the appropriate standard of review is whether, considering the evidence in the light most favorable to the State, a rational jury could have determined that Reed failed to prove his medical authorization defense by a preponderance of the evidence. *Lively*, 130 Wn.2d at 17.

Dr. Carter testified that a 60 day supply of marijuana should constitute 70 ounces of marijuana and 99 plants. But the jury was instructed that 24 ounces and 15 plants constituted a presumptive 60 day supply. The jury was entitled to find that Dr. Carter's testimony was not sufficiently persuasive to overcome the presumption that Reed's 74 plants and 34.7 ounces exceeded a 60 day supply, and this court defers to the jury on such a question. *Thomas*, 150 Wn.2d at 874-75. Moreover, Dr. Carter testified that if a person smoked marijuana he or she would need only 17.5 ounces and 25 plants for a 60 day supply. Reed testified that he planned to smoke some of the marijuana found on his property and ingest the rest, but the police found evidence of marijuana being smoked on the premises and no evidence of it being used in cooking or otherwise ingested. A rational jury could have found that the fact that Reed smoked marijuana meant he needed less than he possessed to constitute a 60 day supply.

A review of all the evidence presented in the light most favorable to the State leads us to conclude that a rational jury could have found that Reed failed to prove by a preponderance of the evidence that he possessed only a 60 day supply of marijuana. Thus, the evidence was sufficient to convict him.

B. *Ineffective Assistance of Counsel*

In his SAG, Reed asserts that he received ineffective assistance of counsel because his

attorney refused to bring a CrR 3.6 "search warrant challenge." SAG at 1. Reed claims that he asked counsel to bring such a challenge several times, but counsel refused in order to avoid "offend[ing]" the trial judge. SAG at 1. Because the facts to which Reed refers are outside the record, we do not consider Reed's argument.

The record on appeal does not include the search warrant, nor the affidavit used to support it. Nor does the record contain the alleged statements between Reed and his counsel. We will not review a claim of ineffective assistance of counsel on direct appeal when the claim, as Reed's does, depends on matters outside the record. *State v. McFarland*, 127 Wn.2d 322, 335, 899 P.2d 1251 (1995). Reed must bring a personal restraint petition to address such a claim. *McFarland*, 127 Wn.2d at 335.

II. Karen Mower

A. *Sufficient Evidence*

Mower first argues that there was insufficient evidence of her involvement in growing the marijuana found on her property to convict her of manufacturing marijuana. We disagree, holding that there was sufficient evidence for the jury to find Mower guilty as an accomplice to manufacturing marijuana.

Under RCW 9A.08.020(3)(a), a person is an accomplice to a crime when, "[w]ith knowledge that it will promote or facilitate the commission of the crime, he or she . . . [s]olicits, commands, encourages, or requests such other person to commit it . . . or . . . [a]ids or agrees to aid such other person in . . . committing it." A person's mere presence or even assent to a crime are insufficient to establish culpability as an accomplice. *State v. Roberts*, 80 Wn. App. 342, 355,

908 P.2d 892 (1996). Rather, the person must associate herself with the crime, desiring and seeking by actions to bring it about. *In re Welfare of Wilson*, 91 Wn.2d 487, 491, 588 P.2d 1161 (1979). An accomplice "must be ready to assist in the crime." *Roberts*, 80 Wn. App. at 356.

Reed testified that Mower attempted to assist him in manufacturing marijuana, but she failed to do so because she was incompetent. The uncontroverted evidence that Mower actually tried to assist Reed in manufacturing marijuana shows that she at least stood ready to assist. That incompetence prevented her from actually assisting does not absolve her of guilt as an accomplice.

Furthermore, Reed testified that he grew several varieties of marijuana for Mower's use, and that Mower had her "pick of the litter." 5 RP at 774-75, 784. This evidence shows more than Mower's mere presence and assent to the grow operation; it showed that the operation was conducted in part for her benefit and that she had her choice of its products. This gave rise to an inference that Mower encouraged the operation.

