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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SIX

THE PEOPLE, Plaintiff and Respondent, v. KNUT NORBERT SIEGFRIED, Defendant and Appellant.	2d Crim. No. B228960 (Super. Ct. No. 1345187) (Santa Barbara County)

Knut Norbert Siegfried appeals from judgment after conviction by jury of one felony count of marijuana cultivation. (Health & Saf. Code, § 11358.)[1] The court correctly instructed the jury on Siegfried's burden to prove his affirmative defenses under the Compassionate Use Act (§ 11362.5, subd. (d)) (CUA) and the Medical Marijuana Program (§ 11362.7 et seq.) (MMP). We affirm.

FACTS

Siegfried cultivated marijuana on his property in Goleta, California. There were 213 plants on his property and 180 on his father's property nearby. He had a physician's recommendation for 90 plants or 6 pounds of processed marijuana.

At trial, he acknowledged that he knowingly cultivated 213 marijuana plants within the meaning of section 11358. He raised two affirmative defenses:

[1] All statutory references are to the Health and safety Code unless otherwise stated.

(1) lawful cultivation under the CUA for "medical purposes . . . upon the written . . . recommendation or approval of a physician" (§ 11362.5, subd. (d); and (2) lawful cultivation under the MMP by a group of "[q]ualified patients . . . who associate . . . in order collectively . . . to cultivate marijuana for medical purposes." (§ 11362.775.)

He argued that he grew the marijuana for medical purposes with Rodney Foster and Peter Schierloh based on recommendations from Morton Sacks, M.D. and another doctor from the same office. Foster and Schierloh testified that they helped Siegfried grow the marijuana. They each had recommendations for 90 plants or 6 pounds.

On the day he was arrested, Siegfried told law enforcement officers he was allowed 90 plants for his own use. He grew more, he said, because, "I'm a caregiver. I have three or four patients." At trial he stipulated he was not a caretaker. When the officers questioned his status as a caretaker, he said, "Okay, I'm a co-op then . . . or something." At trial, he stipulated "this was [not] a cooperative." He gave officers the names of four people with whom he said he was growing the marijuana, but he did not name Foster or Schierloh. He gave the officers written recommendations for the four named people, for himself, and for his recommending physician, but did not give them one for Foster or Schierloh. He told the officers he was his physician's caretaker. The four named people did not testify at trial and he did not rely on them or their recommendations to prove his defenses.

A neighbor testified that in 2009, he and Siegfried talked about "how many years left was there going to be a profit in marijuana-growing before the law changes." Siegfried said, "voting was probably going to make it unprofitable for this wildcat marijuana-growing system anymore," and "[h]e thought he had a couple of years left before he could have enough money to just retire and go to Mexico and live off the profit." Siegfried called the neighbor's brother a week before trial and said, "You better tell your brother to back off." The brother testified he had bought less than one ounce of marijuana from Siegfried for somewhere between $500 and $1,000. He had a physician's recommendation.

Dr. Sacks testified that he gives every patient the same recommendation, 90 plants or 6 pounds, "to protect them from arrest and conviction." He said the amount "might" be medically necessary. He does not discuss the amount with his patients because he cannot predict how much they will smoke. He said, "I don't know what they need, but they certainly need enough to protect them from the law."

An undercover officer testified that Dr. Sacks gave him a recommendation for 90 plants or 6 pounds based on a cursory interview after he paid $160. He said that the doctor issued recommendations to 10 to 20 people in a period of 45 minutes. He testified that the average marijuana plant yields about a pound of marijuana. There are 454 grams in a pound and a "joint" requires about a gram. He showed the jury six pounds of marijuana over defense objection.

The court used a modified version of CALCRIM 2370 to instruct the jury on the CUA defense, without objection. The court used a special instruction for the MMP defense, to which defense counsel objected only on grounds that are not raised on appeal.[2] Each instruction required the defense to present evidence of facts supporting the defenses sufficient to create a reasonable doubt.

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[2] The special instruction read, "The defendant asserts his conduct to be lawful under Health and Safety Code section 11362.775 of the Medical Marijuana Program ('MMP') in that he was a member of a Qualified 'Collective.'

"Under the MMP, Qualified Patients do not violate the law if and only if their conduct is limited to 'associating collectively to cultivate marijuana for medical purposes.'

