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NOT TO BE PUBLISHED

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(Tehama)

THE PEOPLE, Plaintiff and Respondent, v. GERALD MALLEY et al., Defendants and Appellants.	C057353 (Super. Ct. Nos. NCR70297, NCR70298)
THE PEOPLE, Plaintiff and Respondent,	C057181 (Super. Ct. No. NCR70253)

v. JEREMY YOUNGREN, Defendant and Appellant.	

Defendants Gerald Malley (Gerald), Dawn Malley (Dawn), and Jeremy Youngren (Youngren) were tried together for cultivating marijuana and possessing marijuana for sale. Each offered a medical marijuana defense based on the Compassionate Use Act of 1996. (Health & Saf. Code,[1] § 11362.5.) The Compassionate Use Act relieves a defendant of criminal liability for possession or cultivation of marijuana if the patient or primary caregiver possesses or cultivates marijuana "for the personal medical purposes of the patient upon the written or oral recommendation or approval of a physician." (*Id.*, subd. (d).)

The court instructed the jury pursuant to the Medical Marijuana Program Act enacted in 2003. (§ 11362.7 et seq.) The Medical Marijuana Program Act limits the amount of marijuana a qualified patient can possess to "no more than eight ounces of dried marijuana" and "no more than six mature or 12 immature marijuana plants" if there is no doctor's recommendation that these quantities are insufficient to meet the patient's needs. (§ **11362.77**, subds. (a) & (b).)

The jury found Gerald and Dawn each guilty of cultivating marijuana and possessing marijuana for sale and found Youngren guilty of cultivating marijuana, acquitting him of possessing marijuana for sale.

The court sentenced Gerald to prison for two years, placed Dawn on probation for three years (suspending imposition of sentence), and placed Youngren on probation for three years (suspending execution of sentence).

Defendants appeal, raising numerous contentions, many of which relate to the numerical limitations found in the Medical Marijuana Program Act on which the court instructed as to all counts. The People concede the court erred in instructing on the numerical limits found in the Medical Marijuana Program Act but argue the error was harmless. Finding the error prejudicial, we reverse the convictions. We do not address defendants' other contentions, except for rejecting Dawn's contention that the evidence was insufficient to support her

convictions.

FACTUAL AND PROCEDURAL BACKGROUND

A

The Prosecution's Case

In October 2006, the Malleys were living in a rental house on Bosque Avenue in Tehama County while they fixed up their mobile home on land they owned in Tehama County on Glenn Road. Youngren was a friend of Gerald, who visited the Glenn Road property but lived in a tent at Woodson Bridge in Tehama County.

On October 10, 2006, a recent parolee named Vincent Colver moved into the Bosque Avenue house with the Malleys. Three days later, investigator Eric Clay of the Tehama County District Attorney's Office and other law enforcement agents went to the house to verify Colver's address. When the agents arrived, Colver and Gerald were there. Colver refused to provide a urine sample, explaining he had smoked marijuana the night before, which had come from Gerald.[2]

Law enforcement agents searched the Bosque Avenue house. Near the entrance to the home, there were three marijuana plants growing in a wooden planter. In the master bedroom, there was "loose marijuana sitting out throughout the bedroom"; a "Tupperware-type tub" with 10 one-gallon Ziploc bags containing a total of 1875.4 grams (66.15 ounces) of marijuana bud and one gallon-sized Ziploc bag containing 32.9 grams (1.16 ounces) of marijuana shake (the leaf of the marijuana plant that can be smoked); two functioning scales; a book on growing marijuana; and rolling paper, seeds, and a screen to sift out the stems and seeds.

Gerald spoke to Investigator Clay at the Bosque Avenue house. According to Clay, Gerald said he had a medical recommendation for marijuana and smoked four marijuana cigarettes during the day and shared one or two bowls[3] of a marijuana pipe at night. He was the primary caregiver to Dawn's sister, Robyn Ballard, to a man named Jeremy, whom he had known for about two years, and a man named Leon, who lived in Fairfax. In his caregiver capacity, Gerald had supplied all three with marijuana. Initially, Gerald denied growing marijuana at the Bosque Avenue house and said he had five marijuana plants growing at the Glenn Road property. After the search of the Bosque Avenue house, Gerald admitted he had 3 marijuana plants there and 27 plants at Glenn Road.

