STATE OF MICHIGAN
IN THE ISABELLA COUNTY TRIAL COURT

THE PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff,

Case No. 16-801-FH

v

Hon. Paul H. Chamberlain

STEVEN FISHER,

Defendant.
_____/

Robert A. Holmes, Jr. (P44097)
Attorney for Plaintiff

Michael A. Komorn (P47970)
Attorney for Defendant

OPINION AND ORDER
ON DEFENDANT'S MOTION FOR §8 DEFENSE

I. FACTS

Defendant Steven Fisher is charged with Possession with Intent to Deliver 5 to 45 Kilograms of Marijuana, Possession with Intent to Deliver 20 or more Marijuana Plants, Manufacture and/or Creation of Marijuana Oil, Felony Firearm, and two counts of Maintaining a Drug House. Defendant is registered as a patient under the Michigan Medical Marijuana[1] Act (MMMA). He provided marijuana to his wife Leslie Fisher as a caregiver, but he was not registered as Ms. Fisher's caregiver under the Act. Ms. Fisher is also registered as a patient under the MMMA. Defendant seeks dismissal of the charges against him pursuant to the MMMA's §8 defense.

On January 19, 24, and 25, the court held a §8 hearing. Two witnesses testified for the defense: Leslie Fisher and defendant Steven Fisher. Additionally, the prosecutor called Lieutenant Matthew Rice of the Michigan State Police.

The first witness to testify was Leslie Fisher, defendant's wife. Ms. Fisher testified that she began working at the Soaring Eagle Casino in 1993 as a slot attendant, and as a part of her duties she had to carry bags of coins to the slot machines. As a result, Ms. Fisher testified that

[1] The legislature uses the spelling "marihuana" in the MMMA. However, this court will be using the more common spelling "marijuana" throughout this opinion.

she sustained a back injury when a golf ball sized muscle came out from her right shoulder. After taking some time off work, Ms. Fisher returned to work despite her injury, and she testified that she has had problems with her neck and shoulders ever since. To treat the injury and its resulting pain, Ms. Fisher testified that she did some physical therapy but mostly used massage therapy and over-the-counter pain patches and pain reliever rubs. She testified that she had bad reactions to medications and pills. Ms. Fisher testified that she would use pain reliever rubs at work on breaks and would have to have the rubs with her all the time. Additionally, she testified that a car accident in 2010 or 2011 caused her to develop more back pain.

Ms. Fisher also testified that she had a lot of "pelvic problems" primarily caused by a dermoid cyst on one of her ovaries that resulted in pain. Ms. Fisher eventually had to have an ovary removed. To regulate these issues, Ms. Fisher testified that she was put on the birth control pill; however, she had a bad reaction to the pill. Ms. Fisher testified that she wanted to become a medical marijuana patient to deal with her pain and because of her bad reactions to pills and medications.

In April 2014, Ms. Fisher testified that she went to see Dr. Robert Townsend at Denali Healthcare in Mt. Pleasant. She testified that she brought her medical records to the appointment, that Dr. Townsend reviewed and kept the medical records, that she had a 40 minute consultation with Dr. Townsend about her medical history and pain, and that Dr. Townsend did a physical examination of her. Dr. Townsend ultimately recommended that Ms. Fisher was likely to receive therapeutic or palliative benefit from the medical use of marijuana to treat her pain and muscle spasms. The certification signed by Dr. Townsend on April 16, 2014 was admitted as Exhibit 1. The signed certification also attested that Dr. Townsend was in compliance with the MMMA and all amendments. Ms. Fisher's medical records, produced by Denali Healthcare, were admitted as Exhibit 2.

After Dr. Townsend signed the certification form, Ms. Fisher testified that her husband sent the document to the State of Michigan, and she subsequently received a medical marijuana patient card. Ms. Fisher testified that she was aware follow-up care was recommended by Dr. Townsend. She stated that she and her husband returned to Denali Healthcare in June 2015. At that time, Ms. Fisher testified that the staff informed her that she could do follow-up online. In October 2015, Ms. Fisher testified that her husband helped her complete a follow-up form online. In June 2016, Ms. Fisher testified that she had an in-person follow-up visit at Denali Healthcare. This visit was not with Dr. Townsend, but was with another physician at Denali Healthcare, Dr. Aperocho.

Ms. Fisher testified that her husband acted as her medical marijuana caregiver by providing her with marijuana. She testified that, after receiving her patient card, she would try different strains of marijuana and different methods of ingesting it. She stated that she would talk to her husband about how effective the different strains and different methods were at treating her symptoms.

Ms. Fisher testified that her husband initially produced mainly marijuana flower, but eventually began producing oil, wax and lotion. Ms. Fisher stated that she had intended to move towards vaporizing with marijuana wax more than smoking the marijuana flower because vaping was healthier since it did not involve inhaling smoke.

Ms. Fisher testified that, on an average day, she would medicate first thing in the morning, either by smoking a joint or vaping. She stated that a joint contained about 2 grams of marijuana. Then, Ms. Fisher would usually drink tea with 2 or 3 grams of coconut oil containing

marijuana in it. After work, Ms. Fisher testified that she would use lotion containing cannabis, have another cup of tea, and either smoke a joint or vape. In a vaporizing session, Ms. Fisher testified she would use approximately 1 gram of marijuana wax. Ms. Fisher also testified that, on days she did not have to work, she would usually use more marijuana.

