STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED March 21, 2013
v	No. 305041 Oakland Circuit Court
STEVEN SIMON DEHKO, Defendant-Appellant.	LC No. 2010-230795-FH

Before: JANSEN, P.J., and SAWYER and FORT HOOD, JJ.

PER CURIAM.

Defendant was convicted, following a jury trial, of manufacturing marihuana, MCL 333.7401(2)(d)(iii). He was sentenced to 12 months' probation,[1] and the court also imposed a $130 assessment for the crime victim's rights fund. Defendant appeals by right. We affirm.

The basic facts are not in dispute. Defendant's conviction arises from the discovery of more than 70 marihuana plants in a Farmington Hills condominium unit on December 4, 2009. Pursuant to a search warrant, authorities seized from a bedroom in the condominium unit more than 70 marihuana plants, as well as additional plants in a garbage bag, loose marihuana, sophisticated growing paraphernalia, more than $600, and defendant's passport. According to the police, defendant acknowledged that the marihuana in the bedroom belonged to him. Defendant had a registry identification card, dated November 16, 2009. He also produced a copy of a written certification signed on November 16, 2009, by Dr. Louis E. May, indicating that defendant suffered from pain in both wrists and his right shoulder, for which medical use of marihuana was likely to produce palliative or therapeutic benefit. After providing defendant multiple opportunities to produce medical evidence to support his affirmative defense, the trial court denied defendant's pretrial motion to dismiss based on the Michigan Medical Marihuana Act (MMMA), MCL 333.26421 *et seq.* Before trial, the court granted the prosecution's motion to preclude defendant from asserting the MMMA's § 8 affirmative defense, MCL 333.26428, primarily concluding that because defendant was not immune from prosecution under § 4 of the MMMA, MCL 333.26424, he did not meet the requirements of § 8 of the act.

[1] Defendant was also sentenced to 93 days in jail, but the sentenced was suspended upon entry into the zero-tolerance program.

I. THE AFFIRMATIVE DEFENSE UNDER § 8 OF THE MMMA

Defendant first argues that the trial court erroneously ruled as a matter of law that he was barred from presenting the MMMA's § 8 affirmative defense at trial because he possessed more marihuana than allowed under § 4 of the act. Defendant requests that this case be remanded for a new evidentiary hearing and a new trial.

We review de novo questions of statutory interpretation, including the interpretation of the MMMA. *People v Kolanek*, 491 Mich 382, 393; 817 NW2d 528 (2012). The trial court's decision concerning whether defendant could support an affirmative defense is reviewed for an abuse of discretion. *People v Dupree*, 486 Mich 693, 702; 788 NW2d 399 (2010). "An abuse of discretion occurs when the court chooses an outcome that falls outside the range of reasonable and principled outcomes." *People v Unger*, 278 Mich App 210, 217; 749 NW2d 272 (2008). "A defendant asserting an affirmative defense must produce some evidence on all elements of the defense before the trial court is required to instruct the jury regarding the affirmative defense." *People v Crawford*, 232 Mich App 608, 619; 591 NW2d 669 (1998).

We agree with defendant that, pursuant to our Supreme Court's decision in *Kolanek*, 491 Mich at 414, the "plain language of the MMMA does not require that a defendant asserting the affirmative defense under § 8 also meet the requirements of § 4." Contrary to what defendant suggests, however, remand for a new evidentiary hearing and a new trial on this basis alone is not required, because defendant had multiple opportunities to present evidence on the required elements of § 8, but failed to do so.

MCL 333.26428(a) provides that "a patient and a patient's primary caregiver, if any, may assert the medical purpose for using marihuana as a defense to any prosecution involving marihuana," when the defendant establishes the following:

> (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 marihuana to treat or alleviate the patient's serious or debilitating medical condition or symptoms of the patient's serious or debilitating medical condition;
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> (2) The patient and the patient's primary caregiver, if any, were collectively in possession of a quantity of marihuana that was not more than was reasonably necessary to ensure the uninterrupted availability of marihuana 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
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> (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 marihuana or paraphernalia relating to the use of

marihuana to treat or alleviate the patient's serious or debilitating medical condition or symptoms of the patient's serious or debilitating medical condition.

