IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

STATE OF WASHINGTON, Respondent, v. ROBIN LAWRENCE STEPHENS, Appellant.	No. 38412-4-II UNPUBLISHED OPINION

Van Deren, C.J. — Robin L. Stephens appeals his conviction for manufacturing marijuana and using drug paraphernalia, arguing that the trial court violated his constitutional right to a jury trial by approving his waiver of that right. Stephens further contends that his constitutional due process rights were violated when the court did not allow him to argue the defenses of substantial compliance with the medical marijuana act (Act)[1] and medical necessity. We hold that Stephens knowingly, intelligently, and voluntarily waived his right to a jury trial and that the trial court did not err in concluding that Stephens' claimed defenses do not exist and, thus, its rulings excluding his proffered evidence did not amount to an abuse of discretion. We affirm.

[1] Chapter 69.51A RCW.

FACTS

Robin Stephens has suffered from knee and back pain for the past twenty years; his wife, Virginia,[2] has suffered from osteoarthritis pain since she was a teenager. Several physicians prescribed different narcotic pain medications for both Robin and Virginia, including codeine, percocet, percodan, oxycontin, and other opiates. These drugs caused unpleasant side effects for both of them, including nausea and vomiting.

Some years ago, Robin and Virginia smoked marijuana as an analgesic to control their pain. They found that marijuana controlled their pain better than prescription pain medication and did not have the deleterious side effects of prescription pain medication. They used about one ounce of marijuana per week, acquired by Robin from local drug dealers. In 2007, Robin decided to grow marijuana for their personal use.

In April 2007, the Lewis County Sheriff's Office received a tip that there were marijuana plants at the Stephens' residence. When questioned by deputy sheriffs at the house, Virginia did not consent to a search but admitted that there was marijuana on the property. The officers obtained a search warrant and, during the ensuing search, they found a concealed room in the barn that contained marijuana plants.

The State charged Robin with one count of manufacturing a controlled substance within 1000 feet of a school bus route stop and one count of unlawful use of drug paraphernalia. At trial, defense counsel stated that Robin would waive his right to a jury trial. The discussion regarding Robin's waiver follows:

> THE COURT: The record should reflect that we have had an in chambers conference that kind of broke up with a discussion about whether we were going

[2] Because they share the same last name, to avoid confusion, we refer to Robin, Virginia, and Arial Stephens by their first names.

> to have a jury trial. What is the status of that?
>
> [DEFENSE COUNSEL]: We're going to waive jury. I have got a blank order that I just executed that basically just says trial by jury is waived. And may I approach?
>
> THE COURT: Yes. Has your client signed it?
>
> [DEFENSE COUNSEL]: Probably a good thing. There is not really a spot for him here, your Honor, but I'll have him sign right under mine.
>
> THE COURT: Well, that's the way we usually do it.
>
> [DEFENSE COUNSEL]: I discussed it with him, he understands he's waiving an important constitutional right.

Report of Proccedings (RP) at 1. The court then discussed the decision to waive the jury trial right with Robin:

> THE COURT: Mr. Stephens, have you heard, understood, and agree with everything your attorney told me so far?
>
> THE DEFENDANT: Yes, Sir.
>
> THE COURT: I need to just reiterate a couple of things. [Defense counsel] have, I'm sure, talked with you, but you have an absolute right to have any criminal case tried by a jury. It will be by a jury unless you give that right up in writing which I'm told you have done here. I want to make sure you understand a couple of things.
>
> First thing is obvious, and that is if you have trial without a jury, then one person, it would be me in this instance, will make the decision on your guilt or innocence, it won't be twelve people. Some people in some cases view that as an advantage, and apparently, you, after consulting with [defense counsel], feel that's to your advantage here. The second and not so obvious issue is in a nonjury trial there may be evidence questions that come up to determine should the judge or the jury hear the evidence that is being objected to or not. Well, obviously, in a nonjury trial, I'm going to hear what the evidence is and I'm going to decide whether it is admissible or not. If I decide it's not admissible, I'm supposed to, and will, ignore the evidence that's not admitted. That can seem a little odd at first blush. But we as judges are supposed to be able to do that and I can tell you that I think I do. But I just want to make sure that you're aware of that. Was that all explained to you?
>
> THE DEFENDANT: Yes, Sir.
>
> THE COURT: You wish to waive jury then?
>
> THE DEFENDANT: Yes.
>
> THE COURT: I'll approve the waiver.

