

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,
Plaintiff-Appellee,

UNPUBLISHED
October 17, 2017

v

SHANE WESLEY GILLETTE,
Defendant-Appellant.

Nos. 334099; 336891
Manistee Circuit Court
LC No. 16-004582-FH

Before: BOONSTRA, P.J., and METER and GADOLA, JJ.

PER CURIAM.

In Docket No. 334099, defendant appeals as of right his conviction, after a jury trial, of possession of marijuana with intent to deliver, MCL 333.7401(2)(d)(iii). Defendant was sentenced to 42 months' probation, with nine months to be served in jail.¹ While serving his nine-month jail sentence, defendant was charged with violating his probation by using assaultive, abusive, threatening, or intimidating behavior toward his probation agent and engaging in assaultive, abusive, threatening or intimidating behavior against two other jail inmates. At a probation-violation hearing, the trial court found that defendant violated his probation. Defendant's jail sentence was extended to 12 months. In Docket No. 336891,² defendant appeals as of right in the probation-violation matter. We affirm.

The police responded to a domestic-violence disturbance at an apartment complex. Defendant's girlfriend testified that defendant had been selling marijuana out of her apartment, which had caused an argument between them. The police learned that during the argument she took a bag of defendant's marijuana and placed it in a trash receptacle outside of the apartment building. Therefore, the police recovered the marijuana from the receptacle and interviewed

¹ The court stated, "the first nine months of probation will be served in the Manistee County jail . . ."

² On February 23, 2017, these appeals were consolidated "to advance the efficient administration of the appellate process." *People v Gillette*, unpublished order of the Court of Appeals, entered February 23, 2017 (Docket Nos. 334099; 336891).

defendant inside of the apartment. During the interview, defendant indicated that the bag of marijuana was his, but explained that he had a medical-marijuana card.

Following defendant's conviction, defendant appeared for a probation-violation hearing on five counts. Defendant pleaded not guilty to count one, using assaultive, abusive, threatening, or intimidating behavior toward his probation agent, and pleaded no contest to the four counts involving misconduct against other jail inmates. Officer Robert Ide, a probation and parole officer, testified regarding the first count. According to Officer Ide, he walked past defendant's jail cell as he was leaving the jail and as he did so, defendant referred to the officer using a homophobic slur. When Officer Ide asked defendant "if he was serious," defendant clenched his fists, looked very angry, and said, "you're a c*** s*****." Defendant called Officer Ide several other names, hit his cell door with a closed fist, and said that if he were ever to see Officer Ide on the street he would "kick [his] a**." Officer Ide testified that he did not feel threatened or scared for his safety, in part because of the locked cell door. However, he stated that he believed that defendant acted in this manner in an effort to intimidate and threaten him. The court found defendant guilty.

On appeal, defendant first argues that the trial court erred in ruling that he was not entitled to immunity under Section 4 or an affirmative defense under Section 8 of the Michigan Medical Marihuana Act (MMMA), MCL 333.26421 *et seq.*

"Once a claim of immunity [under Section 4 of the MMMA] is made, the trial court must conduct an evidentiary hearing to factually determine whether, for each claim of immunity, the defendant has proved each element required for immunity." *People v Hartwick*, 498 Mich 192, 217; 870 NW2d 37 (2015). The decision regarding entitlement to immunity is decided by the trial court as a matter of law in pretrial proceedings. *Id.* at 212-213. In addition, "[a] defendant seeking to assert the MMMA's statutory affirmative defense must present prima facie evidence for each element of § 8(a)." *Id.* at 228. "[I]f a defendant has not presented prima facie evidence of each element of § 8 by 'present[ing] evidence from which a reasonable jury could conclude that the defendant satisfied the elements of the § 8 affirmative defense, . . . then . . . 'the defendant is not permitted to present the § 8 defense to the jury.'" *Id.* at 227, quoting *People v Kolanek*, 491 Mich 382, 416; 817 NW2d 528 (2012); see also *Kolanek*, 491 Mich at 411 ("the § 8 defense cannot be asserted for the first time at trial, but must be raised in a pretrial motion for an evidentiary hearing."). Thus, to preserve the issues of whether he or she is entitled to immunity under Section 4 and an affirmative defense under Section 8 of the MMMA, a defendant must make a pretrial claim or file a motion on those bases. Here, there is no record evidence that defendant made any such pretrial claim or filed any such motion, and no evidence that an evidentiary hearing was held. Under these circumstances, there is simply no basis for reversal.

However, even disregarding the procedural errors, defendant is unable to demonstrate that any error occurred. A defendant may claim immunity under Section 4 of the MMMA if the defendant proves by a preponderance of the evidence that, at the time of the charged offense, he or she:

- (1) possessed a valid registry identification card;
- (2) possessed no more marijuana than allowed under § 4(a);
- (3) stored any marijuana plants in an enclosed, locked

facility; and (4) was engaged in the medical use of marijuana. If the qualifying patient establishes the first and second elements, then a presumption exists that the qualifying patient was engaged in the medical use of marijuana, thereby establishing the fourth element. [*Hartwick*, 498 Mich at 221.]

Section 4(a) prohibits a qualifying patient from possessing more than “a combined total of 2.5 ounces of usable marijuana and usable marijuana equivalents” MCL 333.26424(a).

