

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellant,

v

PETER ANTHONY TRZOS,

Defendant-Appellee.

UNPUBLISHED
December 12, 2017

No. 334666
Oakland Circuit Court
LC Nos. 2013-245187-FH;
2013-245919-FH

Before: GLEICHER, P.J., and GADOLA and O'BRIEN, JJ.

PER CURIAM.

In this interlocutory appeal, the prosecution appeals by leave granted the trial court's order denying the prosecution's motion in limine to preclude defendant from presenting evidence regarding the Michigan Medical Marihuana¹ Act (MMMA), MCL 333.26421 *et seq.*, and evidence related to multiple claims of entrapment previously raised by defendant and rejected by the trial court. See *People v Trzos*, unpublished order of the Court of Appeals, entered September 16, 2016 (Docket No. 334666).² We reverse in part and affirm in part.

Defendant is currently facing nine charges across two cases that were consolidated in the trial court. In the first case, defendant is charged with three counts of delivery or manufacture of marijuana, MCL 333.7401(2)(d)(iii), specifically, two counts of delivery of marijuana and one count of possession with intent to deliver marijuana. In the second case, defendant is charged with one count of possession with intent to deliver marijuana, three counts of possession of a

¹ We note that "by convention this Court uses the more common spelling 'marijuana' in its opinions." *People v Carruthers*, 301 Mich App 590, 593, n 1; 837 NW2d 16 (2013). Therefore, we will refer to "marijuana" by that spelling except when quoting from the MMMA.

² Defendant contends that this Court lacks jurisdiction over the prosecution's appeal because the Michigan Supreme Court is considering defendant's application for leave to appeal a different order entered by the trial court. However, defendant cites no authority to support this assertion, and, perhaps more importantly, our Supreme Court denied defendant's application for leave to appeal on September 12, 2017. *People v Troz*, ___ Mich ___ (2017) (Docket No. 154066). Thus, we need not address the issue.

firearm during the commission of a felony (felony-firearm), MCL 750.227b, one count of possession of a dangerous weapon (metallic knuckles), MCL 750.224(1)(d), and one count of possession of a controlled substance analogue (testosterone enanthate), MCL 333.7403(2)(b)(ii).

The charges against defendant relate to an investigation that began in early 2013. On January 22, 2013, the Oakland County Sheriff's Department used a confidential informant to purchase marijuana from defendant's dispensary, which had been granted a business license by the Village of Holly. The informant purchased marijuana from defendant a second time on January 23, 2013. Based on defendant's sale of marijuana to the informant, the Oakland County Sheriff's Department obtained and executed search warrants at defendant's dispensary and home. At the dispensary, officers uncovered "close to three pounds" of marijuana, and at defendant's home they found marijuana, packaging materials, vials that were labeled "testosterone," brass knuckles, and "multiple handguns."

Over the course of this case's lengthy procedural history in the trial court, defendant brought multiple motions to dismiss the case on a number of theories, including various theories of entrapment and asserting the affirmative defense under § 8 of the MMMA, MCL 333.26428. The trial court repeatedly denied defendant's motions to dismiss. With respect to defendant's § 8 defense, the trial court found that defendant "essentially concede[d] that he cannot present evidence to establish the elements of a section 8 defense," and denied the motion.

Eventually, the prosecution filed a motion in limine requesting that the trial court enter an order prohibiting defendant "from attempting to place before the jury the MMMA, reference the marijuana as medical, his status as a registered caregiver and/or patient, and/or his alleged belief in the legality of his actions," based on MRE 401, MRE 403, and the trial court's earlier denial of defendant's motions to dismiss based on § 8 and various claims of entrapment. The trial court denied the motion. It found that were it to grant the prosecution's motion to broadly exclude this evidence, it "would leave a gap . . . in the evidence in that the jury would hear no evidence regarding how defendant came to sell marijuana in that location, how defendant came to sell marijuana to [the confidential informant], and how the search warrants on defendant's home and business were obtained." The trial court noted that a jury is better equipped when it knows more about a transaction, and it ultimately ruled that the evidence was "necessary to explain the res gestae of the crime."

