STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED July 17, 2012
v	No. 301427 Kalkaska Circuit Court
ARCHIE DARREL KIEL, Defendant-Appellant.	LC No. 09-003161-FH

Before: FITZGERALD, P.J., and WILDER and MURRAY, JJ.

PER CURIAM.

Defendant appeals as of right from his jury trial conviction of manufacturing a controlled substance, MCL 333.7401(2)(d)(iii). Defendant was acquitted by the jury of one count of perjury in a court proceeding, MCL 750.422.[1] Defendant was sentenced by the circuit court to serve five months in jail, with credit for two days served and 90 days to be suspended upon full payment of all court-ordered fees. Defendant was also ordered to pay a fine of $5,000, and his driver's license was suspended for a period of one year, with defendant eligible for a restricted license after 60 days. We reverse and remand for a new trial.

I

During a routine aerial surveillance, the Traverse Narcotics Team sighted several marijuana plants growing on defendant's property. Ground crews arrived at defendant's property and found 66 to 69[2] plants growing in three separate locations: in the front yard, in the basement, and outside on a deck. After defendant produced medical marijuana cards for three people (himself, Heath Ehl, and Genevieve Geyer), the officers concluded that defendant was entitled as a medical marijuana caregiver to have only 36 plants. The officers seized approximately 30 plants, leaving 36 behind. Defendant was subsequently charged with manufacturing a controlled substance, MCL 333.7401(2)(d)(ii) (20-199 marijuana plants), but

[1] The perjury charge arose out of defendant's testimony at a pretrial evidentiary hearing.

[2] At the pretrial hearing, the stated quantity was 66 or 67 plants, but at trial, one of the detectives testified that there were 69 plants present.

the jury convicted defendant of the lesser-included offense of manufacturing a controlled substance, MCL 333.7401(2)(d)(iii) (less than 20 plants).

In a pretrial motion, defendant sought dismissal of the marijuana charge based on the affirmative defenses located under § 4 and/or § 8 of the Michigan Medical Marijuana Act ("MMMA"), MCL 333.26421 *et seq.* After conducting an evidentiary hearing, the trial court denied defendant's motion to dismiss. The trial court found that defendant was a medical marijuana caregiver, that defendant had four[3] patients at the time of the raid, that the statute permitted a caregiver to have 12 plants per patient, and that defendant exceeded the statutorily permitted amount of 48 plants by having 66 or 67 plants at the time of the raid. The trial court rejected defendant's claim that he was allowed to provide marijuana to a fifth patient, Dorothy Hublick, on the basis of its finding that defendant failed to prove that Hublick had filed an application with the Michigan Department of Community Health's Medical Marijuana Registry Program ("MMRP") before the raid.[4] The trial court further held that the marijuana growing in defendant's front yard was not in a "secure" enclosure as required by § 4. Having found that defendant had more than the permissible amount of marijuana plants and that some of the marijuana was not in a secure facility, the trial court denied defendant's motion to dismiss.

II

Defendant first argues that under § 4, MCL 333.26424, and § 8, MCL 333.26428, of the MMMA he was entitled to present an affirmative defense as to all of the marijuana plants on his property. We disagree that defendant was entitled to assert a § 4 defense at trial, but we agree that he was entitled to assert a defense under § 8. We review questions of statutory interpretation de novo. *People v Feezel*, 486 Mich 184, 205; 783 NW2d 67 (2010).

Section 4 of the MMMA provides, in relevant part, as follows:

> (a) A qualifying patient who has been issued and possesses a registry identification card shall not be subject to arrest, prosecution, or penalty in any manner, or denied any right or privilege, including but not limited to civil penalty or disciplinary action by a business or occupational or professional licensing board or bureau, for the medical use of marihuana in accordance with this act, provided that the qualifying patient possesses an amount of marihuana that does not exceed 2.5 ounces of usable marihuana, and, if the qualifying patient has not

---

[3] In addition to the three people defendant had medical marijuana cards for, the trial court also determined that defendant could supply marijuana to Dusty Kiel, defendant's son.