"Health and Safety Code section 11362.775 states as follows: Qualified patients, persons with valid identification cards, and the designated primary caregivers of qualified patients and persons with identification cards, who associate within the State of California in order to collectively or cooperatively to cultivate marijuana for medical purposes, shall not solely on the basis of that fact be subject to state criminal sanctions under Section 11358 [cultivation of marijuana].

"'Medical Purposes' means an amount of marijuana [for example, an amount possessed; and/or an amount cultivated] that is reasonably related to the current medical need(s) of the patient(s).

The prosecutor argued that defendant had the burden to show by sufficient evidence that the 213 plants he possessed were an amount reasonably related to his current medical condition. "You can't cultivate unless you meet these certain burdens. . . . [¶] The defendant has raised a defense. Is there sufficient evidence? No." ". . . [I]t's on the defendant. He has to show that the . . . MMP applies."

DISCUSSION

Instructions on Defense Burden

Siegfried contends that the court's instructions improperly imposed a burden upon him to prove the facts supporting his affirmative defenses by a preponderance of the evidence. (*People v. Mower* (2002) 28 Cal.4th 457, 464.) Siegfried forfeited this objection when he did not raise it in the trial court. His counsel did not render ineffective assistance by not preserving it. (*Strickland v. Washington* (1984) 466 U.S. 668, 687.) The instructions correctly stated the defense burden.

We review a claim of instructional error de novo. (*People v. Posey* (2004) 32 Cal.4th 193, 218.) The CUA, adopted by voters as Proposition 215 in 1996, immunizes a qualified patient who cultivates marijuana for "the personal medical purposes of the patient upon the written . . . recommendation . . . of a physician." (§ 11362.5, subd. (d); *People v. Mower, supra,* 28 Cal.4th at p. 474.) The MMP, enacted

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"The burden is on the defendant to produce sufficient evidence to raise a reasonable doubt that his conduct was unlawful. This Group Cultivation Defense involves the following elements to be established:

"1. The defendant was a member of a Qualified 'Collective';

"2. Each member of the 'Collective' was a Qualified Patient;

"3. Members of the 'Collective' came together and worked on some aspect of the association that was directly or indirectly related to cultivating marijuana for medical purposes to other members of the 'Collective.'

"If the People have proven beyond a reasonable doubt that the Defendant's conduct exceeded the limited conduct of 'associating with other members of his "collective" for the purposes of cultivating marijuana for medical purposes,' such as selling marijuana, the Group Cultivation Defense is not a defense to any of the charges in this case."

by the Legislature in 2003, provides overlapping and additional defenses to marijuana cultivation. (§ 11362.7 et seq.; *People v. Kelly* (2010) 47 Cal.4th 1008, 1014-1015.) One of these is the MMP group cultivation defense. It immunizes "[q]ualified patients . . . who associate . . . in order collectively . . . to cultivate marijuana for medical purposes." (§ 11362.775.) The quantity must be "*reasonably necessary for* [*the qualified patient's*] *medical condition*." (*Kelly,* at p. 1043.) There is no protection for a person or group who, "cultivate or distribute marijuana for profit." (§ 11362.765, subd. (a).)

The CUA and MMP defenses relate to an element of the charged crime of "unlawful" cultivation. Therefore, the defense has the burden of proving facts to support the defense. But the burden is "merely to raise a reasonable doubt." (*People v. Mower, supra,* 28 Cal.4th at p. 464.)

The trial court's CUA instruction accurately described the defense burden to "produce evidence tending to show" the facts supporting his defense. (CALCRIM 2370, as modified.) The CUA "allocate[s] to the defendant the burden of proof as to the facts" that he was a "'patient,'" he cultivated "'for [] personal medical purposes,'" and he did so on the "'recommendation or approval of a physician.'" (*People v. Mower, supra,* 28 Cal.4th at p. 477.) This allocation is constitutionally permissible under the "rule of convenience and necessity" because "[t]he existence of these facts is peculiarly within a defendant's personal knowledge, and proof of their nonexistence by the prosecution would be relatively difficult or inconvenient." (*Ibid.*) Nothing in the instructions imposed upon Siegfried a burden to prove facts by a preponderance of the evidence.