Ms. Fisher testified that she used marijuana only to treat her debilitating medical conditions, and that the marijuana she possessed was for her own use only. Ms. Fisher testified that medical marijuana was effective as a sleep aid, helped with the nausea she often experienced after work, and helped with her pain and headaches.

Next, defendant Steven Fisher testified. Mr. Fisher stated that he entered the Army in 1985. During his time in the Army, he testified that he injured his knee when he slid on wet asphalt while running. He later learned that he had torn his ACL, but he did not seek medical treatment at the time of the injury because he did not understand what he had done to his knee. Mr. Fisher testified that he later totally ruptured his ACL while snowmobiling and had to have surgery. He testified that he continues to have pain in both knees. Additionally, Mr. Fisher testified that he hurt his back while working in physically demanding jobs. While he worked at Bandit Industries, he testified that he frequently would pick up a hydraulic pump with a twisting motion, which resulted in a back injury. Mr. Fisher was sent to a chiropractor by his employer, but testified that it did not help much. Mr. Fisher later found out he had a herniated disc in his back. Mr. Fisher's physician was going to prescribe Vicodin for his back pain, but Mr. Fisher testified that he cannot take Vicodin because it hurts his stomach. Mr. Fisher also testified that he was ultimately forced to sell his landscaping business due to severe pain in his heels caused by a shortening of the Achilles tendon. Mr. Fisher also has IBS, which makes it difficult to take pills and medication without adverse effects. Mr. Fisher wanted to try medical marijuana to treat his pain and because he wanted to be "done with pills."

In April 2014, Mr. Fisher testified that he went to see Dr. Robert Townsend at Denali Healthcare in Mt. Pleasant. He testified that he brought his medical records to the appointment, that Dr. Townsend reviewed and kept the medical records, and that he had a 30 minute consultation with Dr. Townsend about his medical history and pain. He testified that Dr. Townsend performed a physical examination, including an examination of his back. Dr. Townsend ultimately recommended that Mr. Fisher was likely to receive therapeutic or palliative benefit from the medical use of marijuana to treat his pain and muscle spasms. The certification signed by Dr. Townsend on April 9, 2014 was admitted as Exhibit 1. The signed certification also attested that Dr. Townsend was in compliance with the MMMA and all amendments. Mr. Fisher's medical records, produced by Denali Healthcare, were admitted as Exhibit 2. Mr. Fisher also testified that he completed online follow-up with Denali Healthcare in October 2015. In June 2016, Mr. Fisher also had a follow-up visit with Dr. Aperocho at Denali Healthcare.

After his visit with Dr. Townsend, Mr. Fisher testified that he sent the signed certification to the State of Michigan and ultimately received his medical marijuana patient card. Mr. Fisher intended to grow marijuana for himself and his wife. After he received his card, Mr. Fisher testified that he got some marijuana from a dispensary before his own growing marijuana was ready. He testified that he engaged in research online and talked to people at the dispensaries. He wanted to learn about different strains of the marijuana plant and different methods of ingestion.

Mr. Fisher testified that he began with growing marijuana plants and eventually decided to make other marijuana products. Mr. Fisher made coconut oil, Rick Simpson Oil (RSO), marijuana wax, and a lotion containing cannabis. He testified that the coconut oil could be put

into food or drink, that the marijuana wax could be vaporized, and that he would ingest the RSO orally. Mr. Fisher testified that he preferred these other methods of ingestion over smoking marijuana flower because they were healthier and did not require him to inhale smoke.

Mr. Fisher admitted that he possessed 28 marijuana plants at the time his residence and workshop were raided by law enforcement. He testified that it took these plants about two months to get to the vegetative state they were in at the time of the raid. Additionally, he testified that it would be approximately 6 months until these plants were ready for consumption. Mr. Fisher testified that he usually loses approximately 2 or 3 plants before harvest. Of the 28 plants that he possessed at the time of the raid, Mr. Fisher testified that 4 were "shaky," did not look right, and he intended to get rid of them. Mr. Fisher also admitted he had 39 marijuana clones. The clones were cuttings from marijuana plants that were then introduced to a rooting enzyme and would eventually become marijuana plants. Mr. Fisher testified that the clones would not be ready for consumption for at least 9 months. The clones were not counted as "marijuana plants" in the charges against defendant.

Mr. Fisher also admitted that he possessed the other amounts of marijuana and marijuana wax found by law enforcement at his residence and workshop, but he alleges that all the marijuana he possessed would not actually last him and his wife through the 6 months until his marijuana plants were ready for harvest and consumption.

Law enforcement found 2,300 and 2,400 grams of marijuana "shake," which Mr. Fisher testified is what he trims off after taking the flower. A photograph of the 2,300 grams was admitted as Exhibit 5, and a photo of the 2,400 grams was admitted as Exhibit 10. Mr. Fisher testified that he had intended to dispose of this marijuana shake. He stated that he would collect the shake, and when he had enough to fill a barrel, he would dispose of it by burning. He testified that the shake probably could be used, but that it was not of good quality, and so he did not intend to use it. Additionally, Mr. Fisher testified that it would not be worth his time to extract THC from the shake because it would take a considerable amount of time and he would not get much from it.