A rational jury could have concluded beyond a reasonable doubt that Mower both stood ready to assist and encouraged Reed's grow operation. The evidence was therefore sufficient to find her guilty as an accomplice to manufacturing marijuana. Mower's claim to the contrary fails.

B. *Suppression Based on Probable Cause and Ineffective Assistance of Counsel*

Mower next argues that the evidence against her should have been excluded because she was arrested without probable cause.[3] Because Mower does not raise manifest error with regard to the legality of the search, we do not consider this argument for the first time on appeal. She

[3] Mower also challenges the search of her property for the first time in her reply brief. Because Mower raises this argument for the first time in her reply brief, we do not consider it. RAP 10.3(c); *State v. White*, 123 Wn. App. 106, 114 n.1, 97 P.3d 34 (2004).

also argues that her trial counsel was ineffective for failing to seek suppression of the evidence on the same grounds. Mower fails to show ineffective assistance of counsel.

Mower raises the issue of probable cause for the first time on appeal. Under RAP 2.5(a)(3), a party may raise manifest error affecting a constitutional right for the first time on appeal. "Manifest" error is error that resulted in actual prejudice. *State v. O'Hara*, 167 Wn.2d 91, 99, 217 P.3d 756 (2009). Actual prejudice is demonstrated by showing practical and identifiable consequences at trial. *O'Hara*, 167 Wn.2d at 99.

Here, while an arrest without probable cause is a constitutional violation, the claimed error is not manifest. Washington's exclusionary rule requires suppression of unconstitutionally obtained evidence. *State v. Doughty*, 170 Wn.2d 57, 65, 239 P.3d 573 (2010). But the police obtained all the evidence against Mower from the warrant-based search of her property, and none from her arrest. Assuming without deciding that the police arrested Mower without probable cause, the exclusionary rule would not require suppression of any of the evidence against her. As such, any arrest without probable cause did not prejudice Mower and Mower has failed to show manifest error. Thus, we do not consider her argument on this point for the first time on appeal.

Moreover, because Mower cannot show prejudice, her claim that counsel rendered ineffective assistance by failing to move for suppression on the grounds of unlawful arrest is without merit. In order to show that she received ineffective assistance of counsel, Mower must show "(1) that defense counsel's conduct was deficient" and "(2) that the deficient performance resulted in prejudice." *State v. Reichenbach*, 153 Wn.2d 126, 130, 101 P.3d 80 (2004). Because both prongs must be met, a failure to show either prong will end the inquiry. *State v. Fredrick*, 45

Wn. App. 916, 923, 729 P.2d 56 (1986).

Because a motion to suppress on the grounds of unlawful arrest would not have led to suppression of any evidence against Mower, she cannot show that counsel's failure to make such a motion prejudiced her. As such, Mower cannot show ineffective assistance of counsel and her claim to that effect fails.

C. *Instructions on Burden of Proof and Unanimity as to Medical Authorization Defense*

Mower next argues that the State was required to disprove her medical authorization defense beyond a reasonable doubt, and thus the trial court erred by instructing the jury that she must prove the defense by a preponderance of the evidence. She further argues that the trial court erroneously failed to instruct the jury that it must be unanimous as to which elements of her defense the State had disproved. We disagree.

Mower's arguments are based on the false premise that the State bears the burden to disprove a medical marijuana defense beyond a reasonable doubt. But as we noted above, in *Fry*, 168 Wn.2d at 7, our Supreme Court explicitly held that defendants asserting a medical authorization defense must prove it by a preponderance of the evidence. Because the State was not required to disprove Mower's defense beyond a reasonable doubt, the trial court did not err in failing to instruct the jury to that effect. Additionally, Mower fails to cite any law requiring an instruction that the jury must be unanimous on which element of an affirmative defense has been proved or disproved. Mower's arguments fail.