The agents then went to the Glenn Road property. There, they saw

what they referred to as a "sophisticated grow." There were 41 heavily-budded marijuana plants with drip irrigation. They estimated the total yield of dried bud from the 44 plants found at the Glenn Road and Bosque Avenue properties was 70,796 grams or roughly 156 pounds. It appeared the marijuana was in the process of being harvested. In Tehama County, outdoor marijuana usually is planted in spring or early summer and harvested once, in late summer or early fall.

The agents searched the mobile home on the Glenn Road property. Inside was "marijuana in various stages of being processed," "plastic packaging material," scissors and garden clippers both with the resin of marijuana plants, a marijuana pipe, and a lighter. The total weight of the marijuana bud in the mobile home was 615.3 grams (21.70 ounces). The total weight of the marijuana shake in the mobile home was 426.4 grams (15.04 ounces). Most of the marijuana bud and shake was found loose in the mobile home.

The agents searched Dawn's SUV and Youngren's pickup truck, both of which were on the Glenn Road property. Inside Dawn's SUV was a pipe and a small bag of marijuana shake weighing 14.5 grams (0.51 ounces). Agents did not report finding marijuana, drug paraphernalia, or packaging material in Youngren's pickup truck.

Dawn and Youngren were at the Glenn Road property and spoke to the agents. According to Investigator Clay, Dawn said she smoked four joints a day and one or two bowls in the evening. When Clay asked Dawn whether the marijuana plants were for personal use, Clay gave two different responses during his testimony. On direct examination, he testified that Dawn's response was, "'Honestly, no, it is more.'" According to Clay, she also noted she was in debt and needed to pay off credit cards, and she smoked marijuana with friends when they came over, some of whom had "legal medical recommendations" and others who did not. On recross-examination, Clay testified that Dawn told him the marijuana was for her personal use.

According to Clay, Youngren said he was a medical marijuana patient and helped water and harvest the marijuana at the Glenn Road property. Clay found no evidence connecting Youngren with the marijuana found inside the Bosque Avenue house or Glenn Road trailer. The tent at Woodson Bridge in which Youngren lived had "a small amount of marijuana" inside.

In Clay's expert opinion, the marijuana in this case was possessed for both sale and personal use. He based his opinion regarding personal use on defendants' statements and the "personal use items that [he] saw." He based his opinion regarding sales on what he

believed was "way more [marijuana] than they would consume themselves." He thought the marijuana was going to be sold "on a larger level" based on the large plastic bags he found that could hold "probably half pounds or larger." He noted the absence of pay-owe sheets, "quantities of cash," firearms, sandwich bags typically used in packaging marijuana, foot traffic, or phone calls at either location. However, he would "[n]ot necessarily" expect to see traffic coming and going from the Glenn Road property and "a lot of cash lying around" because the marijuana crop was still in the ground.

B

The Defense

Defendants presented evidence the marijuana at the Bosque Avenue house and the Glenn Road property was being grown by patients or caregivers for medical purposes pursuant to doctors' recommendations. Specifically, the Glenn Road property housed a collective garden planted and tended by five individuals with medical marijuana recommendations -- Gerald, Dawn, Youngren, Fredrick Gillespie, and Dawn's sister Robyn Ballard. Each expected to receive a year's supply when the garden was harvested. Gerald was also growing marijuana as the caregiver for one person, Lloyd Parmenter, who had a medical marijuana recommendation and himself participated in tending the Glenn Road garden.

1. *The Medical Marijuana Recommendations*

The Malleys visited the office of Dr. Phillip Denney in May 2006. According to Dr. Denney, Gerald and Dawn had "a serious medical condition" for which he issued them medical marijuana recommendations for one ounce of dried marijuana bud per patient per week.

One month prior, Ballard visited Dr. Denney. According to Dr. Denney, Ballard had "a serious medical condition," for which he issued her a medical marijuana recommendation for "about a half an ounce per week."