Law enforcement also found 4,300 grams of marijuana bud in mason jars. Mr. Fisher testified that putting the bud in mason jars was part of a gradual drying process. He testified that he removes it from the jars, dries it, puts it back in the jars, and repeats the process until the drying is complete. A photo of the 4,300 grams was admitted as Exhibit 8. Law enforcement also found 4,990 grams of marijuana bud in vacuum sealed bags. A photo of the 4,990 grams was admitted as Exhibit 9. Mr. Fisher testified that he intended to use the marijuana from the mason jars and from the vacuum sealed bags to make marijuana wax, coconut oil, and RSO.

Additionally, law enforcement found 434 grams of marijuana wax in a refrigerator at Mr. Fisher's workshop. Mr. Fisher testified that the marijuana wax in the refrigerator was impure and not safe for human consumption. An August 26, 2015 lab test from PSI Labs of some of Mr. Fisher's marijuana wax was admitted as Exhibit 4. The lab test shows that the wax contained a high concentration of butane and ethanol. Mr. Fisher testified that a total concentration should not be over 400 to 500 ppm. This test shows a total concentration of nearly 900 ppm. Mr. Fisher testified that some of the wax in the refrigerator was from the batch tested by PSI Labs on August 26, 2015. He testified that the remainder of the wax in the refrigerator was also unsafe for human consumption. All of the wax was very dark in color, which Mr. Fisher testified is an indicator that the wax contains high amounts of contaminants. Mr. Fisher testified that he hoped in the future to find a way to remove the impurities and contaminants from the wax in the

refrigerator, but as of the time of the raid, the wax was completely unusable.

In order to make marijuana wax, Mr. Fisher testified that he would take 2 pounds of marijuana bud, put it in an extraction tube, flood the system with butane, purge the butane, and what is left is the wax containing THC. To finish purging the butane, the wax is then heated in a vacuum oven. Mr. Fisher began making wax in June 2015. He testified that he first took his wax to dispensaries and then sent his wax to PSI Labs to determine if it was fit for human consumption. At first, Mr. Fisher testified that he did not distill the butane, which was why his initial marijuana wax contained such high amounts of contaminants. Mr. Fisher testified that it would take about 4 hours to make one batch of wax. He testified that 2 pounds of marijuana would make approximately 30 grams of wax. Mr. Fisher testified that he would vaporize approximately 3 grams of wax per day.

Mr. Fisher also testified that he made RSO. He stated that he would use a strain of marijuana low in THC but better as an anti-inflammatory to make the RSO. Mr. Fisher testified that it takes 10 ounces of marijuana to make approximately 20 grams of RSO. Mr. Fisher testified that he usually ingests around 1 gram of RSO per day and sometimes less. He testified that the 20 grams of RSO will usually last him for a month.

Mr. Fisher also testified that he made coconut oil. He would heat and combine approximately 5 to 6 cups of coconut oil with approximately half a pound of marijuana. This would result in 5 to 6 cups of coconut oil containing marijuana. Mr. Fisher testified that he and his wife used the coconut oil in food and drinks. Mr. Fisher testified that he would have one or two cups of tea each day containing the coconut oil. He also testified that he would make lotion from the oil. Mr. Fisher testified that lotion made from approximately half a pound of marijuana would last about one month.

Mr. Fisher testified that he would sometimes get various marijuana products from dispensaries, either to try new methods of ingestion or to supplement when he did not have enough of his own marijuana.

Mr. Fisher testified that he told law enforcement that he went to dispensaries to have his marijuana wax checked. He testified that he told law enforcement that the people at the dispensaries told him that no one would want the wax because it was too dark and probably would not be safe for consumption. Additionally, Mr. Fisher testified that he told law enforcement that the marijuana in vacuum sealed bags was part of his "overages," by which he meant that it was marijuana he had not yet used. Mr. Fisher testified that he intended to turn this "overage" into wax for consumption by himself and his wife. Mr. Fisher denies telling law enforcement that he tried to sell marijuana wax to dispensaries. Mr. Fisher denies ever selling or trying to sell marijuana to anyone. He testified that the marijuana he possessed was only for medical use by himself and his wife to alleviate their pain. Mr. Fisher testified that marijuana was effective in alleviating his pain. In addition to the amounts needed to make the wax, RSO, and coconut oil, defendant testified that he likes to keep some bud on hand for his wife to smoke if she needs it. Mr. Fisher testified that the amount of marijuana he possessed was necessary to keep an uninterrupted supply for his and his wife's medical use, and that, in fact, it would not have been enough to last them until his marijuana plants were ready for harvest in approximately 6 months.

Finally, the prosecutor called Lieutenant Matthew Rice of the Michigan State Police to testify. Lieutenant Rice testified that he has been with the Michigan State Police for about 23 years, and that he is currently the team leader for BAYANET North. Lieutenant Rice was present

for the execution of the search warrant at defendant's residence, and he testified that he read defendant his *Miranda* rights and had a conversation with defendant. Lieutenant Rice testified that law enforcement found the amounts of marijuana previously discussed and admitted to by defendant.

Lieutenant Rice testified that defendant told law enforcement that he was trying to sell his leftover marijuana, including the wax found in the refrigerator, to dispensaries. Additionally, he testified that he believed defendant was referring to the marijuana in the vacuum sealed bags when he told law enforcement he was trying to sell his "overages." Lieutenant Rice could not quote defendant's exact words, but he testified that defendant's comments were something along the lines of "I have all this marijuana...what do I do with it?"

