# STATE OF MICHIGAN

# COURT OF APPEALS

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| PEOPLE OF THE STATE OF MICHIGAN,<br><br>Plaintiff-Appellee, | UNPUBLISHED<br>November 21, 2017 |
| v | No. 334583<br>Muskegon Circuit Court |
| PATRICK JOHN SLACK,<br><br>Defendant-Appellant. | LC No. 15-066691-FH |

Before: HOEKSTRA, P.J., and STEPHENS and SHAPIRO, JJ.

PER CURIAM.

Defendant appeals his conviction of manufacturing a controlled substance, MCL 333.7401(2)(d)(*iii*), and possession of marijuana, MCL 333.7403(2)(d). The trial court sentenced defendant, as a fourth-offense habitual offender, MCL 769.12, to 1 to 8 years' imprisonment for manufacturing a controlled substance and to a term of two days in jail for possession of marijuana. Defendant argues he is entitled to a new trial on the grounds of ineffective assistance of counsel and prosecutorial misconduct. For the reasons set forth below, we affirm.

This case arises out of a drug raid, conducted pursuant to a search warrant, of a warehouse located in Muskegon, Michigan, on January 13, 2015. At the start of trial, defense counsel stipulated that defendant was not entitled to claim immunity or other defenses under the Michigan Medical Marihuana Act (MMMA), MCL 333.26421 *et seq.*, specifically sections 4 and 8.[1] Because there was no basis to argue that the MMMA applied, we reject defendant's argument.[2]

[1] Section 4, MCL 333.26424, provides potential immunity and protection for the medical use of marijuana, and Section 8, MCL 333.26428, provides a possible medical-purpose defense for using marijuana.

[2] We review a trial court's factual findings for clear error, and review de novo constitutional determinations. *People v Johnson*, 293 Mich App 79, 90; 808 NW2d 815 (2011). However, because defendant failed to file a motion to remand, and no *Ginther* hearing was held, this Court

A criminal defendant has the fundamental right to effective assistance of counsel. *United States v Cronic*, 466 US 648, 654; 104 S Ct 2039; 80 L Ed 2d 657 (1984). "However, effective assistance of counsel is presumed, and the defendant bears a heavy burden of proving otherwise." *People v Schrauben,* 314 Mich App 181, 190; 886 NW2d 173 (2016). "To establish that a defendant's trial counsel was ineffective, a defendant must show: (1) that counsel's performance fell below an objective standard of reasonableness under prevailing professional norms and (2) that there is a reasonable probability that, but for counsel's error, the result of the proceedings would have been different." *Id.*

From October 2014 through January 13, 2015, there were marijuana plants being grown at the warehouse. The West Michigan Enforcement Team (WEMET) found defendant on the premises as well as 23 growing marijuana plants in a basement grow area, and 2.3 pounds of marijuana that were being dried in a drying room. The property was owned by defendant's brother. During a lawful search of the premises, defendant was found coming up the stairs from the basement. Defendant told the officers that he did not have a medical-marijuana card. He explained that he worked at the warehouse approximately five hours a day performing various maintenance duties, including "trimming" the marijuana plants. Defendant stated that he was compensated for these jobs and that he wanted to learn how to grow marijuana plants. At trial, defendant testified that by "trimming" he only meant that he cut up dead marijuana plants in order to make them smaller to throw away. As defined by MCL 333.26423(n), "[u]sable marihuana" does not include the stalks of the plant. Defendant testified that he cut the dead stalks after the buds had been trimmed off and that "[i]t just looked like a plant with sticks on it when I got them. There was—other than that, there was nothing else on them." Defendant also testified that he was not allowed to trim the live plants, and that he was trimming the plants to assist his brother. The jury rejected this explanation based upon evidence that "trimming" the plants actually involved cutting off marijuana flowers and buds so that they could be sold or used.

Defense counsel was not ineffective for not asserting § 4 immunity under the MMMA as there was no basis to do so. To establish immunity under section 4, defendant must be a "qualifying patient" or "primary caregiver." MCL 333.26424(a) and (b) provides immunity to a qualifying patient or a primary caregiver who has been issued a registry identification card from "arrest, prosecution, or penalty in any manner," or from being denied any right or privilege. To prevail on a claim of section 4 immunity, a defendant must show, by a preponderance of the evidence, that he "(1) was issued and possessed a valid registry identification card, (2) complied with the requisite volume limitations of § 4(a) and § 4(b), (3) stored any marijuana plants in an enclosed, locked facility, and (4) was engaged in the medical use of marijuana." *People v Hartwick*, 498 Mich 192, 217; 870 NW2d 37 (2015).

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will review defendant's unpreserved claim of ineffective assistance of counsel for errors "apparent on the record." *People v Matuszak*, 263 Mich App 42, 48; 687 NW2d 342 (2004).