Youngren visited the office of Dr. William Toy in June 2006, suffering from sciatica, a "blown" disk, and a shoulder injury. According to Dr. Toy, he issued Youngren a three-month recommendation for medical marijuana. After receiving documentation from Enloe Hospital regarding Youngren's shoulder injury, Dr. Toy issued Youngren a one-year medical marijuana recommendation for one and one-half ounces per week. Clay found Youngren's three-month recommendation at the Bosque Avenue house and his one-year recommendation at the Glenn Road property.

About the same time as Youngren's visit, Gillespie visited Dr. Toy. Based on his examination of Gillespie, Dr. Toy issued him an initial three-month recommendation for medical marijuana on June 3, 2006, for one and one-quarter ounces per week. Dr. Toy issued Gillespie a one-year recommendation also dated June 3, when he received documentation of Gillespie's medical condition.

Parmenter visited Dr. Basil Hamblin in April 2006. According to Hamblin, Parmenter has "chronic medical conditions" for which Hamblin recommended marijuana and signed the paperwork for Parmenter's application for a state-approved medical marijuana card. He did not provide a recommended dosage of marijuana, as he did not "discuss amounts when patients come to the clinic."

2. *The Glenn Road Garden*

In June 2006, Gerald, Dawn, Youngren, Gillespie, and Ballard planted the Glenn Road garden. All of them, and to a lesser extent Parmenter, tended the garden. A month or two later, Gerald registered the garden and the medical marijuana recommendations belonging to him, Dawn, Youngren, Ballard, and Parmenter with the Tehama County Sheriff's Department. He did not take Gillespie's medical marijuana recommendation to the sheriff's department because Gillespie asked him not to. Detective Dave Hencratt of the Tehama County Sheriff's Department confirmed that the garden's registration and the medical marijuana documentation were on file with the sheriff's department.

Gerald was a primary caregiver for Parmenter and grew medical marijuana for him. Parmenter lives in Marin County and is disabled because of a fall that broke his leg and shattered his ankle. In 2006, Parmenter registered Gerald as his "official caretaker," and Gerald provided Parmenter with marijuana in that capacity. Parmenter also participated in tending the garden. Parmenter expected to receive from the harvest "a quarter ounce [of marijuana] a day to make [it] through the year."

Jason Browne is an expert witness on marijuana use and cultivation. Outdoor marijuana gardens are harvested once a year, and it is not unusual for a person who grows marijuana outdoors to keep a reserve on hand until the next harvest. Browne described the Glenn Road garden as "an average outdoor garden." Browne uses the canopy approach to accurately determine the yield of the marijuana plants prior to their harvest.[4] Based on that approach, Browne estimated the yield at the Glenn Road grow to be between 20.79 to 24.75 pounds. Browne also used an alternative method to calculate the yield of the marijuana plants, which was based on the weight of the plants agents

took to the landfill. Using that method, he estimated the yield to be 23.26 pounds.[5]

C

The Jury Instructions, The Prosecutor's Closing Argument,

And The Jury's Question Regarding Those Instructions

The court instructed the jury on defendants' medical marijuana defense in part as follows:

"The possession, cultivation or possession for sale to qualified patients of marijuana is not unlawful when the acts of the qualified patient and/or primary caregiver are authorized by law for compassionate use. The possession, cultivation or possession for sale of marijuana is lawful when, one, where its medical use is deemed appropriate and has been recommended or approved orally or in writing by a physician; number two, the physician has determined that the person's health would benefit from the use of marijuana; number three, the marijuana possessed, cultivated or possessed for sale was for the personal medical use of the qualified patient; and four, the quantity of marijuana possessed, cultivated or possessed for sale and in the form in which it was possessed was reasonably related to the patient's then current medical needs, not exceeding eight ounces of dried marijuana per qualified patient, six mature or 12 immature marijuana plants per qualified patient, unless the qualified patient or primary caregiver has a doctor's recommendation that this quantity does not meet the qualified patient's medical needs, in which case the qualified patient or primary caregiver may possess an amount of marijuana consistent with the patient's needs.