RP at 2-3. After the court dismissed the jury, Robin stipulated that, on the day of the search, he

manufactured marijuana at his residence and that there was a school bus stop within 1000 feet of the barn that housed the cultivation.

But Robin argued that (1) he substantially complied with the statutory requirement for possessing medical marijuana and (2) an affirmative defense of medical necessity applied. The State moved in limine to preclude both of these defenses. In response to the State's motion in limine, the court instructed Robin to make an offer of proof supporting his affirmative defenses.

Accordingly, defense counsel called four witnesses: Dr. Gregory Carter, Robin, Virginia, and Arial, their 17 year old daughter. Dr. Carter testified about the manner in which marijuana physiologically works as an analgesic. He also testified that marijuana was safer and more effective than the opiates prescribed for Robin and Virginia. They both testified to their individual pain-related problems, the inefficacy of the prescribed opiates, and how the marijuana helped alleviate their pain. Arial testified that she was unaware of the marijuana cultivation in the barn.

Following this testimony, the court granted the State's motion in limine. The court found that, based upon Robin's stipulated facts, he was guilty of manufacturing marijuana. The court later sentenced Robin within the standard range. He appeals.

ANALYSIS

I. Right to a Jury Trial

Robin first argues that the trial court violated his right to a jury trial under the Washington Constitution article 1, section 21[3] and the Six Amendment of the United States Constitution,[4] when it accepted his jury waiver that he asserts he did not "knowingly, intelligently, and voluntarily enter." Br. of Appellant at 2. We disagree.

A. *Gunwall* Analysis

We address a state constitutional claim only if the claimant sufficiently briefs the *Gunwall*[5] factors. *State v. Brown*, 132 Wn.2d 529, 594-95, 940 P.2d 546 (1997). Robin makes no mention of the *Gunwall* factors in his brief. But he invokes the protections of the right to a jury trial under our state constitution, which he argues are greater than those under the federal constitution. Because Robin "fail[s] to discuss at a minimum the six criteria mentioned in *Gunwall*, he requests us to develop without benefit of argument or citation of authority the 'adequate and independent state grounds' to support his assertions." *State v. Wethered*, 110 Wn.2d 466, 472, 755 P.2d 797

[3] "The right of trial by jury shall remain inviolate, but the legislature may provide . . . for waiving of the jury in civil cases where the consent of the parties interested is given thereto." Wash. Const. art. I, § 21.

[4] "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury." U.S. Const. amend. VI.

[5] The factors we consider in deciding whether our state constitution gives greater protection than the federal constitution are set forth in *State v. Gunwall*, 106 Wn.2d 54, 720 P.2d 808 (1986). These factors include: (1) "[t]he textual language of the state constitution," (2) "[s]ignificant differences in the texts of parallel provisions of the federal and state constitutions," (3) "[s]tate constitutional and common law history," (4) "[p]reexisting state law," (5) "[d]ifferences in structure between the federal and state constitutions," and (6) "[m]atters of particular state interest or local concern." *Gunwall*, 106 Wn.2d at 61-62 (emphasis omitted).

(1988) (quoting *Michigan v. Long*, 463 U.S. 1032, 1038, 103 S. Ct. 3469, 77 L. Ed. 2d 1201 (1983)). "We decline to do so consistent with our policy not to consider matters neither timely nor sufficiently argued by the parties." *Wethered*, 110 Wn.2d at 472. Accordingly, we consider Robin's jury trial claims under federal constitutional law. *See Wethered*, 110 Wn.2d at 472-73.

B. Standard of Review

An assertion of a violation of the Sixth Amendment right to a jury trial is a "manifest error affecting a constitutional right" that may be raised for the first time on appeal.[6] RAP 2.5(a)(3). We review a trial court's approval of a waiver of the right to a jury trial de novo. *State v. Vasquez*, 109 Wn. App. 310, 319, 34 P.3d 1255 (2001), *aff'd*, 148 Wn.2d 303, 59 P.3d 648 (2002). Because the right to a jury trial is a valuable constitutional right, we narrowly construe its waiver in favor of preserving that right. *Wilson v. Horsley*, 137 Wn.2d 500, 509-511, 974 P.2d 316 (1999); *see also United States v. Lee*, 539 F.2d 606, 609 (6th Cir. 1976).

C. Valid Waiver

Robin argues that his waiver of the jury trial right was invalid because the trial court's colloquy did not explain that there had to be complete jury unanimity in order to find guilt. The State argues that Robin's waiver was valid because a discussion of complete jury unanimity is not required in a colloquy and Robin completed a written waiver after receiving advice from his counsel. We hold that the waiver was valid and Robin's right to a jury trial was not violated.