On appeal, the prosecution contends that the trial court erred when it denied the prosecution's motion to preclude defendant from presenting evidence relating to the MMMA, references to marijuana as "medical," defendant's status as a patient or primary caregiver under the MMMA, and defendant's alleged belief in the legality of his actions. We disagree with the exception of references to defendant's belief in the legality of his actions.

The decision to admit evidence is within a trial court's discretion and is reviewed for an abuse of that discretion. *People v Bynum*, 496 Mich 610, 623; 852 NW2d 570 (2014). An abuse of discretion occurs when the trial court's decision is outside the range of principled outcomes. *People v Daniels*, 311 Mich App 257, 265; 874 NW2d 732 (2015). When the decision regarding the admission of evidence involves a preliminary question of law, such as whether a statute or rule of evidence precludes admissibility of the evidence, the issue is reviewed de novo. *People v Lukity*, 460 Mich 484, 488; 596 NW2d 607 (1999).

In general, “[a]ll relevant evidence is admissible,” while “[e]vidence which is not relevant is not admissible.” *People v Henry*, 315 Mich App 130, 143; 889 NW2d 1 (2016), quoting MRE 402 (alterations in original). “Evidence is relevant if it has any tendency to make the existence of a fact that is of consequence to the action more probable or less probable than it would be without the evidence.” *People v Aldrich*, 246 Mich App 101, 114; 631 NW2d 67 (2001). “Relevant evidence may be excluded under MRE 403 ‘if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.’ ” *People v Meissner*, 294 Mich App 438, 451; 812 NW2d 37 (2011), quoting MRE 403. Evidence is unfairly prejudicial when there exists a danger that marginally probative evidence will be given undue or preemptive weight by the jury. *People v Mardlin*, 487 Mich 609, 627; 790 NW2d 607 (2010).

“Res gestae are circumstances, facts and declarations which so illustrate and characterize the principal fact as to place it in its proper effect.” *People v Bostic*, 110 Mich App 747, 749; 313 NW2d 98 (1981). As explained by our Supreme Court in *People v Delgado*, 404 Mich 76, 83; 273 NW2d 395 (1978),

It is the nature of things that an event often does not occur singly and independently, isolated from all others, but, instead, is connected with some antecedent event from which the fact or event in question follows as an effect from a cause. When such is the case . . . the principle that the jury is entitled to hear the “complete story” ordinarily supports the admission of such evidence.

This is because “it is essential that prosecutors and defendants be able to give the jury an intelligible presentation of the full context in which disputed events took place.” *People v Sholl*, 453 Mich 730, 741; 556 NW2d 851 (1996). Our Supreme Court recently reiterated “that *Delgado* and *Sholl* provide firm support for the notion that evidence meeting their ‘res gestae’ definition is potentially relevant and admissible.” *People v Jackson*, 498 Mich 246, 268; 869 NW2d 253 (2015).

In *People v Kolanek*, 491 Mich 382, 394; 817 NW2d 528 (2012), the Michigan Supreme Court explained,

The MMMA does *not* create a general right for individuals to use and possess marijuana in Michigan. Possession, manufacture, and delivery of marijuana remain punishable offenses under Michigan law. Rather, the MMMA’s protections are limited to individuals suffering from serious or debilitating medical conditions or symptoms, to the extent that the individuals’ marijuana use is carried out in accordance with the provisions of [the MMMA]. [Alteration in original.]

Pursuant to § 8 of the MMMA, MCL 333.26428,³ “the medical use of marijuana is a statutorily created affirmative defense.” *Kolanek*, 491 Mich at 410. “[I]f 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.” *Kolanek*, 491 Mich at 412. A trial judge must preclude from the jury’s consideration evidence that is legally insufficient to support the § 8 defense in instances where no reasonable juror could conclude that the defendant satisfied the elements of the defense. *Id.* at 412-413. Relatedly, “[t]o allow submission of the defense to the jury when the defense fails as a matter of law would unnecessarily burden the jury and the circuit court with irrelevant testimony.” *Id.* at 413; see also *People v Bylsma*, 315 Mich App 363, 387; 889 NW2d 729 (2016) (holding that the trial courts properly denied motions to dismiss under § 8 and that the trial court correctly concluded that the defendants were precluded from presenting evidence of a § 8 affirmative defense during trial).