[4] While defendant acknowledged that even with a fifth patient, under § 4 of the MMMA, he would only be allowed to have 60 plants, he also asserted that many of his 66 or 67 plants were "unrooted" and, therefore, did not qualify as "plants" under the MMMA. Thus, defendant claims that counting only "rooted" plants, he had less than what he asserts is the allowable number of 60 plants.

specified that a primary caregiver will be allowed under state law to cultivate marihuana for the qualifying patient, 12 marihuana plants kept in an enclosed, locked facility. Any incidental amount of seeds, stalks, and unusable roots shall also be allowed under state law and shall not be included in this amount.

(b) A primary caregiver who has been issued and possesses a registry identification card shall not be subject to arrest, prosecution, or penalty in any manner, or denied any right or privilege, including but not limited to civil penalty or disciplinary action by a business or occupational or professional licensing board or bureau, for assisting a qualifying patient to whom he or she is connected through the department's registration process with the medical use of marihuana in accordance with this act, provided that the primary caregiver possesses an amount of marihuana that does not exceed:

(1) 2.5 ounces of usable marihuana for each qualifying patient to whom he or she is connected through the department's registration process; and

(2) for each registered qualifying patient who has specified that the primary caregiver will be allowed under state law to cultivate marihuana for the qualifying patient, 12 marihuana plants kept in an enclosed, locked facility; and

(3) any incidental amount of seeds, stalks, and unusable roots.

* * *

(d) There shall be a presumption that a qualifying patient or primary caregiver is engaged in the medical use of marihuana in accordance with this act if the qualifying patient or primary caregiver:

(1) is in possession of a registry identification card; and

(2) is in possession of an amount of marihuana that does not exceed the amount allowed under this act. The presumption may be rebutted by evidence that conduct related to marihuana was not for the purpose of alleviating the qualifying patient's debilitating medical condition or symptoms associated with the debilitating medical condition, in accordance with this act. [MCL 333.26424.]

Section 8 of the MMMA provides, in pertinent part, as follows:

(a) Except as provided in section 7, 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, 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 marihuana 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 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

(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.

(b) A person may assert the medical purpose for using marihuana in a motion to dismiss, and the charges shall be dismissed following an evidentiary hearing where the person shows the elements listed in subsection (a).

(c) If a patient or a patient's primary caregiver demonstrates the patient's medical purpose for using marihuana pursuant to this section, the patient and the patient's primary caregiver shall not be subject to the following for the patient's medical use of marihuana:

(1) disciplinary action by a business or occupational or professional licensing board or bureau; or

(2) forfeiture of any interest in or right to property. [MCL 333.26428.]

Our Supreme Court has recently clarified the interaction between the § 4 and the § 8 defenses. Before the Supreme Court's decision in *People v Kolanek*, ___ Mich ___; ___ NW2d ___ (Docket No. 142695, decided May 31, 2012), our Court had issued conflicting opinions regarding the interplay between § 4 and § 8. In *People v King*, 291 Mich App 503; 804 NW2d 911 (2011) rev'd *Kolanek*, ___ Mich ___, this Court stated that a defendant must meet the requirements of § 4 in order to invoke a § 8 defense. This was counter to this Court's earlier pronouncement in *People v Redden*, 290 Mich App 65; 799 NW2d 184 (2010), where this Court stated that § 4 and § 8 were completely separate, such that one need not meet the requirements of § 4 in order to assert a § 8 defense. The Supreme Court in *Kolanek* resolved this conflict when it affirmed the view held by the *Redden* Court that "to establish the elements of the affirmative defense in § 8, a defendant need not establish the elements of § 4." *Kolanek*, ___ Mich at ___ (slip op at 19). The Supreme Court explained that

[t]he stricter requirements of § 4 are intended to encourage patients to register with the state and comply with the act in order to avoid arrest and the initiation of charges and obtain protection for other rights and privileges. If registered patients choose not to abide by the stricter requirements of § 4, they will not be able to

> claim this broad immunity, but will be forced to assert the affirmative defense under § 8, just like unregistered patients. [*Id.* (slip op at 19), citing *Redden*, 290 Mich App at 81.]

