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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA  
FIRST APPELLATE DISTRICT  
DIVISION THREE

THE PEOPLE,

Plaintiff and Respondent,

v.

JENNIFER LYNN CURTIS,

Defendant and Appellant.

A138466

(Contra Costa County  
Super. Ct. No. 51120781)

A jury convicted Jennifer Lynn Curtis of possessing marijuana for sale (Health & Saf. Code, § 11359),<sup>1</sup> cultivating marijuana (§ 11358), and maintaining a place for the purpose of selling, using or giving away marijuana (§ 11366). The jury rejected defendant's claim that she believed the marijuana was legally cultivated for medical use. The court suspended imposition of sentence, placed defendant on probation, and imposed various fees and fines. Defendant appeals her conviction on several grounds. She claims: (1) the trial court unduly limited the scope of her marijuana expert's testimony; (2) the marijuana expert should have been permitted to rely upon, and relate as a basis for his opinion, an alleged accomplice's hearsay statement; (3) the court erred in failing to instruct the jury on the medical marijuana defense in connection with the charge of possession for sale; and (4) the court imposed an excessive laboratory analysis fee. We shall reduce the amount of the disputed fee and otherwise affirm the judgment.

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<sup>1</sup> All further statutory references are to the Health and Safety Code, except as indicated.

## Facts

In September 2009, defendant's boyfriend, Kevin Ackerman, was incarcerated on federal criminal charges. Ackerman telephoned defendant from jail on multiple occasions. At the beginning of each call was a warning to both parties that the telephone calls "may be recorded or monitored." The calls were recorded and Narcotics Investigator Joshua Vincelet listened to them. Vincelet knew Ackerman as a former confidential informant in the officer's narcotic investigations. The conversations led the officer to suspect marijuana was being grown at Ackerman's Antioch house.

### Jail conversations

In a late September 2009 conversation, defendant said she was trying to gather as much money as she could to post Ackerman's bail but complained "I have barely enough money coming from the Antioch house to pay for the Antioch house." Defendant said there was "a little less than two" and Ackerman replied "that's bullshit. Those motherfuckers are . . . clipping over there. I know they are." Defendant responded, "I know. Well, there's nothing you can do about it, so I'm working on it." Defendant and Ackerman had an infant son and defendant mentioned "Jack" babysitting the boy at "the house." Several days later, Ackerman told defendant "to get that Antioch house's PG&E out of your . . . name" and "[g]et Jack to put that in his name" "[j]ust for us to be cool, you know?" Vincelet testified that marijuana cultivation uses a lot of electricity so marijuana cultivators commonly bypass PG&E meters or put the utility account in another's name to avoid police detection. The officer checked with PG&E and found defendant was the account holder on the Antioch house.

In further conversations, defendant told Ackerman "the boys are fucking wanting to work, but I don't know what you want me to do about that, you know?" Ackerman said "Jack knows what to do; just have him do what he . . . does." Defendant said "Well, we got things going. It's just fucking I'm not real happy it's super, super, super light." Days later, in early October 2009, Ackerman told defendant "Jack knows what to do. He just – you just got to push him" and defendant replied, "I will. I'll keep on him." Ackerman said "you're like me right now. You know? You – whatever he gets, that's

yours. You know what I'm saying? [¶] . . . [¶] He knows how it works . . . . [T]hat rent . . . gets paid and then . . . we get paid." Defendant replied, "[H]e's told me I could have all of it, so, I mean – I'm not worried about it."

In late October, Ackerman asked defendant "how's the thing over at Jack's looking?" and she replied "It looks good. It's almost done." In mid-November 2009, Ackerman and defendant were discussing money for attorney fees and Ackerman said "if Jack got his head out of his ass and got that fucking thing going good, we'd have some fucking cash flow coming in." A few days later, Ackerman said Jack needs to "get that going good" and defendant replied "that's going to happen eventually, honey, but it's not going to be until after January." The next day, defendant told Ackerman "I'm waiting on the other part. The other part will be like, 2- or 3,000 . . . . Hopefully, that comes soon. And then I can put that towards the attorney." In early December 2009, defendant told Ackerman that Jack was in the hospital with edema. Ackerman said, "I don't like the house being empty." Defendant said Jack's girlfriend Maria was staying at the house but the girlfriend did not "know what's going on with the house" so "[t]here's nobody babysitting the house" but "I'm sure it's self-sufficient right now."