In this case, the trial court ruled that defendant failed to show the elements for a § 8 defense and that there was no material questions of fact on the issue, and that decision is not challenged on this appeal. Thus, for purposes of this appeal, we assume that the trial court’s

³ MCL 333.26428 provides in pertinent part as follows:

(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:

(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.

ruling with respect to defendant's § 8 defense was correct, and evidence whose sole purpose is to support such a defense is inadmissible as irrelevant. *Kolanek*, 491 Mich at 413.

The prosecution contends that the trial court erred when it denied its motion to preclude the challenged evidence because the effect of the trial court's order is that (1) defendant will be able to present evidence related to a § 8 affirmative defense even though the trial court ruled that defendant would be unable to present that defense to the jury and (2) defendant will be allowed to present evidence of an entrapment defense despite the trial court's earlier ruling that an entrapment defense was not available.

However, the prosecution is largely mistaken as to the effect of the trial court's order. In denying the prosecution's motion in limine, the trial court merely refused to broadly exclude all of the challenged evidence because some of it was necessary to form the *res gestae* of the crime. In other words, the trial court recognized that at least some evidence regarding the MMMA, reference to the marijuana as medicinal, and evidence that defendant was a caregiver and/or patient was relevant to explaining to the factfinder the events and circumstances that led to the alleged offenses. Essentially, the trial court ruled that some of this evidence regarding these broad categories was necessary to give the jury the "complete story," *Delgado*, 404 Mich at 83, or "the full context," *Sholl*, 453 Mich at 741, of the events in this case. At the very least, defendant's operation of a medical marijuana dispensary and his sales of marijuana to the confidential informant would be essential for the factfinder's understanding of how the warrants for defendant's home and dispensary were obtained. Though we may have decided differently under a strictly *de novo* review, our review in this case is for an abuse of discretion, and we cannot conclude that the trial court's decision to not exclude all references to the MMMA, references to the marijuana as medicinal, and evidence that defendant was a caregiver and/or patient, was outside the range of reasonable and principled outcomes. Some evidence related to these categories was necessary to give the jury the "complete story," *Delgado*, 404 Mich at 83, or "the full context," *Sholl*, 453 Mich at 741, of the facts of this case.⁴

Our decision is based, in large part, on the fact that the evidence that the prosecution seeks to exclude is overly broad. Contrary to the prosecution's assertion on appeal, the trial court's decision did *not* grant defendant permission to present evidence that was related to a § 8 defense or an entrapment defense. In an order from 2014, the trial court specifically ruled that defendant would be unable to present a § 8 defense during trial. In another order from 2014, the trial court ruled that defendant was not entitled to an entrapment defense. The trial court's ruling that the prosecution now contests did not nullify those previous orders; evidence intended solely

⁴ Admitting this evidence would also not be a violation of MRE 403. The evidence that the prosecution seeks to exclude falls into broad categories, and some evidence in these categories was necessary to establish the *res gestae* of the crime. Therefore, the probative value of this evidence is high, and we see little danger of unfair prejudice by admitting evidence necessary to establish the *res gestae* of the crime, especially when an appropriate jury instruction would dispel any potential juror confusion. See *Mitchell v Kalamazoo Anesthesiology, PC*, ___ Mich App ___, ___; ___ NW2d ___ (2017) (Docket No. 331959); slip op at 6.

to support a § 8 or entrapment defense is clearly still inadmissible at trial because such evidence is obviously irrelevant. See MRE 402. While we understand the prosecution's concerns, the trial court has a continuing duty "to limit the introduction of evidence and the argument of counsel to relevant and material matters." MCL 768.29. Moreover, any confusion that the jury may have with the applicability of the MMMA to this case could be cured by an appropriate jury instruction that defendant was not in compliance with the MMMA. See *Mitchell v Kalamazoo Anesthesiology, PC*, ___ Mich App ___, ___; ___ NW2d ___ (2017) (Docket No. 331959); slip op at 6 (stating that "any potential confusion" among jurors "could have been cured with an appropriate instruction by the trial judge"). Although the trial court's pretrial ruling did not explicitly exclude all of the broad categories of evidence that the prosecution sought to exclude, we have no reason to conclude that the trial court will admit otherwise inadmissible evidence⁵ at trial or that the jury will be unnecessarily confused by evidence that forms the *res gestae* of the crime.