The *Kolanek* Court further explained that a § 8 defense must be asserted in a pretrial motion. *Kolanek*, ___ Mich at ___ (slip op at 27).

> Thus, if a defendant raises a § 8 defense, there are no material questions of fact, and the defendant shows the elements listed in subsection (a), then the defendant is entitled to dismissal of the charges following the evidentiary hearing. Alternatively, if a defendant establishes a prima facie case for this affirmative defense by presenting evidence on all the elements listed in subsection (a) but material questions of fact exist, then dismissal of the charges is not appropriate and the defense must be submitted to the jury. . . . Finally, if there are no material questions of fact and the defendant has not shown the elements listed in subsection (a), the defendant is not entitled to dismissal of the charges and the defendant cannot assert § 8(a) as a defense at trial. [*Id.* (slip op at 28-29) (quotations and footnote omitted).]

In the instant case, the trial court correctly concluded that defendant failed to establish the requirements under § 4. Subsection (b)(2) permits a caregiver to have no more than 12 plants "for each *registered* qualifying patient." Defendant admitted that he only had his, Geyer's and Ehl's cards at the time of the raid. Thus, defendant could only have possessed 36 plants in order to successfully assert a § 4 defense. Defendant argued at the hearing that pursuant to § 9 of the MMMA, two other patients (Dusty Kiel and Hublick) should have counted as registered qualified patients as well. We disagree. Section 9 of the MMMA provides that

> [i]f the department fails to issue a valid registry identification card in response to a valid application or renewal submitted pursuant to this act within 20 days of its submission, the registry identification card shall be deemed granted, and a copy of the registry identification application or renewal shall be deemed a valid registry identification card.

Because the evidence shows that Dusty's ID was issued on September 8, 2009, and Hublick's ID was issued on September 28, 2009 (in other words, *after* the raid), in order for Dusty and Hublick to have been registered qualified patients at the time of the August 13, 2009, raid, they must have submitted their applications 20 days prior to the raid, or by July 24, 2009. The evidence fails to establish that either Dusty or Hublick applied by this date.

Dusty testified at the hearing that he could not recall exactly when he submitted his application to the state but thought it might have been "somewhere in the end of July." He also admitted that he did not have a copy of his registry identification application. There was no evidence introduced at the hearing regarding when Hublick submitted her application to the

state.[5] As a result, defendant was only able to establish that he was a caregiver for three registered qualified patients as of August 13, 2009, and defendant's possession of 66 or 67 plants exceeded the § 4 allotted amount of 36. Thus, the trial court correctly determined that defendant could not invoke the § 4 affirmative defense.[6]

Even though defendant was not permitted to assert a § 4 affirmative defense, under *Kolanek,* a defendant's ability to assert a § 8 defense is not dependent upon meeting the requirements under § 4. *Kolanek*, ___ Mich at ___ (slip op at 19). Applying *Kolanek* here, then, we conclude from our review of the record that defendant established a prima facie case for a § 8 defense and that there were questions of fact regarding that defense, such that while defendant was not entitled to dismissal, he was entitled to raise the § 8 defense at trial. *Id.* (slip op at 28-29).

The elements to be established in a § 8 defense are as follows:

> (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 medial use of marihuana," (2) the defendant did not possess an amount of marijuana that was more than "reasonably necessary for this purpose" and (3) the defendant's use was "to treat or alleviate the patient's serious or debilitating medical condition or symptoms . . . ." [*Id.* (slip op at 33).]