"[¶] . . . [¶]

"To establish the defense of compassionate use, the burden is upon the defendants to raise a reasonable doubt as to the guilt of the unlawful possession, cultivation or possession for sale of marijuana."

Immediately before these instructions were given, the prosecutor made her closing argument. In it, she argued that the two charges here -- possession of marijuana for sale and cultivation of marijuana -- were subject to the medical marijuana defense, which was "really what the case is all about." She stressed the numerical limits of 12 immature or 6 mature plants and 8 ounces of dried marijuana. She also stressed "[t]he large quantity of marijuana possessed and being grown [wa]s the most telling" fact to show it was "possessed for sale" and

"[t]he amount of marijuana alone wa[s] enough to show that it was possessed for sale."

In rebuttal closing argument, the prosecutor read the numerical limits in the Medical Marijuana Program Act "to be sure you have exactly what it says in your head before you go back [t]o deliberate."

On July 31, 2007, at 2:19 p.m., the court read the instructions and the jury retired to deliberate. At 4:15 p.m., the jury submitted the following question:

"How much medical marijuana can you have in your possession? [¶] i.e. can you have 8 oz in possession + Are you allowed to keep your years [*sic*] supply & where? [¶] Are you allowed a years [*sic*] supply + 6 mature plants - @ one time -"

At 4:35 p.m., the court responded as follows: "I cannot add to the jury instructions." At 5:00 p.m., the jury returned the guilty verdicts.

DISCUSSION

I

The Jury Instructions Regarding The Numerical Limits On The Compassionate Use Act

Defendants make a multi-pronged attack on the convictions in this case. Many of their arguments are based on the numerical limits in the Medical Marijuana Program Act and the instructions in this case incorporating those numerical limits. The People concede the court's instruction and prosecutor's argument were "improper because they unconstitutionally applied the [Medical Marijuana Program Act's] limits to an in-court medical use defense." We accept the People's concession.[6] As we will explain, the erroneous instructions on the medical marijuana defense prejudiced defendants both as to the convictions for possession for sale and as to the convictions for cultivation.

The court here misinstructed on the medical marijuana defense because it limited the amount that defendants could possess to a maximum of "eight ounces of dried marijuana per qualified patient, six mature or 12 immature marijuana plants per qualified patient, unless the qualified patient or primary caregiver has a doctor's recommendation that this quantity does not meet the qualified

patient's medical needs, in which case the qualified patient or primary caregiver may possess an amount of marijuana consistent with the patient's needs." These limits are nowhere in the Compassionate Use Act. (§ 11362.5, subd. (d).)

A court's misinstruction on one element of a defense is akin to a court's misinstruction on one element of an offense. Where the court misinstructs on one element of an offense, the beyond-a-reasonable-doubt harmless error standard of *Chapman v. California* (1967) 386 U.S. 18, 23-24 [17 L.Ed.2d 705, 709-710] applies. (*People v. Flood* (1998) 18 Cal.4th 470, 502-503.) Under this standard, the error is reversible unless we can say "beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained." (*Chapman*, at p. 24 [17 L.Ed.2d at p. 710].)

The People argue that as to Gerald and Dawn, "[t]he issue of prejudice is simple . . . because they were convicted of . . . possession of marijuana for sale" and therefore the jury found under other "properly given instructions" they had the specific intent to sell and "clearly rejected their claim that they cultivated and possessed the marijuana solely for the medical needs of themselves and the other qualified patients involved in the collective grow."

The problem with this argument is that the Compassionate Use Act is *not* a defense to possession of marijuana for sale yet the jury was instructed incorrectly that it was. (*People ex rel. Lungren v. Peron* (1997) 59 Cal.App.4th 1383, 1393-1395.) In addition to arguing that it was a defense to this charge, the prosecutor further argued, "[t]he amount alone is enough to show that it was possessed for sale." On this record, we cannot say the jury found Gerald and Dawn guilty of possessing marijuana for sale based on a properly-given instruction. We therefore turn to the evidence supporting a medical marijuana defense without regard to the use limits in the Medical Marijuana Program Act as to all defendants and as to all their convictions.