This court held a hearing on defendant's motion for §8 defense. The court took the motion under advisement and now issues this written opinion dismissing the charges against defendant pursuant to §8 of the MMMA.

II. ANALYSIS

Defendant asserts immunity from prosecution pursuant to §8 of the MMMA, which states:

> [A] patient and a patient's primary caregiver, if any, may assert the medical purpose for using marijuana as a defense to any prosecution involving marijuana, and this defense shall be presumed valid where the evidence shows that:
>
> > (1) A physician has stated that, in the physician's professional opinion, after having completed a full assessment of the patient's medical history and current medical condition made in the course of a bona fide physician-patient relationship, the patient is likely to receive therapeutic or palliative benefit from the medical use of marijuana to treat or alleviate the patient's serious or debilitating medical condition or symptoms of the patient's serious or debilitating medical condition;
> >
> > (2) The patient and the patient's primary caregiver, if any, were collectively in possession of a quantity of marijuana that was not more than was reasonably necessary to ensure the uninterrupted availability of marijuana for the purpose of treating or alleviating the patient's serious or debilitating medical condition or symptoms of the patient's serious or debilitating medical condition; and
> >
> > (3) The patient and the patient's primary caregiver, if any, were engaged in the acquisition, possession, cultivation, manufacture, use, delivery, transfer, or transportation of marijuana or paraphernalia relating to the use of marijuana to treat or alleviate the patient's serious or debilitating medical condition or symptoms of the patient's serious or debilitating medical condition. MCL 333.26428(a).

A defendant bears the burden of proof as to each of the three elements of the §8 defense. *People v Kolanek*, 491 Mich 382, 410; 817 NW2d 528 (2012). A defendant must establish a prima facie case for this affirmative defense by presenting evidence on all the elements listed in §8(a). *Id.* at 412-13; *People v Hartwick*, 498 Mich 192, 227; 870 NW2d 37 (2015). If a defendant establishes a prima facie case and there are no material questions of fact, then the defendant is entitled to dismissal of the charges following the evidentiary hearing. *Kolanek*, 491 Mich at 412-13; *Hartwick*, 498 Mich at 227. When a defendant asserts a §8 defense, questions of fact, such as credibility of witnesses, are for the jury to decide. *Kolanek*, 491 Mich at 411. If a defendant establishes a prima facie case for the defense but material questions of fact exist, then dismissal of the charge is not appropriate and the defense must be submitted to the jury. *Kolanek*, 491 Mich at 412-13; *Hartwick*, 498 Mich at 227. Finally, if there are no material questions of fact and defendant has not presented prima facie evidence for each of the elements in §8(a), defendant cannot assert a §8 defense at trial. *Kolanek*, 491 Mich at 412-13; *Hartwick*, 498 Mich at 227.

A material question of fact is not created simply because a party produces testimony in support of its position. *Amorello v Monsanto Corp*, 186 Mich App 324, 331; 463 NW2d 487 (1990). In order to create a material question of fact, the testimony must be supported by more than "conjecture and speculation." *Karbel v Comerica Bank*, 247 Mich App 90, 98; 635 NW2d 69 (2001). Evidence that constitutes only a "mere possibility" is insufficient to raise a material question of fact. *Id.* at 107.

In order to establish the first element of the §8 defense, defendant must satisfy §8(a)(1) by showing: "(1) the existence of a bona fide physician-patient relationship, (2) in which the physician completes a full assessment of the patient's medical history and current medical conditions, and (3) from which results the physician's professional opinion that the patient has a debilitating medical condition and will likely benefit from the medical use of marijuana to treat the debilitating medical condition." *Hartwick*, 498 Mich at 227. The mere presentation of a medical marijuana registration card fails to meet even the prima facie evidence requirements as to this element. *Id.* However, the Michigan Supreme Court has acknowledged that the actual text of the physician's written certification could itself provide prima facie evidence of a bona fide physician-patient relationship. *Id.* at 231 n77. A defendant who submits proper evidence "would not likely need his or her physician to testify to establish prima facie evidence of any element of §8(a)." A caregiver also bears the burden of presenting evidence as to a bona fide physician-patient relationship for each patient to whom he provides care. *Id.* at 227.

In order to assist the court in establishing whether defendant has satisfied the first requirement of §8(a)(1), the existence of a bona fide physician-patient relationship, MCL 333.26423(a) provides a definition for "bona fide physician-patient relationship":

> [A] treatment or counseling relationship between a physician and patient in which all of the following are present:
>
> (1) The physician has reviewed the patient's relevant medical records and completed a full assessment of the patient's medical history and current medical condition, including a relevant, in-person, medical evaluation of the patient.
>
> (2) The physician has created and maintained records of the patient's condition in accord with medically accepted standards.

(3) The physician has a reasonable expectation that he or she will provide follow-up care to the patient to monitor the efficacy of the use of medical marijuana as a treatment of the patient's debilitating medical condition.

(4) If the patient has given permission, the physician has notified the patient's primary care physician of the patient's debilitating medical condition and certification for the medical use of marijuana to treat that condition.

