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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SIX

THE PEOPLE, Plaintiff and Respondent, v. LEE ANDRE LOVE, Defendant and Appellant.	2d Crim. No. B235156 (Super. Ct. No. YA076313) (Los Angeles County)

Appellant Lee Andre Love was charged with two counts of possession of marijuana for sale (Health and Saf. Code, § 11359)[1] and a single count of transportation for sale of marijuana (§ 11360, subd. (a)). In addition to the pattern instructions regarding the charged offenses, the trial court gave the jury a special instruction on the applicability of the Compassionate Use Act (§ 11362.5 et seq. [CUA]). As crafted, the special instruction was limited to the charged felonies. In addition, the court instructed the jury that "simple" possession of more than 28.5 grams of marijuana is a lesser included offense of possession of marijuana for sale. (§ 11357, subd. (c).) That instruction referenced the CUA defense without fully describing its applicability to simple possession.

The jury acquitted appellant of the charged felonies. It convicted him of two counts of simple possession, as lesser included offenses of the possession of marijuana for sale counts. Appellant contends that the court erred by failing to properly

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

instruct the jury that the medical marijuana defense applied to simple possession of marijuana.

Respondent concedes the error requires reversal. We briefly discuss, and accept, the concession. To obviate any question of a reversal barring further prosecution, we address appellant's contention that the evidence was insufficient to sustain the judgment. (See *Greene v. Massey* (1978) 437 U.S. 19, 24; *Burks v. U.S.* (1978) 437 U.S. 1, 11.)

BACKGROUND

Prosecution Case

On October 13, 2009, Los Angeles County Sheriff Deputy Daniel Chavez approached appellant in a parking lot. When Chavez questioned him, appellant said that he had marijuana in the car, and that he was a medical marijuana user. The car contained approximately 2.8 ounces of marijuana. On November 6, 2009, California Highway Patrol Officer Martin Geller stopped appellant for a traffic violation. Appellant had two pounds of marijuana in the trunk and an ounce of marijuana in the passenger area. He also had $443 in cash. He claimed that he operated a dispensary and the marijuana in the trunk was for medical marijuana users. At trial, Geller opined that appellant possessed the marijuana unlawfully, for the purpose of sale.

During trial, Sheriff Detective Robert Wagner testified as an expert about California's medical marijuana laws, the CUA, and the Medical Marijuana Program (MMP). (§ 11362.7 et seq.) When presented with facts based on the October 13, 2009, and November 6, 2009, incidents, Wagner opined that the marijuana recovered on each occasion was possessed unlawfully for the purpose of sale.

In 2006, appellant registered a medical marijuana dispensary business called Ambrosia Holistic Caregivers with the Los Angeles City Office of Finance. He later advised that office that he never started the business. There are 186 registered medical marijuana dispensaries in Los Angeles. Appellant's business is not among them.

Defense Case

Armond Tollette, M.D., testified that each year from 2005 until 2009, he recommended that appellant use marijuana to treat migraine headaches. Bonni Goldstein, M.D., testified that in 2009 and 2010 she recommended that appellant use marijuana to treat migraine headaches and insomnia. Goldstein did not recommend a particular dose because marijuana is a "patient-determined medication," under the guidelines of the California Medical Board. When questioned about appellant's required dose, Tollette responded that he would need more than the eight ounces permitted by statute. (See § 11362.77; *People v. Kelly* (2010) 47 Cal.4th 1008, 1045-1047.)

Appellant testified that in 2009, he was a qualified medical marijuana patient and a member of several collectives, including Holistic Cannabis. He used marijuana to treat his headaches and insomnia. He grew marijuana for the Holistic Cannabis collective and for his own use. He did not profit from providing marijuana to the collective.

DISCUSSION

Appellant argues, and respondent concedes, that the trial court committed prejudicial error by failing to properly instruct the jury that the CUA defense applied to the lesser included simple marijuana possession offense. We accept respondent's concession. The trial court gave the jury a special instruction regarding the CUA, which is entitled "Collectives--Health and Safety Code Section 11362.775." The special instruction states: "Under the [CUA], qualified patients, persons with valid identification cards, and/or the designated primary caregivers of qualified patients and persons with identification cards, who associate within the State of California in order collectively or cooperatively to cultivate marijuana for medical purposes, shall not, solely on the basis of that fact, be guilty of Health & Safety Code sections 11360 (relating to the transportation of marijuana) or 11359 (relating to the possession of marijuana for sale)." The special instruction does not state that the CUA defense described therein applied to the lesser included offense of simple marijuana possession. (§ 11357, subd. (c).)

The court also instructed the jury, using a version of CALCRIM No. 2375, that misdemeanor marijuana possession is a lesser included offense of felony possession of marijuana for sale. That version of CALCRIM No. 2375 refers to the CUA defense and its applicability to misdemeanor marijuana possession. However, it does not state that cultivating marijuana for medical purposes is a defense to misdemeanor medical marijuana possession.

Substantial Evidence

Appellant contends that there is not sufficient evidence to support his misdemeanor marijuana possession convictions. We disagree.

We view the evidence in the light most favorable to the judgment. (*Jackson v. Virginia* (1979) 443 U.S. 307, 319; *People v. Augborne* (2002) 104 Cal.App.4th 362, 366.) Our review for substantial evidence is independent of the jury's determination the evidence was insufficient as to other counts. (See *United States v. Powell* (1984) 469 U.S. 57, 67; *People v. Superior Court* (2010) 48 Cal.4th 1, 5.)

In challenging the sufficiency of the evidence, appellant argues that in order to find him guilty of misdemeanor marijuana possession, the jury necessarily "concluded that [he] was allowed to legally transport and distribute marijuana under the CUA" and further concluded that on October 13, and November 6, 2009, he possessed marijuana in amounts that were not reasonably related to his personal medical needs. His argument suggests that if the jury did acquit appellant of the felonies based on the CUA defense, it reached an inconsistent verdict by convicting him of two misdemeanor marijuana possession counts. Even if that were true, it would not compel the reversal of those misdemeanors. (*People v. Pahl* (1991) 226 Cal.App.3d 1651, 1657 ["[T]he fact that a guilty verdict on one count is inconsistent with an acquittal verdict on another [does not compel] reversal if there is substantial evidence to support the conviction. [Citation]"]; see also *People v. Superior Court, supra*, 48 Cal.4th at p. 13.) There is substantial evidence from which the jury could rationally find that appellant possessed marijuana

illegally on October 13, and November 6, 2009, in violation of section 11357, subdivision (c).

DISPOSITION

The judgment is reversed and remanded for further proceedings.

NOT TO BE PUBLISHED.

PERREN, J.

We concur:

GILBERT, P.J.

YEGAN, J.

James R. Brandlin, Judge

Superior Court County of Los Angeles

Christian C. Buckley, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Lance E. Winters, Senior Assistant Attorney General, Lawrence M. Daniels, Michael R. Johnsen, Supervising Deputy Attorneys General, for Plaintiff and Respondent.