Six people were implicated in the collective grow and had medical marijuana recommendations from their doctors. Gerald and Dawn had recommendations for one ounce each per week from Dr. Denney. Youngren had a recommendation for one and one-half ounces per week from Dr. Toy. Ballard had a recommendation for one-half ounce per week from Dr. Denney. Gillespie had a recommendation for one and one-quarter ounces per week from Dr. Toy. And Parmenter had a recommendation for an unspecified amount from Dr. Hamblin, and Parmenter testified he ingested a quarter ounce per day for his medical condition.

Providing a one year's supply to each person with a medical marijuana recommendation implicated in the grow amounts to 52 ounces

for Gerald, 52 ounces for Dawn, 78 ounces for Youngren, 26 ounces for Ballard, 65 ounces for Gillespie, and 91.25 ounces for Parmenter. Adding these yearly amounts together equals 364.25 ounces. At 16 ounces a pound, the yearly supply of medical marijuana for these patients was 22.77 pounds.

According to defense expert witness Jason Browne, the estimated yield of the Glenn Road garden was between 20.79 pounds and 24.75 pounds and the estimated yield of the plants law enforcement agents took to the landfill was 23.26 pounds. Browne further testified that outdoor gardens are harvested once a year and it was not unusual for people growing marijuana outdoors to keep a reserve on hand until the next harvest. The Glenn Road garden, which was outdoors, was near harvest. Therefore, under this scenario, the amount of marijuana from the plants was not out of proportion to the reasonable medical needs contained in the patients' recommendations.

This leaves the marijuana found at the house on Bosque Avenue and in the trailer on the Glenn Road property. This totaled 87.9 ounces of marijuana bud and 47.9 ounces of marijuana shake. There were indicia that the marijuana was already being harvested and was currently being ingested by qualified patients, including Gerald and Dawn. Furthermore, although there were some "plastic packaging material" and two scales, there were no other accompanying indicia of sales, such as pay-owe sheets, cash, firearms, sandwich bags, foot traffic, or phone calls.

The jury was having trouble with how the evidence of the marijuana and the marijuana weights related to the medical marijuana defense here, as the following question indicated: "How much medical marijuana can you have in your possession? [¶] i.e. can you have 8 oz in possession + Are you allowed to keep your years [*sic*] supply & where? [¶] Are you allowed a years [*sic*] supply + 6 mature plants - @ one time -"

Of course, it was a factual question what amount of marijuana meets a patient's current medical needs (*People v. Windus* (2008) 165 Cal.App.4th 634, 643), and that could not be answered simply by reference to the numerical limits in the Medical Marijuana Program Act. The court responded by telling the jury that it could not add to the jury instructions (and those jury instructions included the incorrect numerical limitation on the Compassionate Use Act). Within 25 minutes of the court's response, the jury returned the guilty verdicts.

The jury's verdict was not surprising given that the prosecutor's closing argument stated that the case was "all about" the medical

marijuana defense, focused on the numerical limits found in the Medical Marijuana Program Act, and included a rereading of the impermissible weight limits at the outset of the rebuttal closing argument.

In light of these facts, we cannot say the error was harmless beyond a reasonable doubt as to all of defendants' convictions. This conclusion leaves open the possibility of retrial unless there was insufficient evidence to support the convictions. Only Dawn makes that claim on appeal and we turn there next.

II

There Was Sufficient Evidence To Support Dawn's Convictions

Dawn contends there was insufficient evidence to support her convictions for possession of marijuana for sale and marijuana cultivation. Her argument focuses on what she contends was the lack of evidence she intended to sell marijuana. Taking the evidence in the light most favorable to the prosecution, as we are required to do in a challenge to the sufficiency of evidence (*Jackson v. Virginia* (1979) 443 U.S. 307, 319 [61 L.Ed.2d 560, 573]), we reject Dawn's claim.