Both defendant and Leslie Fisher testified about meeting with Dr. Townsend in April of 2014. Defense counsel argues that they both had a bona fide physician-patient relationship with Dr. Townsend. Both Mr. and Ms. Fisher testified that they took Dr. Townsend their medical records and that he reviewed such records in their presence. They both testified that Dr. Townsend talked with them about their medical histories, past treatments of their conditions, and their current medical conditions. Ms. Fisher's appointment with Dr. Townsend lasted approximately 40 minutes, and Mr. Fisher's appointment lasted approximately 30 minutes. They each testified that, during the appointment, Dr. Townsend conducted a physical examination of them. It appears that Dr. Townsend reviewed medical records and completed a full assessment of Mr. and Ms. Fisher's medical history and current medical condition, including an in-person evaluation, as required under MCL 333.26423(a)(1). No evidence was introduced that could create a question of fact on this issue.

Both Mr. and Ms. Fisher testified that they provided Dr. Townsend with their medical records and left the records with him at Denali Healthcare. Prior to this hearing, defense counsel requested Denali Healthcare to produce these records, which were admitted during the hearing as Exhibit 2. This exhibit contains a record certification from Denali Healthcare, which states that the records were kept in the course of regularly conducted business activity. Therefore, defendant has produced evidence that Dr. Townsend "created and maintained records of [Mr. and Ms. Fisher's conditions] in accord with medically accepted standards" as required by MCL 333.26423(a)(2). Mr. and Ms. Fisher left their medical records with Denali Healthcare, and those records, along with additional records created by Dr. Townsend, were produced by Denali Healthcare upon request. The People point out that the record certification states that the records were kept in the course of a regularly conducted "business activity" and do not explicitly state that they were kept "in accord with medically accepted standards." However, the People failed to introduce any evidence that would call into question Denali Healthcare's keeping of the records. Additionally, Denali Healthcare's business is medical, and so keeping records in the course of a regularly conducted "business activity" would necessarily require keeping them "in accord with medically accepted standards." Finally, the medical marijuana physician certification signed by Dr. Townsend states that he is in compliance with the MMMA, which would include keeping patients' records "in accord with medically accepted standards." No evidence was introduced that could create a question of fact on this issue.

Mr. and Ms. Fisher both testified that they were aware that Dr. Townsend recommended that they obtain follow-up care from Denali Healthcare. Additionally, a review of Exhibit 2, Mr. and Ms. Fisher's medical records, establishes that each of them signed a form provided by Denali Healthcare which states, "Dr. Townsend recommends that all patients follow up with him on a regular basis to further solidify the 'Dr-Pt Bonafide Relationship' as defined by the State of

Michigan." This form makes it clear that Dr. Townsend expected to provide follow-up care for both Mr. and Ms. Fisher, and the fact that each of them signed one of these forms shows that this expectation is reasonable. Dr. Townsend knew that Mr. and Ms. Fisher were both informed of the expectation and had essentially agreed to it, or at least acknowledged it, by signing the form. Therefore, defendant has clearly produced evidence that Dr. Townsend had "a reasonable expectation that [he] will provide follow-up care" to Mr. and Ms. Fisher, as required by MCL 333.26423(a)(3). The People argued that this element was not met because Mr. and Ms. Fisher completed only an online follow-up about one and a half years after their first visit with Dr. Townsend and did not follow-up in person at Denali Healthcare until 2 years after their first visit. However, nowhere in the MMMA is there a requirement that a patient actually follow-up with a physician in order to establish a bona fide physician-patient relationship. The only requirement is that the physician must have a "reasonable expectation" that the follow-up will occur. Such a reasonable expectation was present in this case, considering the forms in Exhibit 2 and defendant and Ms. Fisher's testimony. No evidence was introduced that could create a question of fact on this issue.

As stated above, defendant established a prima facie case for each required element of the definition of "bona fide physician-patient relationship" set forth in MCL 333.26423(a). This satisfies the first requirement of §8(a)(1). Further, the cross examination of Mr. and Ms. Fisher by the People and the testimony of the People's witness Lieutenant Rice did not create a material question of fact regarding whether a bona fide physician-patient relationship existed between Dr. Townsend and Mr. and Ms. Fisher.

Additionally, in order to comply with the definition of "bona fide physician-patient relationship" set forth in MCL 333.26423(a), defendant had to establish that Dr. Townsend completed a "full assessment of [Mr. and Ms. Fisher's] medical history and current medical conditions. This satisfies the second requirement of §8(a)(1). As stated previously, defendant produced such evidence without a material question of fact.

Finally, to satisfy the third requirement of §8(a)(1), defendant must show that it was Dr. Townsend's professional opinion that Mr. and Ms. Fisher have "a debilitating medical condition and will likely benefit from the medical use of marijuana to treat the debilitating medical condition." Defendant produced in Exhibit 1 a physician certification form for each Mr. and Ms. Fisher. These forms, signed by Dr. Townsend in April 2014, state that Mr. and Ms. Fisher have been diagnosed with debilitating medical conditions and that Dr. Townsend attests in his professional opinion that Mr. and Ms. Fisher are "likely to receive therapeutic or palliative benefit from the medical use of marijuana to treat or alleviate the [patients'] debilitating medical condition or symptoms associated with the debilitating medical condition." The Michigan Supreme Court has acknowledged that the actual text of the physician's written certification could itself provide prima facie evidence for the elements establishing the existence of a bona fide physician-patient relationship. *Hartwick* at 231 n77. As defendant has produced physician certifications that state that Mr. and Ms. Fisher have debilitating medical conditions and will likely benefit from the use of medical marijuana, defendant has satisfied this last requirement of §8(a)(1). Further, there was no evidence produced that would raise a material question of fact on this issue. Therefore, defendant has completely satisfied the first element of §8(a).