Contrary to the prosecution's argument, our ruling does not run counter to any precedent. While the Michigan Supreme Court held that the defendant in *Kolanek* was not entitled to present evidence relating to his failed § 8 affirmative defense during trial, the basis of that holding was that, because the defendant had failed to establish all the elements of a § 8 affirmative defense, the evidence was irrelevant. *Kolanek*, 491 Mich at 413 ("To allow submission of the defense to the jury when the defense fails as a matter of law would unnecessarily burden the jury and the circuit court with irrelevant testimony."). Here, unlike in *Kolanek*, the trial court ruled that the challenged evidence was relevant and admissible because it was part of the *res gestae* of the alleged crime and was unlikely to be given undue weight by the jury due the highly probative nature of the evidence. The trial court did *not* rule that evidence relevant solely to a § 8 affirmative defense was admissible. Based on *Kolanek*, such evidence is obviously inadmissible based on the trial court's ruling that a § 8 defense is not available to defendant. See *id.*

The prosecution also contends that this Court's decision in *People v Danto*, 294 Mich App 596; 822 NW2d 600 (2011), demonstrates that the trial court abused its discretion. In *Danto*, the defendants argued that the trial court erred by precluding the defendants "from raising a defense under § 8 of the [MMMA], MCL 333.26428, and from mentioning the medical use of marijuana at trial." *Id.* at 605. The *Danto* majority concluded that, "[b]ecause defendants have not met their burdens of production to establish that the marijuana was kept in an enclosed, locked facility, MCL 333.26424, the trial court's order precluding assertion of the [MMMA] affirmative defense and references to the [MMMA] at trial was not erroneous." *Id.* at 613. It would appear that *Danto* supports the prosecution's position because, as noted by the dissenting opinion, the *Danto* majority's opinion effectively ruled that the trial court did not abuse its discretion by not allowing the defendants to make reference to the MMMA or the use of medical marijuana, despite the fact that "the medical use of marijuana would be necessary to explain the

⁵ To reiterate, this includes evidence that is only relevant to either establish defendant's theory of entrapment or support a § 8 affirmative defense. Such evidence is clearly irrelevant based on the trial court's rulings that those defenses are not available to defendant.

‘res gestae’ of the crime.” *Id.* at 615 (GLEICHER, J., concurring in part and dissenting in part). However, “the concept of ‘res gestae’ evidence is inherently indefinite and malleable.” *Jackson*, 498 Mich at 270 (2015). “It must be determined largely in each case by the peculiar facts and circumstances incident thereto[.]” *People v Kayne*, 268 Mich 186, 192; 255 NW 758 (1934) (citation and quotation marks omitted). Because res gestae is determined on a case-by-case basis, and the concept itself is largely malleable and hard to define, we cannot conclude, based on the facts of this particular case, that the trial court abused its discretion by not excluding all references to the MMMA, reference to the marijuana as medicinal, or evidence that defendant was a caregiver, because it determined that such evidence was necessary to establish the res gestae of the crime. While we acknowledge that some references to this evidence are inadmissible as irrelevant, MRE 402, we cannot conclude that the trial court’s refusal to grant a blanket exclusion to all of this evidence was outside the range of reasonable and principled outcomes.⁶