When Investigator Clay asked Dawn whether the marijuana plants were for personal use, she responded, "'Honestly, no, it is more,'" noting she was in debt and needed to pay off credit cards. She also admitted she smoked marijuana with friends when they came over and some of them had "legal medical recommendations" and others did not. In addition to this evidence, there was some "plastic packaging material" found at the mobile home on the Glenn Road property and, if the jury accepted the testimony of law enforcement agents, the estimated total yield of the dried bud product from the Glenn Road and Bosque Road properties was 70,796 grams or roughly 156 pounds, which greatly exceeded the approximately 22.7 pounds needed yearly by the qualified patients implicated in the grow. From this evidence, a jury could have found Dawn cultivated the marijuana for reasons other than medicinal use and also possessed it with the intent to sell. Accordingly, her challenge to the sufficiency of evidence fails.

DISPOSITION

The judgments are reversed.

ROBIE, J.

I concur:

BLEASE, Acting P. J.

HULL, J.

I concur. I write separately only to note that, to the extent that our opinion here suggests that the Medical Marijuana Program (MMP) (Health and Saf. Code, § 11362.7 et seq.; unspecified section references that follow are to this code) is an unconstitutional amendment of the Compassionate Use Act of 1996 (CUA) (Health and Saf. Code, § 11362.5), I respectfully disagree with that suggestion. In my view, the MMP is stand-alone legislation that has no bearing on the CUA. (See *County of San Diego v. San Diego NORML* (2008) 165 Cal.App.4th 798, 830-831.) The MMP only establishes that, "[s]ubject to the requirements of [the MMP]" (Health and Saf. Code, § 11362.765) qualified users and others are not subject to criminal liability under the Health and Safety Code sections that outlaw the possession of marijuana (§ 11357), the cultivation of marijuana (§ 11358), the possession for sale of marijuana (§ 11359), the transportation, distribution or importation of marijuana (§ 11360), the maintenance of a location for the purpose of unlawfully selling, giving away or using a controlled substance (§ 11366), the management of a location for the purpose of unlawfully manufacturing, storing, or distributing a controlled substance (§ 11366.5), or that declare locations that house such activities a nuisance (§ 11570).

The confusion in this case, and in others, arises from the wording of section **11362.77**, subdivision (a) which says: "A qualified patient or primary caregiver may possess no more than eight ounces of dried marijuana per qualified patient. In addition, a qualified patient or primary caregiver may also maintain no more than six mature or 12 immature marijuana plants per qualified patient." Although no doubt drafted without a full appreciation of the confusion it would engender, subdivision (a) quoted above must be read in context with

the provisions of the entire act.

The statutory language of the MMP is something of a mishmash, but it seems to me the MMP can be read to provide that the protections of section 11362.765 and other sections of the MMP are available only to qualified patients, their caregivers or persons holding an identification card issued pursuant to the MMP (who must themselves be qualified patients (§ 11362.71, subd. (a)(1)) who possess no more than eight ounces of dried marijuana or six mature or 12 immature plants. None of these provisions has a bearing on the CUA. So read, section **11362.77** is not unconstitutional.

The error here, whether of constitutional proportion or not, occurred when the trial court and the prosecutor applied the quantity provisions of section **11362.77,** subdivision (a) to the CUA defense. That superimposition of the MMP quantity amounts requires that defendant's conviction be reversed.

HULL, J.

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

[2] At trial, Colver testified he took the marijuana out of a drawer at the Bosque Avenue house without permission and smoked it outside.

[3] A "bowl is the part of the pipe where the marijuana is placed before it is placed on fire."

[4] The canopy approach involves determining yield based on the square footage of the plants' canopies. For each square foot of canopy, the yield of marijuana is approximately 21 grams.

[5] In reaching this conclusion, Brown started with the 340 pounds of marijuana plants delivered to the landfill. He then deducted five percent of the total poundage for root weight. Next, he deducted 14.4 percent for the "wet weight" of the plants. Finally, he deducted the weight of the leaves from the buds.

[6] In *People v. Phomphakdy* (2008) 165 Cal.App.4th 857, review granted October 28, 2008, S166565, this court held that the Medical Marijuana Program Act unconstitutionally amends the Compassionate Use Act by

quantifying the amount of marijuana a person may possess. The California Supreme Court is currently reviewing the issue in that case and in another (*People v. Kelly* (2008) 163 Cal.App.4th 124, review granted Aug. 13, 2008, S164830).