The second element of §8(a) requires defendant to establish that he did not possess an amount of marijuana that was more than "reasonably necessary to ensure the uninterrupted availability of marijuana" for the purpose of treating defendant's medical condition and the

medical conditions of his patient. MCL 333.26428(a)(2). Under a §8 defense, a defendant is not required to possess an amount equal to or less than the quantity limits established in §4 of the MMMA. *Hartwick*, 498 Mich at 234. Section 8 does not include any specific volume limitation. *Id.* A patient may have to testify about "whether a specific amount of marijuana alleviated the debilitating medical condition, and if not what adjustments were made." *Hartwick*, 498 Mich at 227. Likewise a caregiver must establish the amount of marijuana reasonably necessary to treat his patients and ensure "uninterrupted availability." *Hartwick*, 498 Mich at 227.

When law enforcement searched defendant's residence and workshop, they found 28 marijuana plants. Mr. Fisher testified that these plants would not be ready for consumption for approximately 6 months. Additionally, law enforcement found 2,300 grams of marijuana shake, 2,400 grams of marijuana shake, 4,500 grams of marijuana bud in mason jars, 4,990 grams of marijuana bud in vacuum sealed bags, and 434 grams of marijuana wax in a refrigerator. This is a total of 14,190 grams, or approximately 31 pounds, of marijuana plus 434 grams of marijuana wax. Mr. Fisher testified that he was going to dispose of the shake and that the wax was unusable. Therefore, that would leave 9,490 grams, or approximately 20.9 pounds of marijuana.

Both defendant and Ms. Fisher testified that they have experimented with different strains and methods of ingesting marijuana, trying to determine what works best to alleviate the symptoms of their medical conditions. Ms. Fisher testified that she has had conversations with her husband, who acted as her caregiver, regarding how effective different strains and methods of ingestion were for her. Both defendant and Ms. Fisher testified to the amount of marijuana they were typically using right before law enforcement's raid.

Mr. Fisher testified that he would typically vaporize about 3 grams of wax per day. He also testified that he would have a cup or two of tea with coconut oil, which would amount to approximately 4 to 6 grams of marijuana per day. Mr. Fisher also testified that he used around 1 gram of RSO per day, but that 20 grams of RSO would usually last him about a month.

Ms. Fisher testified that, in the past, she would typically smoke 2 joints of 2 grams each every day. Instead of smoking, Ms. Fisher testified that she was trying to move more toward vaporizing marijuana wax. If she vaped, she testified that she would use approximately 2 grams of wax per day. Ms. Fisher also testified that she would have two cups of tea with coconut oil each day, which would amount to approximately 4 to 6 grams of marijuana. Additionally, both Mr. and Ms. Fisher testified that they used lotion containing marijuana oil. Mr. Fisher testified that when he made lotion from ½ a pound of marijuana, that lotion would last for approximately one month.

Both Mr. and Ms. Fisher testified that these amounts of marijuana were necessary and sufficient to alleviate the symptoms of their medical conditions. After listening to the testimony of Mr. and Ms. Fisher, it is clear to the court that these amounts were determined after considerable research and trial and error on the part of both Mr. and Ms. Fisher. Mr. Fisher testified regarding the research he did to determine the best way to use medical marijuana. Both Mr. and Ms. Fisher testified that they tried different methods of ingestion, have ruled out certain methods, and have now determined the methods that work best. For example, both Mr. and Ms. Fisher decided to move away from smoking marijuana and begin vaporizing marijuana wax. They both testified that this method is healthier and is more effective to treat their symptoms. Further, from her testimony, Ms. Fisher appears to have consulted with her caregiver, Mr. Fisher, to determine the appropriate type, amount, and method of ingestion.

In order to produce enough of each product used by Mr. and Ms. Fisher, it takes a considerable amount of marijuana. The People argue that Mr. Fisher possessed an amount that was clearly more than necessary for a medical purpose. However, when the court does the math and adds up the amount of marijuana it would take to produce enough wax, RSO, coconut oil, and lotion to last Mr. and Ms. Fisher for the 6 months until Mr. Fisher's marijuana plants would have been ready for harvest and consumption, it is clear that the marijuana possessed by Mr. Fisher was not nearly enough. Mr. Fisher would likely have had to supplement his marijuana by going to dispensaries, as he testified that he sometimes needed to do in the past.

Mr. Fisher testified that it would take ½ a pound of marijuana to produce enough lotion for one month. He testified that it would take 10 ounces of marijuana to produce enough RSO for one month. Together, Mr. and Ms. Fisher ingest approximately 360 grams of marijuana in coconut oil per month. Half a pound of marijuana, or 226 grams makes 5 to 6 cups of coconut oil. It takes at least ½ a pound of marijuana, and closer to 1 pound, to provide Mr. and Ms. Fisher with enough coconut oil for a month. Finally, Mr. and Ms. Fisher together use about 150 grams of wax per month. Mr. Fisher testified that 2 pounds of marijuana makes about 30 grams of wax. Therefore, it would take 10 pounds of marijuana to make enough wax to last Mr. and Ms. Fisher for a single month. In total, to produce everything used by Mr. and Ms. Fisher in one month, it would take about 11 pounds and 10 ounces of marijuana. Over 6 months, this would amount to 69.75 pounds of marijuana. Mr. Fisher testified that he was going to dispose of the marijuana shake found by law enforcement. However, even if the court considers this marijuana that was intended to be disposed, Mr. Fisher did not possess nearly 69.75 pounds of marijuana. At most, Mr. Fisher possessed 31 pounds of marijuana. This is not even half of the amount of marijuana necessary to produce everything used by Mr. and Ms. Fisher over 6 months. Additionally, even if the court considers the 434 grams of marijuana wax that Mr. Fisher testified is unusable and unsafe for human consumption, the amount of marijuana possessed by Mr. Fisher would not exceed the amount reasonably necessary to ensure uninterrupted availability. The 434 grams of marijuana wax would not last even three months at the rate it would be consumed by Mr. and Ms. Fisher. Regardless, Mr. Fisher's testimony and the lab test from PSI Labs, admitted as Exhibit 4, make it clear that this 434 grams of wax would not have been consumed.