The prosecution did not argue that defendant’s registry-identification card was invalid. Further, the police report indicated that defendant possessed only six grams of marijuana. However, while the police conceded that the marijuana at issue was never weighed, the evidence at trial indicated that the police report was incorrect and that defendant actually possessed approximately three ounces of marijuana—an amount exceeding the permissible weight in Section 4(a). Thus, absent a pretrial evidentiary hearing on the issue, defendant did not establish that he was entitled to immunity under Section 4 of the MMMA.

Section 8 of the MMMA “provides any patient or primary caregiver—regardless of registration with the state—with the ability to assert an affirmative defense to a marijuana-related offense” if that person satisfies the elements of that section. *Hartwick*, 498 Mich at 226. “[T]o establish the elements of the affirmative defense in § 8, a defendant need not establish the elements of § 4.” *Kolanek*, 491 Mich at 403. Instead, a defendant may assert a § 8 affirmative defense if the defendant presents evidence of the following three elements:

(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).]

“[I]f a defendant establishes these elements and no question of fact exists regarding these elements, then the defendant is entitled to dismissal of the criminal charges.” *Hartwick*, 498

Mich at 227. On the other hand, “if questions of fact exist, then dismissal of the charges is not appropriate and the defense must be submitted to the jury.” *Id.* (quotation marks and citations omitted). Further,

if a defendant has not presented prima facie evidence of each element of § 8 by present[ing] evidence from which a reasonable jury could conclude that the defendant satisfied the elements of the § 8 affirmative defense, . . . then the circuit court must deny the motion to dismiss the charges and the defendant is not permitted to present the § 8 defense to the jury. [*Id.* (quotation marks and citation omitted).]

Here, even though defendant provided testimony during trial regarding his registry-identification card, he evidently failed to request an evidentiary hearing on the matter and failed to present prima facie evidence for each element of § 8(a). Specifically, defendant failed to provide any evidence with regard to § 8(a)(1) (bona fide physician-patient relationship), § 8(a)(2) (amount of marijuana needed), or § 8(a)(3) (use of marijuana for a medical purpose). Accordingly, absent a pretrial evidentiary hearing on the issue, defendant did not establish that he was entitled to assert an affirmative defense under § 8 of the MMMA.

Defendant also argues that the trial court erred in instructing the jury that although he was a medical-marijuana card holder, he was not entitled to immunity or defenses pursuant to the MMMA. This Court reviews “jury instructions in their entirety to determine if error requiring reversal occurred.” *People v Aldrich*, 246 Mich App 101, 124; 631 NW2d 67 (2001). “Even if the instructions are somewhat imperfect, reversal is not required as long as they fairly presented the issues to be tried and sufficiently protected the defendant’s rights.” *Id.*

“ ‘A defendant in a criminal trial is entitled to have a properly instructed jury consider the evidence against him or her.’ ” *People v Guajardo*, 300 Mich App 26, 34-35; 832 NW2d 409 (2013), quoting *People v Dobek*, 274 Mich App 58, 82; 732 NW2d 546 (2007). “The instructions must include all elements of the crime charged and must not exclude consideration of material issues, defenses, and theories for which there is supporting evidence.” *People v Kurr*, 253 Mich App 317, 327; 654 NW2d 651 (2002). “ ‘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.’ ” *Guajardo*, 300 Mich App at 34-35, quoting *People v Crawford*, 232 Mich App 608, 619; 591 NW2d 669 (1998).

Here, the trial court properly instructed the jury on the law and fairly presented to the jury the issues to be tried. Defendant failed to properly assert immunity or an affirmative defense under the MMMA. However, at trial defendant and police officers testified regarding defendant’s valid medical-marijuana card. This testimony could have confused the jury and resulted in defendant avoiding conviction of a marijuana-related offense without complying with the requirements of the MMMA. Thus, the trial court did not abuse its discretion when it instructed the jury that defendant was not entitled to immunity or defenses pursuant to the MMMA. The trial court properly instructed the jury on the law and fairly presented to the jury the issues to be tried.

Lastly, defendant argues that there was insufficient evidence presented at his probation-violation hearing to find that he violated his probation, given that Officer Ide did not feel threatened and defendant did not assault Officer Ide during the incident in question. Generally, claims concerning the sufficiency of the evidence are reviewed de novo in a criminal proceeding. *People v Kanaan*, 278 Mich App 594, 618; 751 NW2d 57 (2008).

“A trial court must base its decision that a probation violation was proven on verified facts in the record.” *People v Breeding*, 284 Mich App 471, 487; 772 NW2d 810 (2009). The evidence, when “viewed in a light most favorable to the prosecution, must be sufficient to enable a rational trier of fact to find a probation violation by a preponderance of the evidence.” *Id.* Deference is given to the trial court’s decisions regarding issues of credibility or the weight of evidence. See, generally, *People v Sexton (After Remand)*, 461 Mich 746, 752; 609 NW2d 822 (2000).

A term of defendant’s probation prohibited him from “engag[ing] in any assaultive, abusive, threatening, or intimidating behavior.” During the incident at issue, defendant hit his cell door with a closed fist, called Officer Ide vile names, and specifically threatened Officer Ide’s physical safety when he stated that if he saw Officer Ide on the street he would “kick [his] a**.” While defendant argues that his actions did not rise to the level of assault, his “assaultive, abusive, threatening, or intimidating behavior” against Office Ide was clearly manifest by his conduct. Thus, when viewed in the light most favorable to the prosecution, the evidence presented at the probation-violation hearing was sufficient to enable a rational trier of fact to find by a preponderance of the evidence that defendant violated his probation.

Affirmed.

/s/ Mark T. Boonstra
/s/ Patrick M. Meter
/s/ Michael F. Gadola