While we leave untouched the majority of the trial court’s decision, we cannot agree with that portion in which the trial court ruled that defendant’s belief that he was in compliance with the law was part of the res gestae of the crime. “[I]ncluded in the res gestae are the facts which so illustrate and characterize the principal fact as to constitute the whole one transaction, and render the latter necessary to exhibit the former in its proper effect.” *Kayne*, 268 Mich at 192 (citation and quotation marks omitted). Even with the malleable and indefinite nature of the res gestae of a crime, there is no reasonable scenario in which defendant’s belief that he was in compliance with the law would be “necessary” to explain his actions in this case. The events necessary to “illustrate and characterize the principal fact[s],” *id.*, in this case would be the same whether defendant did not know the law, knew the law and tried to work around it, or knew the law and believed his actions were in compliance with it.⁷ Accordingly, defendant’s belief that he

⁶ The prosecution also cites to *People v Vansickle*, 303 Mich App 111, 118, 120, 120; 842 NW2d 289 (2013), in which this Court held that the trial court did not abuse its discretion by granting the prosecution’s motion in limine to preclude the defendant from presenting evidence related to the MMMA or the defendant’s status as a MMMA patient. Like in *Danto* and *Kolanek*, the basis of this Court’s decision in *Vansickle* was that the trial court did not abuse its discretion because the defendant did not have a defense available under the MMMA. *Id.* at 120. The present case is, again, distinguishable because the trial court found that the information that the prosecution sought to exclude was necessary for the res gestae of the crime. Moreover, the fact that this Court previously ruled that a trial court’s ruling was not an abuse of discretion does not dictate that every ruling with respect to a similar issue must follow the prior ruling. By its very definition an abuse of discretion standard recognizes “that there will be circumstances in which there will be no single correct outcome,” *People v Carnicom*, 272 Mich App 614, 616; 727 NW2d 399 (2006) (citation and quotation marks omitted), and the facts of every case are different such that a different outcome may be reasonable under a different set of facts.

⁷ We note that there are a number of events described in both parties’ briefs on appeal that would not be part of the res gestae of the crime, and, therefore, would be irrelevant and inadmissible at trial. We also reiterate that some of that evidence relates to the MMMA, reference to the marijuana as medical, and defendant’s status as a registered caregiver and/or patient. However,

was in compliance with the law is clearly not part of the res gestae of the crime. Therefore, any evidence or argument based on that belief is inadmissible as irrelevant because that evidence would not have any tendency to make the existence of a fact that is of consequence to the action more probable or less probable. See *Aldrich*, 246 Mich App at 114; see also *People v Motor City Hosp & Surgical Supply, Inc*, 227 Mich App 209, 215; 575 NW2d 95 (1997) (stating that “ignorance of the law or a mistake of law is no defense to a criminal prosecution”). The trial court erred by not excluding evidence and argument that defendant believed he was in compliance with the MMMA.⁸

Accordingly, we hold that the trial court did not abuse its discretion by not excluding reference to the MMMA, reference to the marijuana as medicinal, and evidence that defendant was a caregiver and/or patient. However, we also hold that the trial court erred by not excluding evidence and argument that defendant believed he was in compliance with the law because that evidence was not part of the res gestae of the crime and is irrelevant.

Reversed in part, affirmed in part.

/s/ Elizabeth L. Gleicher
/s/ Michael F. Gadola
/s/ Colleen A. O'Brien

given that the definition of res gestae is inherently indefinite and our review is for an abuse of discretion, we are only finding that the trial court did not abuse its discretion by refusing to exclude *all* of the evidence related to those categories. We make this interlocutory ruling knowing that, at trial, the trial court will execute its duty “to limit the introduction of evidence and the argument of counsel to relevant and material matters.” MCL 768.29.

⁸ Defendant does not argue that his intent is relevant because it related to the res gestae of the crime as the trial court ruled, but rather that it is relevant because possession with intent to deliver is a specific intent crime, and he should be permitted to present evidence of his mens rea. While defendant is correct that possession with intent to deliver is a specific intent crime, the specific intent is the “intent to distribute.” *Danto*, 294 Mich App at 601 (citation and quotation marks omitted). Contrary to defendant’s apparent assertion on appeal, whether he intended to break the law is irrelevant; it only matters whether defendant intended to distribute the marijuana. Thus, while defendant is correct that his intent is relevant, the MMMA, and specifically a § 8 defense, is irrelevant to whether he possessed the requisite mens rea.