In this case, there is no evidence that defendant had a registry card as either a qualifying patient or caregiver. Although there is some indication in the record that defendant stated that he had applied for a card after submitting the necessary paperwork, no evidence was proffered at trial or in this appeal to support this assertion. Since defendant could not establish the essential elements of immunity under section 4 of the MMMA, the argument was futile and defense counsel was under no obligation to pursue it. *People v Ericksen*, 288 Mich App 192, 201; 793 NW2d 120 (2010).

Similarly, there was no basis to assert the § 8 affirmative defense under the MMMA. MCL 333.26428 provides in relevant part:

> (a) Except as provided in section 7(b), 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:
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> (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 that 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 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.

Although a section 8 defense does not require registration under the MMMA, it applies only to conduct by a patient or a caregiver within the patient-caregiver relationship. *People v Bylsma*, 315 Mich App 363, 384; 889 NW2d 729 (2016). Defendant did not qualify as a patient or caregiver under the MMMA. There was no evidence proffered at trial or on appeal that defendant meets the requirements of subsections (a)(1) or (a)(2). To the degree that defendant argues he should be permitted to rely on a claim that he was merely assisting his brother in lawful conduct, there was no evidence to support the argument that defendant's brother's activities met the requirements of section 8. Moreover, the laws allowing medical marijuana dispensaries did not take effect until December 2016. MCL 333.27101 *et seq.*, as created by 2016 PA 281; MCL 333.27901 *et seq.*, as created by 2016 PA 282.

We conclude that defense counsel was not ineffective for failing to raise futile arguments under the MMMA. Because defendant has failed to show that defense counsel's performance fell below an objective standard of reasonableness, and that but for defense counsel's deficient performance, there was a reasonable probability the outcome would be different, defendant is not entitled to relief. *People v Carbin*, 463 Mich 590, 600; 623 NW2d 884 (2001).

Defendant also claims that prosecutor's statements during closing arguments denied him a fair and impartial trial. We disagree.[3]

To establish prosecutorial misconduct, the test is whether defendant was denied a fair and impartial trial. *People v Dobek*, 274 Mich App 58, 63; 732 NW2d 546 (2007). A prosecutor has a duty to seek justice and "not merely convict." *Id*. "Although a prosecutor may not argue a fact to the jury that is not supported by evidence, a prosecutor is free to argue the evidence and any reasonable inferences that may arise from the evidence." *People v Callon*, 256 Mich App 312, 330; 662 NW2d 501 (2003). A prosecutor "may not vouch for the credibility of his witnesses by implying that he has some specialized knowledge of their truthfulness. But a prosecutor may comment on his own witnesses' credibility during closing argument, especially when there is conflicting evidence and the question of the defendant's guilt depends on which witnesses the jury believes." *People v Thomas*, 260 Mich App 450, 455; 678 NW2d 631 (2004) (citation omitted).

During closing arguments, the prosecutor commented on the credibility of the police officers who testified:

> Ladies and gentlemen, I have to prove for Count I that the Defendant manufactured marijuana. And not only did he manufacture marijuana, but that he knew he was manufacturing marijuana. And I submit to you, *the officers in this case really have no reason to lie*. And at the time, the Defendant was only concerned about his brother, so then he wasn't lying about his involvement. . . . So the Defendant wants you to pick a side. Pick a story. And I'm asking you to use your common sense and reason on which one makes more sense. Which one fits with the rest of the evidence? (Emphasis added).

The prosecutor's comment was directed at the defense's argument that the officers lied in recounting statements made by the defendant about whether he was trimming only stems or other

[3] "This Court reviews claims of prosecutorial misconduct case by case, examining the remarks in context, to determine whether the defendant received a fair and impartial trial." *People v Aldrich*, 246 Mich App 101, 110; 631 NW2d 67 (2001). However, because defendant failed to preserve this issue, our review is for plain error. In order to avoid forfeiture of the issue, defendant must demonstrate plain error that affected his substantial rights and thereby affected the outcome of the proceedings. *Aldrich*, 246 Mich App at 110. " 'No error requiring reversal will be found if the prejudicial effect of the prosecutor's comments could have been cured by a timely instruction.' " *People v Watson*, 245 Mich App 572, 586; 629 NW2d 411 (2001) (citation omitted).

portions of the plants. The prosecutor did not make any statements concerning his own personal knowledge of the witness's truthfulness. Rather, by stating that "the officers in this case really have no reason to lie," the prosecutor was simply commenting on the witnesses' credibility in light of conflicting evidence. *Thomas*, 260 Mich App at 455.

Affirmed.

/s/ Joel P. Hoekstra
/s/ Cynthia Diane Stephens
/s/ Douglas B. Shapiro