The special instruction on the MMP defense was also correct. The court instructed the jury that Siegfried had "the burden to produce sufficient evidence to raise a reasonable doubt that his conduct was unlawful." We agree this language may be superfluous but, in this case, it was not misleading. We reject Siegfried's contention that the word "sufficient" imposed an excessive burden. This language did not impose a quantum of proof that meets standards such as preponderance of the evidence. It simply asks the jury to determine whether the defendant produced evidence that raised a reasonable doubt that he was guilty of the offense. In the absence of evidence "'sufficient

for a reasonable jury to find in favor of the defendant,'" Siegfried would not have been entitled to any instruction on the MMP defense. (*People v. Mentch* (2008) 45 Cal.4th 274, 288 [defendant not entitled to CUA caregiver defense instruction because the defense was not "supported by substantial evidence--evidence that, if believed by a rational jury, would have raised a reasonable doubt as to whether Mentch was a primary caregiver and thus innocent of unlawful possession or cultivation"].)

Instruction on Weight of Recommendations

Siegfried contends that the court's response to a jury question undermined his defense by allowing the jury to "second-guess" his physician's recommendation about the amount of marijuana he should use for medical purposes. We reject the contention because the physician's recommendation was only one factor for the jury to consider when determining whether the amount Siegfried cultivated was reasonably related to his, or the group's, current medical needs.

During deliberations, the jury asked why the parties had stipulated that marijuana recommendations do not expire. The written recommendations in evidence had expiration dates. The court responded, "The medical marijuana recommendation does not expire. The weight of the recommendation is for you to determine." The defense objected to the second sentence.

The plausibility of Siegfried's claim that these three individuals required 90 plants for their current personal medical needs was a question for the jury. The trial court's response accurately stated the law. A physician's recommendation does not make marijuana cultivation lawful under either the CUA or the MMP unless the recommended amount is cultivated for "medical purposes." (§§ 11362.5, subd. (d); 11362.7, subd. (f); 11362.775.) The amount must be reasonably related to the patient's medical needs. (*People v. Trippet* (1997) 56 Cal.App.4th 1532, 1550-1551.) "What precisely are the 'patient's current medical needs' must, of course, remain a factual question to be determined by the trier of fact." (*Id.* at p. 1549.) The physician's opinion is only one type of evidence to be considered when making this determination. (*Ibid.*)

Six Pounds of Marijuana for Illustrative Purposes

Siegfried contends that the trial court abused its discretion when it allowed the prosecution's witness to show six pounds of processed marijuana to the jury for illustrative purposes because the marijuana had no probative value. We disagree.

The trial court reasonably could find that the probative value of this evidence substantially outweighed the possibility of prejudice. (Evid. Code, § 352.) The jury was required to determine whether 90 plants or 6 pounds, as recommended, was an amount reasonably related to the medical needs of Siegfried and each of his fellow growers. The court admonished the jury that the marijuana was for illustrative purposes only and was not used in the charged crime. (*People v. Wiley* (1976) 18 Cal.3d 162, 176-177.) The court acted within its discretion when it determined the marijuana would not be unduly prejudicial.

Finding of Guilt Based on Excessive Recommendations

In a supplemental brief, Siegfried contends that the court violated his federal right to due process when it allowed him to be convicted for cultivating an amount of marijuana that his physician had recommended. We disagree.

Due process does not permit conviction of a person for exercising a privilege which an "agent of the State" has told him was available to him. (*Raley v. Ohio* (1959) 360 U.S. 423, 437-438; *Cox v. Louisiana* (1965) 379 U.S. 559, 561.) A conviction after such assurances would "sanction an indefensible sort of entrapment by the State." (*Raley*, at p. 438.) By extension, Siegfried argues that he may not be convicted for cultivating marijuana in an amount that his physician has recommended. We are not persuaded.

Siegfried's recommending physician was not a public official and there was no evidence that he assured Siegfried he was immune from prosecution. The CUA only promises immunity if the amount cultivated is both (1) recommended and (2) cultivated for "medical purposes." (§ 11362.5, subd. (d).) MMP immunity is also limited to use for "medical purposes," notwithstanding recommendations. (§ 11362.775.) Siegfried could

not reasonably believe that his physician's recommendation ensured immunity for cultivation for non-medical purposes.

The judgment is affirmed.

NOT TO BE PUBLISHED.

GILBERT, P.J.

We concur:

YEGAN, J.

PERREN, J.

James F. Iwasko, Judge

Superior Court County of Santa Barbara

William M. Aron; Daniel Mrotek, under appointment by the Court of Appeal, for Defendant and Appellant.

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