Considering the evidence produced by defendant showing that he and his wife carefully determined, through research and trial and error, the amount of marijuana necessary to treat their symptoms, as well as the fact that the marijuana possessed by defendant was considerably less than was necessary to provide an uninterrupted supply of marijuana during the 6 months until defendant's marijuana plants would be ready for harvest and consumption, this court finds that defendant satisfied §8(a)(2). Additionally, there was no evidence presented that would raise a material question of fact regarding this element. The People argue that defendant possessed too much marijuana, but by doing the math, the court finds that defendant actually did not possess nearly enough marijuana to properly alleviate the symptoms of his and his wife's medical conditions.

In order for defendant to satisfy the third and final element of the §8 defense, defendant must show that any marijuana in his possession was in fact being possessed for medical use. MCL 333.26428(a)(3). A defendant may satisfy this element with sufficient evidence even if the defendant was not actually registered as a patient or caregiver under the MMMA. *Hartwick*, 498 Mich at 237. A patient or caregiver must put forth evidence showing that the marijuana in

question was in fact being grown, possessed, processed or used for medical purposes only. *Hartwick*, 498 Mich at 227.

Both Mr. and Ms. Fisher testified that the marijuana in their possession was for their own medical use only. However, the People's witness Lieutenant Rice testified that defendant made a very different statement to law enforcement. Lieutenant Rice testified that defendant told law enforcement he had tried to sell his "overages" to dispensaries. Lieutenant Rice could not quote defendant exactly, but he testified that, from his conversation with defendant, he understood that defendant had too much marijuana and marijuana wax, had been trying to sell it to dispensaries and others, but no one would buy it. Defendant denied ever making such statements to law enforcement. Defendant stated that if he used the word "overages," he meant marijuana that he had not yet used and intended to turn into wax. Defendant denied ever selling or trying to sell marijuana to anyone.

Initially, it appears that Lieutenant Rice's testimony may create a material question of fact on the third element of §8. However, there are two problems with this testimony. First, there is an issue regarding timing. In *Hartwick*, the Michigan Supreme Court makes it clear that, to satisfy the third element of §8, the defendant must show that "at the time of the charged offense," any marijuana in his possession was being used for a medical purpose. *Hartwick*, 498 Mich at 237. Lieutenant Rice's testimony was that defendant told law enforcement he had "tried" to sell marijuana to dispensaries. While Lieutenant Rice testified that it was his understanding that defendant was still trying to sell the marijuana, it is not clear that this was anything more than speculation on the witness's part. Lieutenant Rice testified that he understood the vacuum sealed bags of marijuana to be the marijuana the defendant had tried to sell to dispensaries, and that defendant told law enforcement that he vacuum sealed this marijuana so it would not spoil. Lieutenant Rice then testified that he understood this to mean that defendant was still trying to sell the marijuana. However, Lieutenant Rice did not testify that defendant made the statement to law enforcement that he was currently engaged in the effort to sell marijuana. From Lieutenant Rice's testimony, it appears that he concluded on his own that, because defendant said he previously tried to sell the vacuum sealed marijuana and now did not want that marijuana to spoil, that meant defendant was currently still trying to sell the marijuana. Lieutenant Rice's testimony on the timing therefore appears to be speculation. In order to create a material question of fact, the testimony must be supported by more than "conjecture and speculation." *Karbel*, 247 Mich App at 98. Lieutenant Rice's speculation that defendant was probably still trying to sell marijuana to dispensaries at the time of the charged offenses is not sufficient to establish a material question of fact.

The second problem with Lieutenant Rice's testimony is that the only portion of the testimony that could create a question of material fact is defendant's alleged statement to law enforcement, the admission at trial of which may violate the corpus delicti rule. In Michigan law, "it has long been the rule that proof of the corpus delicti is required before the prosecution is allowed to introduce the inculpatory statements of an accused." *People v McMahan*, 451 Mich 543, 548; 548 NW2d 199 (1996). Corpus delicti literally means "the body of the crime." Black's Law Dictionary (10th ed. 2014). The doctrine prohibits the prosecution from proving that an offense occurred based solely on a defendant's extra-judicial statements. *Id.* The main purposes of the corpus delicti rule are to preclude conviction for a crime when none was committed and to minimize the weight of a confession by requiring collateral evidence to support conviction. *McMahan*, 451 Mich at 548.