D. *Right To Present a Complete Defense*

Mower next argues that she was denied her right to present a complete defense because

the trial court refused to admit evidence that Reed had sought and obtained a legal opinion that he and Mower were in compliance with Washington medical marijuana law. She argues that the court "violated court rules as well as the appearance of fairness by rejecting the proffered evidence sua sponte without even inviting argument from the State." Br. of Appellant (Karen Mower) at 24-25. Mower cites no legal authority for this argument except ER 401 and 403, claiming that these rules support the proposition that "[a]ll evidence is admissible unless the opposing party objects to it." Br. of Appellant (Karen Mower) at 25.

First, Mower misrepresents the record. The trial court did opine that the evidence proffered was inadmissible immediately after defense counsel moved to admit it. But the court then heard additional argument from defense counsel *and* an objection from the State before finally excluding the evidence.

Second, Mower misrepresents the law. ER 401 and 403 do not support the proposition for which she cites them: that courts must admit all evidence unless objected to. ER 401 provides that relevant evidence is evidence making any fact consequential to the determination of the action more or less probable. And ER 403 provides that relevant evidence may be excluded if its probative value is "substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by consideration of undue delay, waste of time, or needless presentation of cumulative evidence." Neither of these rules provide that all evidence must be admitted unless a party objects.

Moreover, the plain text of ER 402 negates any such argument: "All relevant evidence is admissible, except as limited by constitutional requirements . . . by these rules, or by other rules or

regulations applicable in the courts of this state." Hence, relevant evidence may be inadmissible when, for instance, it violates the rules of evidence. Mower cites no law requiring trial courts to admit inadmissible evidence under *any* circumstances. Nor does she cite any law relevant to the appearance of fairness, let alone any law suggesting that the trial court's ruling here violated the appearance of fairness doctrine. Lacking any basis in law or in fact, Mower's argument on this point is meritless.

Mower also argues that the evidence was not hearsay and that the prosecutor "opened the door." Br. of Appellant (Karen Mower) at 25. She cites no law to support these arguments, and we accordingly do not consider them. *Thomas*, 150 Wn.2d at 874.

E. *Imposition of Community Custody*

Mower next argues that the trial court applied the wrong legal standard by sentencing her to a term of community custody it believed was mandatory. We agree and vacate Mower's term of community custody. We also note that Reed suffered the same error and we exercise our discretion to vacate his community custody term as well. We remand for the trial court to consider the correct legal standard as to community custody for both Mower and Reed.

"We review the imposition of community custody conditions for abuse of discretion." *State v. Vant*, 145 Wn. App. 592, 602, 186 P.3d 1149 (2008). A trial court abuses its discretion by relying on untenable grounds, which occurs when the trial court applies the wrong legal standard or relies on unsupported facts. *State v. Griffin*, 173 Wn.2d 467, 473, 268 P.3d 924 (2012).

Under RCW 9.94A.702(1), "If an offender is sentenced to a term of confinement for one

year or less for one of the following offenses, the court *may* impose up to one year of community custody . . . [a] felony violation of chapter 69.50." (Emphasis added.) The trial court sentenced Mower to 20 days' confinement, converted to community service or electronic home monitoring. And Mower was convicted of a felony offense under chapter 69.50 RCW. But contrary to RCW 9.94A.702, the trial court ruled, "The Court also is *required* to impose a term of community custody. The community custody the Court will indicate is required in this case." 7 RP at 1047 (emphasis added). The trial court thus imposed what it considered to be a mandatory 12-month term of community custody on Mower.

The State correctly concedes that the trial court had discretion whether to sentence Mower to community custody. We hold that the trial court applied the wrong legal standard by ruling that it was required to impose a term of community custody on Mower. We vacate the community custody portion of Mower's sentence and remand for the trial court to consider the correct legal standard for the imposition of community custody on Mower.

Moreover, the record reflects that the same error occurred as to Reed. The trial court sentenced Reed to 45 days' confinement, with 30 days converted to electronic home monitoring or community service. And Reed was also convicted of a felony offense under chapter 69.50 RCW. And the trial court sentenced Reed to the same purportedly mandatory 12-month term of community custody. But Reed does not raise this issue on appeal.