#### Police surveillance

Vincelet went to the Antioch house to investigate. The officer observed condensation inside the windows of Ackerman's house but no condensation on the windows of neighboring houses. He testified that window condensation is a sign of marijuana cultivation because the plants produce humidity. Vincelet went through trash placed at the curb in front of the house and found marijuana remnants, empty bottles of liquid fertilizer, and packaging for a large quantity of hydroponic grow blocks commonly used in marijuana cultivation. The trash also contained mail addressed to Jack Foster.

#### House search

The police obtained a search warrant and, on January 5, 2010, searched the Antioch house. Officer Vincelet testified that the house smelled of marijuana. Jack Foster and Brian Murphy were found in the house coming into the kitchen from the attached garage and Maria Barzelay was located in the living room. Murphy's cell phone had a

text message from defendant asking, “Did you get that shit?” When confronted with the message, Murphy “became very nervous” and sweated “profusely.”

The police searched the garage and found 201 marijuana plants. The garage was used exclusively for marijuana cultivation: the door to the driveway was walled shut with steel girders and sheetrock and the interior space was fashioned with walled rooms and equipped with high-intensity grow lamps, water pumps, fans, and ventilation ducts. The marijuana plants in the garage were of three types. There were 118 small four-inch plants, 75 plants about one-foot tall almost ready to harvest, and eight “mother plants” used to clone new plants.

The house had three bedrooms. The master bedroom contained items belonging to Foster and Barzelay, a second bedroom had items belonging to Ackerman and showed signs of prior marijuana cultivation, including a boarded window, and the third bedroom had a bed, crib and children’s toys.

#### Defendant’s police statement

Defendant arrived at the house when the search was underway. Officer Vincelet told defendant he had a search warrant and discovered marijuana cultivation at the house. Initially, defendant denied knowing about the cultivation. She said her boyfriend owned the house and she was helping him collect rent from his tenant, Foster. Defendant later admitted knowing about the cultivation after Vincelet told her he had recorded jail conversations with her talking about it. Defendant admitted sometimes staying overnight at the house with her son and being inside the garage where marijuana was cultivated. Defendant said she thought “it was a legal marijuana grow.”

#### Police testimony

Officer Vincelet qualified as an expert in marijuana cultivation and possession for sale. He opined that the marijuana at the Antioch house was being cultivated for sale, not personal use. In support of his opinion, the officer noted that it was a rotational cultivation of a large number of marijuana plants that would produce about eight pounds of marijuana every six to eight weeks. With an eight-week cycle, the cultivation would be ready to harvest six times a year and produce about 48 pounds of marijuana annually.

Vincelet testified that a daily user of marijuana consumes no more than three pounds annually. The officer further testified that a grower receives about \$2,000 for a pound of marijuana sold to a storefront dispensary and \$3,500 if sold “on the street.” Vincelet said defendant’s telephone conversations with Ackerman also supported his opinion that the marijuana was cultivated for sale. The officer noted “the urgency you hear in the phone calls about the pressure to make money, the pressure to have Jack get on his job to get the cultivation done, [and] the fact that at no point in the jail phone calls do they mention . . . that this is some type of a medical marijuana cultivation.”

Defense expert witness

Christopher Conrad testified as a defense expert on marijuana cultivation and possession for sale. Conrad is an author, artist and former marijuana museum curator. Conrad opined the cultivation was consistent with personal use. Conrad testified that the plants would have produced, at most, six pounds when harvested, not eight pounds as Vincelet testified. Conrad also estimated three harvests a year, not six, although he conceded that six was possible. Three harvests at the yield proposed by the defense expert would produce 18 pounds a year, which he claimed was consistent with personal use. The expert testified that a heavy user may smoke six to 12 pounds of marijuana a year, and some smoke more. The expert was asked on cross-examination if there was any quantity of marijuana he considers inconsistent with personal use and he said he was “not sure.” He said “probably” 100 pounds because he had “a hard time figuring how people would use that” much but 50 pounds was consistent with personal use because that amount could be smoked, eaten and applied topically by one person during a year.

Conrad further testified that his opinion was “strengthened” by evidence that occupants of the Antioch house had past or present physician-approval for medical marijuana use. Police testimony established that their search of the house found a medical marijuana dispensary card for Jack Foster with a 2007 expiration date. The police also found a current medical marijuana recommendation for Jerry Foster but no other indicia of residency.

### Defendant's trial testimony

Defendant testified that Ackerman owned two houses, the Antioch house which he rented and another house in Brentwood. Defendant said she lived in the Brentwood house. The Antioch house utilities were in her name, she said, to save Ackerman from having to post a large deposit because he already had utilities in his name. The Antioch house was rented to Foster, who was “very good friends” with Ackerman. Defendant testified Foster had been living at the house without a lease when she assumed management of the property in September 2009 after Ackerman went to jail. She said she arranged for Foster to pay \$2,000 monthly rent, a security deposit of \$3,500, and to reimburse the cost of utilities. Defendant testified that she received \$8,750 from Foster between September and November in partial payment of his tenant obligations.