Every criminal defendant has a right under the federal constitution to a jury trial. *City of Pasco v. Mace*, 98 Wn.2d 87, 89, 653 P.2d 618 (1982). Federal rule of criminal procedure 23(a)

[6] Robin did not raise the validity of his jury trial waiver at trial. He assented to the waiver after the trial court colloquy.

provides that cases required to be tried by jury shall be so tried unless the defendant waives a jury trial in writing with the approval of the court and the consent of the government. A waiver is valid if it is "voluntary, knowing, and intelligent." *United States v. Williams*, 559 F.3d 607, 609 (7th Cir. 2009). A "writing under Rule 23" provides the best evidence of a defendant's express consent to a waiver. *United States v. Saadya*, 750 F.2d 1419, 1420 (9th Cir. 1985). A "writing" is not necessary when the record clearly reflects that the defendant "'personally gave express consent in open court, intelligently and knowingly.'" *Saadya*, 750 F.2d at 1420 (internal quotation marks omitted) (quoting *United States v. Reyes*, 603 F.2d 69, 71 (9th Cir. 1979)). Whether a defendant received "'the advice of counsel'" when he waived his right is a "'relevant'" consideration. *United States v. Martin*, 704 F.2d 267, 272 (6th Cir. 1983) (quoting *Adams v. United States ex rel. McCann*, 317 U.S. 269, 277, 63 S. Ct. 236, 87 L. Ed. 268 (1942)).

Here, Robin's counsel stated that he discussed the jury waiver with Robin and that Robin "underst[ood[d[] that he[wa]s waiving an important constitutional right." RP at 1. Robin also executed a written jury waiver. In its colloquy, the trial court explained to Robin the difference between a jury trial and a bench trial, "[I]f you have a trial without a jury, then one person . . . will make the decision on your guilt or innocence, it won't be twelve people." RP at 2. At the end of this explanation, the court asked Robin if he wished to waive the jury and he responded, "Yes." RP at 3. We hold that Robin's waiver was valid because both his written waiver and his counsel's representation to the court, along with the trial court's colloquy, establish that his waiver was "voluntary, knowing, and intelligent." *Williams*, 559 F.3d at 609.

II. Due Process Right

Robin also argues that the trial court denied his right to due process under both the Washington[7] and federal[8] constitutions when it refused to admit the testimony of four witnesses supporting the affirmative defenses of substantial compliance and medical necessity. The State argues that the trial court correctly excluded the testimony because neither substantial compliance nor medical necessity is a defense to the Act.

A. *Gunwall* Analysis

Robin again makes no mention of the *Gunwall* factors. When analyzing challenges under the state and federal due process clauses, "we have held [that] Washington's due process clause does not afford broader protection than that given by the Fourteenth Amendment[9] to the United States Constitution." *State v. McCormick*, 166 Wn.2d 689, 699, 213 P.3d 32 (2009).

B. Standard of Review

We review the trial court's determination of whether a defense exists as a question of law de novo. *See State v. Fry*, No. 81210-1, 2010 WL 185857, at *5 (Jan. 21, 2010). We review a challenge to a trial court's decision on admissibility of evidence for abuse of discretion. *State v. Ellis*, 136 Wn.2d 498, 504, 963 P.2d 843 (1998).

"The right of an accused in a criminal trial to due process is, in essence, the right to a fair

[7] The Washington State Constitution article I, section 3 provides, "No person shall be deprived of life, liberty, or property, without due process of law."

[8] The United States Constitution amendment XIV, section 1 provides, "No State shall . . . deprive any person of life, liberty, or property, without due process of law."

[9] "No state shall . . . deprive any person of life, liberty, or property, without due process law; nor deny to any person within its jurisdiction the equal protection of the laws." U.S. Const. amend. 14, § 1,

opportunity to defend against the State's accusations." *Chambers v. Mississippi*, 410 U.S. 284, 294, 93 S. Ct. 1038, 35 L. Ed. 2d 297 (1973). The right to present witnesses in one's defense "'is a fundamental element of due process of law.'" *State v. Maupin*, 128 Wn.2d 918, 924, 913 P.2d 808 (1996) (*quoting Washington v. Texas*, 388 U.S. 14, 19, 87 S. Ct. 1920, 18 L. Ed. 2d 1019 (1967)). But this right is not absolute. *Maupin*, 128 Wn.2d at 924-25. "'[A] criminal defendant has no constitutional right to have irrelevant evidence admitted in his or her defense.'" *Maupin*, 128 Wn.2d at 925 (quoting *State v. Hudlow*, 99 Wn.2d 1, 15, 659 P.2d 514 (1983)).