Reed's failure to assign error to his sentence or argue this issue would normally preclude relief on this point. RAP 10.3(g); *Escude v. King County Pub. Hosp. Dist. No. 2*, 117 Wn. App. 183, 190 n.4, 69 P.3d 895 (2003). However, this court has authority to waive or alter the rules of

appellate procedure to serve the ends of justice. RAP 1.2(c). And given that Reed suffered the same error as Mower at a consolidated trial, there is no just basis to grant relief to Mower and not to Reed. We accordingly vacate the community custody portion of Reed's sentence and remand for the trial court to consider the correct legal standard for the imposition of community custody on Reed as well.

F. *Legal Financial Obligations*

Finally, Mower argues that the trial court erred by imposing legal financial obligations on her to repay fees imposed by the sheriff's office for serving subpoenas. She also argues that the trial court erroneously doubled the amount of service fees by imposing the full amount on both her and Reed. We hold that the trial court had authority to impose the service fees, but we agree that the trial court erroneously doubled the fees by imposing the full amount on both defendants. We accordingly vacate the sheriff's service fees imposed on Mower and remand for further proceedings. And because Reed suffered the same error, we exercise our discretion to provide him the same relief.

Under RCW 10.01.160, a trial court may require convicted defendants to pay costs. Costs must be "expenses specially incurred by the state in prosecuting the defendant" and "cannot include expenses inherent in providing a constitutionally guaranteed jury trial or expenditures in connection with the maintenance and operation of government agencies that must be made by the public irrespective of specific violations of law." RCW 10.01.160(2). The trial court's authority to impose service fees under RCW 10.01.160 is a question of statutory interpretation, reviewed de novo. *See State v. Moon*, 124 Wn. App. 190, 193, 100 P.3d 357 (2004).

Mower argues that the sheriff's service fees are costs of maintaining the sheriff's office and not costs specially incurred in prosecuting her. But Mower does not cite the record on this point and nothing in the record supports her assertion.[4]

Mower relies on *Utter v. Department of Social and Health Services*, 140 Wn. App. 293, 165 P.3d 399 (2007), to support her argument that the trial court lacked authority to impose the service fees as costs. *Utter* did not address the question of service fees and does not support Mower's argument. However, Division Three of this court addressed that precise issue in *State v. Earls*, 51 Wn. App. 192, 197-98, 752 P.2d 402 (1988), *overruled on other grounds by State v. Curry*, 118 Wn.2d 911, 915-16, 829 P.2d 166 (1992). The *Earls* court held that costs under RCW 10.01.160 may properly include "the sheriff's fee for service of process." 51 Wn. App. at 198. Mower cites nothing to the contrary and her claim that the trial court lacked authority to impose such fees under RCW 10.01.160 fails.

But Mower also contends that the trial court erroneously doubled the service fees by imposing the full amount on both her and Reed. Mower is correct. At sentencing, the trial court found that the service fees amounted to $2,129, "which then would be split between the parties." 7 RP at 1049. But instead of splitting the service fees, the trial court imposed $2,129 each on Mower and Reed. We accordingly vacate the imposition of sheriff's service fees on Mower. And although Reed does not raise this argument on appeal, he suffered the same error and we exercise our discretion to grant him the same relief. We remand for further proceedings on this issue.

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[4] Mower also makes the incorrect assertion that all the subpoenas at issue could have been served at one time. The record reflects that the subpoenas had to be served serially because new subpoenas had to be issued every time the trial court set a new trial date.

We affirm Reed's and Mower's convictions, but vacate their terms of community custody and the sheriff's service fees imposed as costs and remand for further proceedings.

A majority of the panel having determined that this opinion will not be printed in the Washington Appellate Reports, but will be filed for public record in accordance with RCW 2.06.040, it is so ordered.

Worswick, C.J.

We concur:

Hunt, J.

Johanson, J.