In *Kolanek*, our Supreme Court explained that if the defendant establishes the elements of § 8 during a pretrial evidentiary hearing, and there are no material questions of fact, then the defendant is entitled to dismissal of the charges. *Kolanek*, 491 Mich at 412. If the defendant establishes evidence of each element listed in § 8 but there are still material questions of fact, then the § 8 affirmative defense must be submitted to the jury. *Id.* Finally, if no reasonable juror could conclude that a defendant has satisfied the elements of the § 8 defense, then the defendant is precluded from asserting the defense at trial. *Id*. at 412-413.

In this case, defendant was granted an evidentiary hearing and provided with numerous opportunities to present evidence on the elements of the MMMA's affirmative defense, up to the eve of trial. Defendant declined to do so. Instead, he maintained that he would continue to rely on his physician's certification and evaluation and a proposed marihuana cultivation expert. Given defendant's chosen evidence, there is no question of fact regarding whether defendant satisfied the second element under § 8(a)(2). Although afforded the opportunity to do so, defendant did not present any evidence that he possessed only the amount of marihuana reasonably necessary to ensure him an uninterrupted supply for the treatment or alleviation of his alleged serious or debilitating medical condition or symptoms of that condition. Defendant did not testify and did not present any medical records, or medically-based evidence or testimony from Dr. May or another knowledgeable doctor regarding how much marihuana he was instructed to use or needed to use at a time to address his condition, and how often and how long he needed to use it. The mere certification does not provide any information regarding how much marihuana defendant should use for treatment. Further, defendant did not explain below how a marihuana cultivation expert possessed the medical knowledge or information to address defendant's medical condition and the amount of marihuana defendant needed for his allegedly serious or debilitating health condition. Because defendant failed to establish a question of fact with respect to this element of the § 8 defense, he was not entitled to assert the § 8 defense at trial.

With regard to the elements required under § 8(a)(1), defendant relied on his physician certification to show that he had bona fide physician-patient relationship with his physician, and that the physician completed a "full assessment of the patient's medical history and current medical condition." The MMMA does not define a "bona fide physician-patient relationship." See *People v Redden*, 290 Mich App 65, 86; 799 NW2d 184 (2010). In *Redden*, this Court observed that the dictionary definition of "'bona fide' includes "1. made, done, etc., in good faith; without deception or fraud. 2. authentic; genuine; real." However, this Court declined to "define exactly what must take place in order for a bona fide physician patient relationship to exist." *Id.* Here, even if the physician certification raised an inference of a bona fide patient-physician relationship, because defendant failed to present any evidence regarding whether the amount of marihuana he possessed was reasonable, it is not necessary to determine whether he also established a question of fact with respect to the other elements of a § 8 defense, including whether he had a bona fide physician-patient relationship with his respective certifying physician.

In sum, defendant was correctly precluded from asserting the MMMA's § 8 defense at trial because no reasonable juror could conclude that he satisfied the required elements of the defense.

II. CRIME VICTIMS ASSESSMENT FEE

Defendant lastly argues that imposition of an enhanced $130 crime victims assessment fee violates the bar on ex post facto laws under the federal and state constitutions because the crime was committed before the Legislature increased the fee from $60 to $130. Because defendant failed to raise this issue below, it is unpreserved, and our review is limited to plain error affecting defendant's substantial rights. *People v Carines*, 460 Mich 750, 763; 597 NW2d 130 (1999).

This Court recently addressed and considered this precise issue in *People v Earl*, 297 Mich App 104, 113-114; 822 NW2d 271 (2012), and held that imposition of the $130 fee against a defendant convicted of an offense committed before the act was amended does not violate the Ex Post Facto Clause of either the state or federal constitution. On the authority of *Earl*, we therefore reject this unpreserved claim of error.

Affirmed.

/s/ Kathleen Jansen
/s/ David H. Sawyer
/s/ Karen Fort Hood