Defendant testified Foster was a friend and she visited the Antioch house every couple weeks to see him and his brother Jerry who also lived in the house. In September 2009, she saw posted on the refrigerator medical marijuana cards in the Foster brothers' names. She asked about the cards and was told marijuana was being grown in the garage. Defendant denied seeing the cultivation or going into the garage. She testified, “I believed they were growing medical marijuana for medicinal purposes” to treat chronic pain.

Defendant offered explanations for her conversations with Ackerman. When she told Ackerman “I barely have enough money coming from the Antioch house to pay for the Antioch house,” she was referring to inadequate rental payments. Defendant was asked to explain her exchange with Ackerman when he complained “[t]hose motherfuckers are . . . clipping over there. I know they are” and she replied, “I know. Well, there's nothing you can do about it, so I'm working on it.” Defendant testified she was “working” on her knowledge of medical marijuana laws because “I was under the knowledge or impression that my tenants were growing medical marijuana for themselves and was told from my tenant anything they didn't use, they were going to sell to a collective or cooperative, and they would be reimbursed for their expenses which in turn would have reimbursed the expenses for the house itself.” In conversations where

Ackerman told defendant “Jack knows what to do; just have him do what he does” and “Jack knows what to do. He just – you just got to push him,” defendant said Ackerman was referring to Jack Foster wanting to buy Ackerman’s truck and being slow to obtain financing.

On cross-examination, defendant was confronted with her prior testimony in a family law matter in which she said she had *not* received rent from the people in the Antioch house. Defendant replied that she “couldn’t tell you right off the top of my head what I was thinking” during her earlier testimony but “possibly” meant that very little was paid against what was owed. Defendant testified she believed her tenants were growing marijuana for personal medical use and giving any excess to a club. She admitted knowing Foster was receiving money from a marijuana club but said the money was to reimburse expenses and thus was not a sale but “some sort of donation process.”

#### Theories of the case and jury instructions

The prosecution maintained that defendant aided, abetted and conspired in the illegal cultivation of marijuana for sale. Defendant claimed she believed Jack Foster and Jerry Foster were medical marijuana patients who were legally cultivating marijuana for medical use. The court gave instructions on the medical marijuana defense. The jury was told: “If either Jack Foster or Jerry Foster was a qualified medical marijuana patient and the marijuana was possessed for medical use, then the defendant cannot be found guilty” of illegal cultivation. (CALCRIM No. 2370.) A qualified medical marijuana patient was defined as “a person whose physician has recommended the use of marijuana for medical purposes.” The jury was also instructed on mistake of fact: Defendant “did not have the specific intent or mental state” required for illegal cultivation of marijuana if she “reasonably believed” that Jack Foster or Jerry Foster was “a qualified medical marijuana patient” who was growing marijuana “exclusively for medical purposes.” (CALCRIM No. 3406.)

#### Verdict and sentencing

The jury convicted defendant of possessing marijuana for sale (§ 11359), cultivating marijuana (§ 11358), and maintaining a place for the purpose of selling, using

or giving away marijuana (§ 11366).<sup>2</sup> In a pretrial proceeding, defendant pled no contest to possession of methamphetamine discovered during an unrelated traffic stop in June 2011. (§ 11377, subd. (a).) The court suspended imposition of sentence, placed defendant on four years' formal probation, and imposed various fees and fines.

Jack Foster was separately tried and convicted. We affirmed his conviction in a separate appeal. (*People v. Foster* (Feb. 24, 2014, A136138) [nonpub. opn.].)

### **Discussion**

1. The trial court did not err in limiting the scope of the marijuana expert's testimony.

Defendant claims she was entitled to a mistrial because the trial court interfered with her right to present a defense by failing to qualify defense expert Conrad as an expert on medical marijuana. We conclude the witness was properly precluded from offering legal conclusions but otherwise permitted to address issues concerning medicinal use of marijuana relevant to the defense.

As noted earlier, Police Officer Vincelet testified for the prosecution as an expert in marijuana cultivation and possession for sale. Conrad testified for the defense in the same subject areas. The defense also offered Conrad as an expert in the area of medical marijuana but the prosecution objected on relevance grounds. The court said, "I agree I don't find that to be relevant" and denied defense counsel's request to qualify Conrad as an expert on medical marijuana. The nature of the expert's proposed testimony on the subject of medical marijuana is not clear because defense counsel failed to make an offer of proof to the court. It is clear, however, that the expert was permitted to testify on many matters concerning medical use of marijuana.