Here, Robin's claim fails to state a due process violation because he cannot show that the substantial compliance or medical necessity defenses are available.[10] Accordingly, any evidence in support of those defenses is made irrelevant[11] and the trial court properly excluded it.

C. Substantial Compliance Defense

Robin argues that the Act is a remedial statute which, therefore, allows a substantial compliance defense. He argues further that he substantially complied with the Act because he grew the marijuana for medicinal purposes and acquired the appropriate medical authorization before trial. The State argues that the Act does not allow a substantial compliance defense. It

[10] In the only case Robin argues in support of his due process violation claim, our Supreme Court held that the trial court violated the due process rights of a defendant charged with murder because it granted the State's motion to exclude defendant's qualified experts on diminished capacity. *Ellis*, 136 Wn.2d at 522-23. This is distinguishable from the present case because in *Ellis* there was no question that diminished capacity was an available defense. Instead, the issue was whether common law foundational requirements for admissibility of expert testimony applied to a diminished capacity defense. *Ellis*, 136 Wn.2d at 522-23.

[11] Similarly, in *State v. Ayala*, 108 Wn. App. 480, 485, 31 P.3d 58 (2001), our court held that the trial court correctly excluded evidence regarding the victim's alleged acquiescence to the kidnapping as "irrelevant" because the kidnapping statute "clearly strips away a 14-year-old victim's acquiescence as a defense."

argues further that even if we were to conclude that a substantial compliance defense is allowed under the Act, Robin's evidence is insufficient to support such a defense.

Substantial compliance is not a defense to a penal statute when such defense undermines the underlying policy[12] of the statute. *State v. Vanderpool*, 99 Wn. App. 709, 712, 995 P.2d 104 (2000). "[C]riminal statute[s] must be given a literal and strict interpretation." *State v. Dunn,* 82 Wn. App. 122, 128, 916 P.2d 952 (1996).

Here, the legislature makes clear that the statute "shall [not] be construed to supersede Washington state law prohibiting the acquisition, possession, manufacture, sale or use of marijuana for nonmedical purposes." *State v. Hanson*, 138 Wn. App. 322, 330-31, 157 P.3d 438 (2007) (quoting former RCW 69.51A.020 (1999)). "The people of . . . Washington intend that: . . . Qualifying patients . . . who, in the judgment of their physicians, would benefit from the medical use of marijuana, shall not be found guilty of a crime under state law for their possession and *limited* use of marijuana." Former RCW 69.51A.005 (1999) (emphasis added). The limited use of marijuana allowed by the Act is ensured by the affirmative defense that follows from "proof of [a qualifying patient's] compliance with the requirements provided in [chapter 69.51A RCW]." Former RCW 69.51A.040 (1999).[13]

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[12] In *State v. Vanderpool*, 99 Wn. App. 709, 712, 995 P.2d 104 (2000), our court held that allowing substantial compliance with the registration requirements of sex offenders undermines the policy of former RCW 9A.44.130 (1999) to allow law enforcement agencies to protect their communities, conduct investigations and quickly apprehend sex offenders.

[13] The former RCW 69.51A.040(2) requirements for a qualified patient, eighteen years of age or older, were to:

> (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.

A substantial compliance defense to the requirements in former RCW 69.51A.040 would undermine the "limited" exception of former RCW 69.51A.005 to the prohibition against "the acquisition, possession, manufacture, sale or use of marijuana for nonmedical purposes." Former RCW 69.51A.020. Accordingly, we will not create a substantial compliance defense in contravention of the legislative intent and policy behind the Act or which erodes the Act's requirements to establish an exception to criminal prosecution for possession, use, or cultivation of marijuana. Thus, Robin's witnesses' testimony supporting a substantial compliance defense was not relevant and the trial court properly excluded that testimony.[14] *See Maupin*, 128 Wn.2d at 924-25. The trial court did not err in its interpretation of the law regarding the existence of a substantial compliance defense nor did it abuse its discretion in denying admission of Robin's