At the evidentiary hearing, defendant testified that he was not only a medical marijuana user, but he was also a medical marijuana caregiver for himself, plus four other people. To support his testimony regarding the first element and third element, he offered into evidence various medical marijuana IDs of himself, Hublick, Geyer, Ehl, and his son, Dusty. Defendant also submitted two caregiver attestations, one each for Hublick and Dusty that were each dated July 24, 2009. The fact that these individuals were registered with the state as medical marijuana users is prima facie evidence of the first and third elements. However, because Dusty and

---

[5] We note that since copies of the actual applications submitted by Dusty and Hublick were not admitted as evidence, it is mere speculation that the applications were timely submitted in this case, or that Dusty and Hublick actually specified defendant as their primary caregiver. Moreover, the § 9 presumption applies only for "valid" applications. Thus, in order to make a prima facie case regarding this presumption, there must be evidence that the patient's application was not rejected during this 20-day period. This evidence can only come from the patient who, unlike the proposed caregiver, is the only person who would be notified of defects in the application.

[6] We further note that even if defendant is correct and only "rooted" plants should be counted for purposes of § 4, defendant still possessed in excess of the permitted 36 plants. Defendant claimed that he had 21 "unrooted" plants, so he had either 45 or 46 "rooted" plants.

Hublick were registered after the date of the raid, there remains a question of fact for resolution by a jury as to whether they were "patients" as of the time of the raid. Furthermore, there is a question of fact regarding whether the amount that defendant possessed was "more than reasonably necessary" to support whomever he was providing marijuana. Therefore, the trial court appropriately denied defendant's motion to dismiss, but defendant was entitled to present an affirmative defense based on § 8. *Id.* (slip op at 28-29).

III

Next, defendant argues that the trial court erred by refusing to read a proposed jury instruction offered by defense counsel. We agree.

Claims of instructional error are reviewed de novo. *People v Kowalski*, 489 Mich 488, 501; 802 NW2d 608 (2011). Generally, jury instructions must fairly present the issues to be tried and sufficiently protect a defendant's rights. *People v Aldrich*, 246 Mich App 101, 124; 631 NW2d 67 (2005). "The instructions must include all elements of the charged offenses and any material issues, defenses, and theories if supported by the evidence." *People v McGhee*, 268 Mich App 600, 606; 709 NW2d 595 (2005).

The trial court gave the following jury instruction regarding the MMMA affirmative defense:

> Now, we have a state statute regarding the medical use of marijuana which provides as follows: A qualifying patient or caregiver may assert the medical purpose for using or manufacturing marijuana as a defense to any prosecution involving marijuana. And this defense shall be presumed valid where the evidence shows that the statute provides that there shall be a presumption that a qualifying patient or caregiver is engaged in the medical use of marijuana in accordance with this act if the qualifying patient or caregiver, one, is in possession of a registry identification card, and two, is in possession of an amount of marijuana that does not exceed the amount allowed under this act.
>
> Now, the presumption may be rebutted by evidence that conduct related to marijuana was not for the purpose of alleviating the qualifying patient's debilitating medical condition or symptoms associated with the debilitating medical condition in accordance with this act.
>
> * * *
>
> A qualifying patient or caregiver who has been issued and possesses a registry identification card shall not be subject to prosecution for the medial use of marijuana and 12 marijuana plants kept in an enclosed locked facility. . . .

While this instruction matches the requirements under § 4, the trial court erred in giving this instruction to the jury because, as discussed, *supra*, defendant was entitled to assert a § 8 affirmative defense at trial.

IV

As clarified by our Supreme Court, § 4 applies only to *registered* qualifying patients, while § 8 provides an affirmative defense to "patients" generally. *Kolanek*, ___ Mich at ___ (slip op at 19). Because the jury was not properly instructed concerning the applicable affirmative defense, defendant is entitled to a new trial.

Having concluded that the instructional error warrants reversal, we decline to address defendant's remaining claim of error.

Reversed and remanded for a new trial. We do not retain jurisdiction.

/s/ E. Thomas Fitzgerald
/s/ Kurtis T. Wilder
/s/ Christopher M. Murray