Conrad testified that California law recognizes "a legal defense for patients or a caregiver to possess or cultivate marijuana as long as it's for medical uses with a physician's approval." Conrad proceeded to explain California's medical marijuana laws, including legal recognition of collectives, a "statewide identification card program," "safe

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<sup>2</sup> The jury acquitted defendant of child endangerment. (Pen. Code, § 273a, subd. (a).) Evidence presented on that count is irrelevant to the appeal and not discussed in this opinion.

harbor” provisions immunizing from criminal prosecution the possession of specified quantities of marijuana, and the process for obtaining a physician’s approval to use marijuana medicinally. Conrad also testified that his opinion the cultivation was for personal use was “strengthened” by evidence that occupants of the Antioch house had past or present physician-approval for medical marijuana use.

Questions to which objections were made and sustained related to legal conclusions.<sup>3</sup> Thus, the court sustained objections to the following questions calling for legal conclusions, “In your opinion, was the garden being cultivated by qualified patients?”; “What is the relevance in your expert opinion of a marijuana card?”; and “Does a marijuana card determine a patient’s status?” The court properly precluded this testimony. “ ‘The manner in which the law should apply to particular facts is a legal question and is not subject to expert opinion.’ ” (*Downer v. Bramet* (1984) 152 Cal.App.3d 837, 841.) Using expert witnesses “to give opinions as to the application of the law to particular facts usurps the duty of the trial court to instruct the jury on the law as applicable to the facts” (*ibid*) and the duty of the jury to apply the law to the facts. As the prosecutor argued to the court when responding to defendant’s motion for mistrial premised on wrongful exclusion of expert testimony, it is not “appropriate . . . to ask a witness to explain the law to the jury. That’s not what an expert witness is designed for.”

Even if, as defendant asserts, the trial court erred in limiting the scope of Conrad’s testimony, the error was not prejudicial. The court did not permit Conrad to testify that the amount of marijuana under cultivation was consistent with “medical use” but did permit him to testify that this amount was consistent with personal use and defendant’s medical marijuana defense was fully presented to the jury. Jack and Jerry Foster’s medical marijuana cards were admitted into evidence, defendant asserted her belief that the marijuana cultivation was legal, Conrad testified that qualified patients may legally possess and cultivate marijuana, and the jury was instructed that defendant “did not have the specific intent or mental state” required for illegal cultivation of marijuana if she

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<sup>3</sup> Objections were also sustained on general grounds such as vagueness and hearsay which rulings are not at issue on appeal.

“reasonably believed” that Jack or Jerry Foster was “a qualified medical marijuana patient” who was growing marijuana “exclusively for medical purposes.” Defendant’s motion for mistrial was rightly denied and there is no basis for reversal.

2. The trial court did not err in precluding the marijuana expert from introducing an alleged accomplice’s hearsay statement.

Defendant contends the trial court erred in precluding Conrad from relating Jack Foster’s statement to the police that he was growing marijuana for a marijuana club. Defendant maintains the statement supports a claim that the marijuana was legally cultivated for a collective and should have been introduced as a basis for the expert’s opinion that the marijuana was not possessed for sale.

There are several flaws in defendant’s argument. First, an expert may rely on inadmissible hearsay in forming an opinion only if the matter relied upon “is of a type that reasonably may be relied upon by an expert in forming an opinion upon the subject to which his testimony relates.” (Evid. Code, § 801, subd. (b).) The trial court reasonably questioned whether “one could conclude that a criminal defendant . . . who’s being interviewed by the investigating officers is going to give reliable and trustworthy statements” that may be relied upon by an expert witness in forming an opinion. Second, even if Foster’s statement is reliable, “an expert’s reliance on hearsay does not automatically make the hearsay evidence itself admissible.” (*People v. Yuksel* (2012) 207 Cal.App.4th 850, 856.) “ ‘Evidence Code section 352 authorizes the court to exclude from an expert’s testimony any hearsay matter whose irrelevance, unreliability, or potential for prejudice outweighs its proper probative value.’ ” (*Id.* at p. 857.) Third, Foster’s statement was of doubtful value to the defense. His police statement did not suggest participation in a medical marijuana collective but sale of marijuana for profit. Foster told the police he received about \$7,000 from the club, which he gave to defendant. Introduction of Foster’s statement would not have aided defendant.