Defendant is charged with possession of marijuana and marijuana plants with intent to deliver. Other cases dealing with possession of controlled substances with intent to deliver have established a standard for proving the corpus delicti in such cases. In *People v Konrad*, 449 Mich 263, 270; 536 NW2d 517 (1995), the Michigan Supreme Court found that, when a defendant was charged with possession of cocaine with intent to deliver, the corpus delicti was satisfied by "evidence independent of defendant's confession that the cocaine existed and was possessed by someone." However, the Supreme Court qualified this determination with a discussion about the fact that cocaine cannot be legally possessed. Therefore, this standard cannot simply be applied to the case currently before this court. Possession of marijuana by someone who is a patient under the MMMA is very different from possession of cocaine by someone who had no legal right to possess cocaine. In the first instance, evidence that marijuana was possessed is not necessarily evidence that any crime was committed at all. In the second instance, mere evidence that cocaine was possessed is quite likely evidence that someone has committed a crime. In this case, simply the evidence that defendant possessed marijuana cannot, in the interest of justice, be sufficient to establish the corpus delicti for the offenses with which defendant is charged. There must be some evidence that defendant committed a crime other than his extra-judicial statement to law enforcement. Otherwise, the corpus delicti rule would not serve its purpose of preventing conviction when no crime has occurred because the simple fact that marijuana was possessed is not necessarily evidence that a crime was committed at all.

In an unpublished Court of Appeals case, the Court discussed additional evidence that could prove the corpus delicti when a defendant was charged with possession of heroin with intent to deliver. In that case, the court found that there was sufficient evidence because heroin was found packaged for sale in individual packets and there was no evidence that the defendant possessed the heroin for personal use because the defendant was not found to possess any paraphernalia used to ingest heroin. *People v Chalmers*, No 251974, 2005 WL 415282, page 5 (Mich Ct App February 22, 2005). If similar evidence of intent to sell marijuana would have been found in the case currently before this court, the prosecutor could have sufficiently proven the corpus delicti of the offenses with which defendant has been charged. However, no such evidence is present here.

In addition to the extensive hearing conducted on the §8 defense, this court has reviewed the preliminary examination in this matter and held hearings over several days on 9 other motions filed by defense counsel, as well as several oral motions made during the aforementioned hearings. In all of this time, the court has not seen any evidence whatsoever that defendant sold, attempted to sell, or intended to sell marijuana, other than defendant's alleged statements to law enforcement.

The People may argue that the large amount of marijuana possessed by defendant could be evidence that he intended to sell marijuana. However, as has been established, defendant possessed less marijuana than was reasonably necessary to ensure an uninterrupted supply of marijuana for medical use by defendant and his wife. Other than defendant's alleged statements to law enforcement, there is no evidence of an intent to deliver marijuana. Under the corpus delicti rule, this would bar the admission at trial of defendant's extra-judicial statements to law enforcement.

In order for defendant's statements to law enforcement to be able to be introduced at trial, law enforcement would have needed to gather additional evidence on this issue. There is certainly more investigation that law enforcement could have done to find evidence in this case.

For example, prior to the execution of the search warrant at defendant's residence and workshop, law enforcement could have sent someone undercover to try to purchase marijuana from defendant. There is no evidence that this was done. Additionally, law enforcement could have followed up on the interview with defendant in an attempt to gather more evidence. Lieutenant Rice testified that defendant told law enforcement he tried to sell marijuana to dispensaries. Law enforcement could have gone to these dispensaries and made inquiries. They could have asked if anyone at the dispensary knows defendant and, if so, if defendant ever tried to sell them marijuana. However, it does not appear that law enforcement engaged in this type of investigation. Therefore, there is no additional evidence to prove the corpus delicti of the charged crimes.

None of the offenses with which defendant is charged can be established unless it is proven that defendant intended to sell marijuana. However, the only evidence of an intent to sell the marijuana he possessed is defendant's extra-judicial statement to law enforcement. This is insufficient under the corpus delicti rule, and so defendant's statements cannot be admitted at trial. *McMahan*, 451 Mich at 548.

As discussed previously, the statements defendant allegedly made to law enforcement do not raise a material question of fact on the third element of §8 because the timing of defendant's alleged actions is primarily speculation. However, the court does not even need to reach such a conclusion. Because defendant's statements to law enforcement cannot be admitted at trial, it would make no sense for the court to consider said statements at all in its analysis under §8. When asserting a §8 defense, the defendant must present evidence from which a reasonable juror could conclude he satisfied each element of the defense. *Hartwick*, 498 Mich at 227. If the standard is that of a reasonable juror, it would only make sense for the court to consider solely that evidence which a reasonable juror would actually see. Both defendant and Ms. Fisher testified that the marijuana defendant possessed was used only for a medical purpose, and there is no evidence, other than defendant's alleged statements to law enforcement, that the marijuana was used for anything other than a medical purpose. If the court does not consider defendant's statements to law enforcement, there remains absolutely no material question of fact on the third element of the §8 defense. As established, defendant has completely satisfied each of the three elements of the §8 defense without the existence of any material question of fact, and so, pursuant to §8 of the MMMA, defendant is entitled to dismissal of the charges against him. *Kolanek*, 491 Mich at 412-13; *Hartwick*, 498 Mich at 227.

THEREFORE IT IS ORDERED that defendant has established a §8 defense, no material question of fact exists, and all charges against defendant shall be dismissed.

This order resolves the last pending claim and closes the case.

Date: January 31, 2017

Hon. Paul H. Chamberlain (P31682)
Chief Judge
Isabella County Trial Court