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[14] Even if we allowed Robin's substantial compliance defense, we hold that he did not substantially comply with the requirements of the Act. Whether a party substantially complied with a statute is a mixed question of law and fact. *See Tapper v. Employment Sec. Dep't*, 122 Wn.2d 397, 402-03, 858 P.2d 494 (1993). We review a trial court's findings for substantial evidence. *Ridgeview Props. v. Starbuck*, 96 Wn.2d 716, 719, 638 P.2d 1231 (1982). We review a trial court's application of law to the facts de novo. *Tapper*, 122 Wn.2d at 403. Substantial compliance is "'actual compliance in respect to the substance essential to every reasonable objective of [a] statute.'" *State v. Robinson*, 104 Wn. App. 657, 666, 17 P.3d 653 (2001) (quoting *In re Habeas Corpus of Santore*, 28 Wn. App. 319, 326, 623 P.2d 702 (1981)). Where time requirements are concerned, our Supreme Court has held that "'failure to comply with a statutorily set time limitation cannot be considered substantial compliance with th[e] statute.'" *State v. Dearbone*, 125 Wn.2d 173, 182, 883 P.2d 303 (1994) (*quoting Seattle v. Pub. Employment Relations Comm'n*, 116 Wn.2d 923, 929, 809 P.2d 1377 (1991)).

Although there is no explicit time limitation in the Act, the requirement that qualifying patients "shall [p]resent [their] valid documentation to any law enforcement official who questions [their] medical use of marijuana" creates an implicit time limitation on when the patients should acquire the valid documentation. Former RCW 69.51A.040(2)(c). In other words, the Act requires patients to acquire the valid documentation *before* any police officer questions them about the marijuana. Robin did not satisfy this requirement when he obtained the valid documentation from Dr. Carter four months after he was confronted by the police about his marijuana cultivation. Because Robin did not meet the valid documentation requirement, he did not substantially comply with the Act.

evidence of substantial compliance.

D. Medical Necessity Defense

Robin further argues that his due process rights were violated because the trial court did not allow him to pursue a medical necessity defense. He states that we wrongly decided *State v. Butler*, 126 Wn. App. 741, 109 P.3d 493 (2005), when we held that the affirmative defense provided by the Act superseded the common law medical necessity defense. The State argues that there is no reason to reconsider our decision in *Butler* because the medical necessity defense conflicts with the Act's affirmative defense and any former medical necessity defense is abrogated. The State further argues that even if we reinstate a medical necessity defense, Robin does not present sufficient evidence to support such a defense.

Our state constitution vests in the legislature the task of determining whether there is an accepted medical use for particular drugs. *Seeley v. State*, 132 Wn.2d 776, 805-06, 940 P.2d 604 (1997); *see also State v.Williams*, 93 Wn. App. 340, 347, 969 P.2d 106 (1998). We have previously held that "if the debate over medical treatment belongs in the political arena, it makes no sense for the courts to fashion a defense . . . on the medical uses of a Schedule I drug." *Williams*, 93 Wn. App. at 347. We also held that *Seeley* "by implication" overruled previous cases in which Washington courts did find a medical necessity defense. *Williams*, 93 Wn. App. at 347. After Washington voters passed Initiative 692 in November 1998 and the legislature codified this initiative in chapter 69.51A RCW, we held in dicta[15] that the Act superseded any common law medical necessity defense, if such a defense existed. *Butler*, 126 Wn. App. at 747-

[15] In *Butler*, we stated that "[the defendant] does not persuade us to reconsider our decision in *Williams*," in which we held that "Washington did not recognize a [common law] defense of medical necessity for marijuana use." 126 Wn. App. at 747. We added that "[b]ecause the Supreme Court declined to review our *Williams* decision, our *Williams* rationale, analysis, and holding remain good law." *Butler*, 126 Wn. App. at 747.

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The Act does not contain any indication that the legislature intended to overrule a medical necessity defense because the Supreme Court and the Court of Appeals had previously established that there was no "accepted medical use" for marijuana and, by extension, there was no medical necessity defense to its possession, use, or cultivation. *Seeley*, 132 Wn.2d at 800; *Williams*, 93 Wn. App. at 347-49. *See also* former chapter 69.51A RCW (1999). In other words, when the Act was adopted, there was no common law medical necessity defense to abrogate.

We hold that there is no medical necessity defense for the manufacture and use of marijuana. Because there is no available medical necessity defense, the trial court did not err in refusing Robin to acknowledge such a defense. Furthermore, Robin's four witnesses' testimony supporting such a defense was not relevant and the trial court did not abuse its discretion in excluding the testimony. *Ellis*, 136 Wn.2d at 504.

We affirm.

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 pursuant to RCW 2.06.040, it is so ordered.

Van Deren, C.J.

We concur:

Houghton, J.

Penoyar, J.