3. The trial court did not err when instructing the jury on the medical marijuana defense.

Defendant claims the court erred by failing to instruct the jury on the medical marijuana defense in connection with the charge of possession for sale. The court

instructed the jury on the defense in connection with the other drug charges: “If either Jack Foster or Jerry Foster was a qualified medical marijuana patient and the marijuana was possessed for medical use, then the defendant cannot be found guilty” of unlawfully cultivating marijuana, illegally possessing marijuana, or illegally maintaining a place for the sale, use or giving away of marijuana. The court did not instruct that this qualification applied to the charge of possession for sale because an element of that offense is possession with intent to sell, which is logically inconsistent with possession for medical use. The court explained to counsel that the instruction on possession for sale effectively incorporated a medical marijuana defense without need for revision because the jurors “can’t possibly find” defendant guilty of possession for sale if they “are satisfied that possession was for medical use.”

Defendant maintains that further instruction on the possession for sale charge was needed because she testified that Foster’s distribution to a marijuana club was not a sale but “some sort of donation process” in which money was received from a marijuana collective to reimburse expenses. Defense counsel asked the trial court to “provide just a brief instruction regarding a collective and members’ ability to donate marijuana and receive money in regards to that marijuana.” The court denied defense counsel’s request to revise the instruction on possession for sale but agreed to add a separate instruction on collectives. The court provided a “special instruction regarding marijuana collective or cooperative”: “Under California law, you are allowed to associate collectively or cooperatively to cultivate or transport marijuana for medical purposes. No individual or group may cultivate or distribute marijuana for profit.”

Defendant’s medical marijuana defense was fully presented for the jury’s consideration in the instructions that were given. The jury was informed that individuals are allowed to associate collectively to cultivate medical marijuana and that possession for sale occurs only with an intent to sell. The jury was thus fully apprised of the distinction between possession for sale and possession for nonprofit distribution to a marijuana collective. No additional instruction was required.

4. Substantial evidence supports defendant's conviction for maintaining a place for the purpose of selling, using or giving away marijuana.

Defendant argues there is insufficient evidence to support her conviction for maintaining a place for sale of a controlled substance because there was no evidence that sales occurred at the Antioch house. (§ 11366.) Defendant misunderstands the scope of section 11366. The statute provides, in relevant part: "Every person who opens or maintains any place for the purpose of unlawfully selling, giving away, or using any controlled substance . . . shall be punished by imprisonment in the county jail for a period of not more than one year or the state prison." "The proscribed 'purpose' is one that contemplates a continuity of such unlawful usage; a single or isolated instance of the forbidden conduct does not suffice." (*People v. Horn* (1960) 187 Cal.App.2d 68, 72; accord *People v. Shoals* (1992) 8 Cal.App.4th 475, 490.) The conduct forbidden by section 11366 is not limited to on-premises sales. The statute "does not require that the place be maintained for the purpose of selling; it can be violated without selling, merely by providing a place for drug abusers to gather and share their experience." (*People v. Green* (1988) 200 Cal.App.3d 538, 544.)

There was substantial evidence the Antioch house was repeatedly used to grow and sell marijuana. The house's attached garage was reconfigured as a marijuana greenhouse in which scores of plants were cultivated on a rotating basis. An upstairs bedroom had been used to grow marijuana and the downstairs living quarters smelled of marijuana. Defendant admitted knowing marijuana was cultivated at the house. Defendant also admitted knowing that marijuana grown at the house was distributed to a marijuana club and there was substantial evidence defendant received money from sales to the club. "[T]he intent of statutes such as section 11366 was to prohibit persons from maintaining a public nuisance, such as a Prohibition-era speakeasy or a modern crack house." (*People v. Franco* (2009) 180 Cal.App.4th 713, 723.) The statute was properly applied here to defendant's maintenance of a house used to cultivate and distribute large quantities of marijuana. Substantial evidence supports the conviction.

5. The laboratory analysis fee imposed at sentencing must be reduced.

Section 11372.5 requires defendants convicted of specified drug offenses to pay a \$50 laboratory analysis fee for each separate offense. The trial court imposed a total fee of \$200, \$50 for each of defendant's four drug offenses. Defendant maintains that the fee should be reduced to \$150 because her section 11366 conviction for maintaining a place for the purpose of selling, using or giving away marijuana is not one of the enumerated offenses in the section 11372.5 fee provision. The Attorney General concedes the point and urges reduction of the total fee to \$150. We shall reduce the fee.

**Disposition**

The laboratory analysis fee imposed under Health and Safety Code section 11372.5 is reduced from \$200 to \$150. In all other respects, the judgment is affirmed.

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Pollak, Acting P.J.

We concur:

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Siggins, J.

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Jenkins, J.