# STATE OF MICHIGAN

# COURT OF APPEALS

| | |
|---|---|
| PEOPLE OF THE STATE OF MICHIGAN,<br><br>Plaintiff-Appellant, | UNPUBLISHED<br>October 11, 2012 |
| v | No. 302795<br>Genesee Circuit Court |
| CHASON WILLIAM-GREGORY POINTER,<br><br>Defendant-Appellee. | LC No. 10-026419-FH |

Before: FORT HOOD, P.J., and METER and MURRAY, JJ.

PER CURIAM.

The prosecution appeals as of right from an order directing a verdict of acquittal. We reverse and remand.

The prosecution contends that the trial court's order should be reversed because the trial court did not view the elements of manufacturing 20 plants or more but fewer than 200 plants of marijuana, MCL 333.7401(2)(d)(*ii*),[1] in the light most favorable to the prosecution and erroneously found that the prosecution was required to introduce evidence that the weight of usable marijuana exceeded the amount allowed under the Michigan Medical Marihuana Act (MMMA), MCL 333.26421 *et seq*.[2] We agree that reversal is warranted.

"We review a trial court's decision on a motion for a directed verdict de novo to determine whether the evidence presented by the prosecution, viewed in a light most favorable to the prosecution, could persuade a rational fact-finder that the essential elements of the offense were proved beyond a reasonable doubt." *People v Evans*, 288 Mich App 410, 415-416; 794 NW2d 848 (2010), aff'd 491 Mich 1; 810 NW2d 535 (2012), cert gtd __ US __; 132 S Ct 2753; 183 L Ed 2d 614 (2012). We review de novo, as a question of law, the applicability of the Double Jeopardy Clause, US Const Amend V; Const 1963, art 1, § 15. *Evans*, 288 Mich App at 416. Questions of statutory interpretation are also reviewed de novo. *People v Kolanek*, 491 Mich 382, 393; 817 NW2d 528 (2012).

---

[1] MCL 333.7401 was amended in 2012, but the amendment did not affect the provision at issue.

[2] Although the statutes use the spelling "marihuana," we use the spelling "marijuana" in this opinion.

This case involves an interpretation of the MMMA, which "was proposed in a citizen's initiative petition, was elector-approved in November 2008, and became effective December 4, 2008." *Id*.

> The words of an initiative law are given their ordinary and customary meaning as would have been understood by the voters. We presume that the meaning as plainly expressed in the statute is what was intended. This Court must avoid a construction that would render any part of a statute surplusage or nugatory, and [w]e must consider both the plain meaning of the critical words or phrases as well as their placement and purpose in the statutory scheme. [*People v Redden*, 290 Mich App 65, 76-77; 799 NW2d 184 (2010) (internal citations and quotation marks omitted).]

" MCL 333.26424[] grants 'qualifying patient[s]' who hold 'registry identification card[s]' broad immunity from criminal prosecution, civil penalties, and disciplinary actions . . . ." *Kolanek*, 491 Mich at 394-395. This provision, § 4, provides, in part:

> (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 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. [MCL 333.26424.]

Defendant was charged in the amended information with the unlawful manufacture of 20 or more but less than 200 marijuana plants, MCL 333.7401(2)(d)(*ii*). MCL 333.7401 provides, in part:

> (1) Except as authorized by this article, a person shall not manufacture, create, deliver, or possess with intent to manufacture, create, or deliver a controlled substance, a prescription form, or a counterfeit prescription form. A practitioner licensed by the administrator under this article shall not dispense, prescribe, or administer a controlled substance for other than legitimate and professionally recognized therapeutic or scientific purposes or outside the scope of practice of the practitioner, licensee, or applicant.
>
> (2) A person who violates this section as to:
>
> * * *
>
> (d) Marihuana or a mixture containing marihuana is guilty of a felony punishable as follows:
>
> * * *
>
> (*ii*) If the amount is 5 kilograms or more but less than 45 kilograms, or 20 plants or more but fewer than 200 plants, by imprisonment for not more than 7 years or a fine of not more than $500,000.00, or both.[3]

The trial court granted defendant's motion for a directed verdict because the prosecution failed to prove that defendant, a medical-marijuana card holder, was in possession of more than 2.5 ounces of usable marijuana. The trial court found that the prosecution established that defendant was in possession of more than 12 plants. However, the court found that the language of the MMMA required the prosecution to show both.

Leaving aside as irrelevant the question regarding whether the burden should lay with the prosecution to establish that a defendant did not comply with § 4 or whether the burden should lay with the defendant to establish immunity under § 4, it is clear in the present case that defendant possessed more than 12 marijuana plants. The plain language of § 4 indicates that a qualifying patient who possesses a registry identification card is immune from prosecution provided the qualifying patient possesses not more than 2.5 ounces of usable marijuana *and* not more than 12 plants. See MCL 333.26424(a). In other words, a qualifying patient is immune only if both limitations are satisfied. Given the language of the statute, defendant was not entitled to immunity because the evidence clearly established that he possessed more than 12 plants, regardless of whether he also possessed more than 2.5 ounces of usable marijuana.

---

[3] The elements of unlawful manufacture of marijuana are: (1) the defendant manufactured a controlled substance, (2) the substance manufactured was marijuana, and (3) the defendant knew he was manufacturing marijuana. See MCL 333.7401(2)(d) and CJI2d 12.1.

The Michigan Supreme Court, in its opinion in *Evans*, 491 Mich at 20-21, stated:

> [A]n acquittal for double-jeopardy purposes is a "ruling of the judge, whatever its label, [that] actually represents a resolution, correct or not, of some or all of the *factual elements* of the offense charged." The trial court's legal error resulted in its adding an element to the charged offense and requiring the prosecution to provide proof of that extraneous element. As the Court of Appeals concluded, the trial court did not resolve or even address any factual element necessary to establish a conviction for burning other real property. Rather, the substance of the trial court's ruling was entirely focused on the extraneous element. Consequently, the trial court's decision was based on an error of law unrelated to defendant's guilt or innocence on the elements of the charged offense, and thus the trial court's dismissal of the charge did not constitute an acquittal. [Citations omitted.]

The Court held that "when a trial court grants a defendant's motion for a directed verdict on the basis of an error of law that did not resolve any factual element of the charged offense, the trial court's ruling does not constitute an acquittal for the purposes of double jeopardy and retrial is therefore not barred." *Id*. at 25.

The trial court granted defendant's motion for a directed verdict based on an error of law that did not resolve any factual element of the crime charged. Therefore, its ruling did not constitute an acquittal for double-jeopardy purposes and retrial is not barred. We express no opinion regarding the potential applicability of the § 8 affirmative defense on remand; the trial court must address this issue if it arises.

Reversed and remanded for further proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ Karen M. Fort Hood
/s/ Patrick M. Meter
/s/ Christopher M. Murray