STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED December 13, 2011
V	No. 299347 Cass Circuit Court
SYLVESTER WILSON VANDERBUTTS, Defendant-Appellant.	LC No. 09-010276-FH

Before: WILDER, P.J., and HOEKSTRA and BORRELLO, JJ.

PER CURIAM.

After a jury trial, defendant Sylvester Wilson Vanderbutts was convicted of possession with intent to deliver marijuana, MCL 333.7401(2)(d)(iii); manufacturing marijuana, MCL 333.7401(2)(d)(iii); maintaining a drug house, MCL 333.7405(1)(d); and possession of marijuana, MCL 333.7403(2)(d). Defendant appeals as of right. We affirm.

Defendant first argues that the trial court denied him his constitutional right to present a defense when it provided confusing instructions to the jury regarding the affirmative defense in the Michigan Medical Marihuana Act ("MMMA"), MCL 333.26421 *et seq*. We disagree.

While "[i]nstructional errors that directly affect a defendant's theory of defense can infringe a defendant's due process right to present a defense," *People v Kurr*, 253 Mich App 317, 326-327; 654 NW2d 651 (2002), defendant never objected at trial on constitutional grounds. Thus, the issue is not preserved. See *People v Kimble*, 470 Mich 305, 309; 684 NW2d 699 (2004) ("An objection based on one ground is usually considered insufficient to preserve an appellate attack on a different ground.") We, therefore, review this unpreserved issue for plain error affecting defendant's substantial rights. *People v Carines*, 460 Mich 750, 763-764; 597 NW2d 130 (1999).

The MMMA "provides a procedure through which seriously ill individuals using marijuana for its palliative effects can be identified and protected from prosecution under state law." *People v King*, ___Mich App___; ___NW2d___ (Docket No. 294682, issued February 3, 2011), slip op at 4, lv gtd 489 Mich 957 (2011). Sections 4 and 8 of the MMMA provide two ways to show legal use of marijuana for medical purposes. *People v Redden*, 290 Mich App 65, 81-82; 799 NW2d 184 (2010). Section 4 states the following:

> (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 . . . 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. [MCL 333.26424(a).]

And section 8 provides:

> (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:
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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 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
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> (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. [MCL 333.26428(a).]

In *Redden*, this Court determined that "[b]ecause of the differing levels of protection in §§ 4 and 8, the plain language of the [MMMA] establishes that § 8 is applicable for a patient who does not satisfy § 4." *Redden*, 290 Mich App at 79-81. In other words, according to *Redden*, as long as the three requirements of section 8 are satisfied, a person can assert a section 8 affirmative defense, whether or not that person is in possession of a valid registry identification card at the time of the offense.

We conclude on the basis of the record before us, however, that there was insufficient evidence that defendant met all of the requirements of the section 8 defense. This Court has recently explained,

> The [MMMA] provides an affirmative defense to prosecution for any marijuana offense, but that defense is quite limited. Because of those limitations, there may be situations where a defendant simply cannot establish the right to assert a § 8 defense. In such situations, a trial court might be warranted in barring a defendant from presenting evidence or arguing at trial that he or she is entitled to the defense stated under § 8(a). Therefore, I conclude that a trial court may bar a defendant from presenting evidence and arguing a § 8 defense at trial where, given the undisputed evidence, no reasonable jury could find that the elements of the § 8 defense had been met. [*People v Anderson*, ___ Mich App ___; ___ NW2d ___ (Docket No. 300641, issued June 7, 2011), slip op, pp 15-16 (M.J. Kelly, J., concurring), adopted by majority, slip op at 1.]

Here, defendant should have been barred from presenting the defense to the jury because no reasonable jury could have found that all of the elements of the section 8 defense were established. First, regarding the first element of the section 8 affirmative defense, defendant failed to present evidence at trial that a physician conducted a full assessment of defendant in the course of a bona fide physician-patient relationship and then provided a professional opinion that defendant was likely to receive therapeutic or palliative benefit from the medical use of marijuana to treat or alleviate a serious or debilitating medical condition or symptoms of a serious or debilitating medical condition. MCL 333.26428(a)(1). Second, defendant's own admissions preclude him from establishing the required second element of the section 8 affirmative defense. Defendant testified that he stored marijuana in anticipation of possibly becoming a caregiver[1] in the future. The fact that defendant had sufficient marijuana to store in the event of becoming a caregiver in the future, and yet also had marijuana on hand to meet his own "medical" needs, is unrebutted evidence that defendant possessed an amount of marijuana in excess of that which was reasonably necessary to ensure his uninterrupted supply solely to meet his medical needs. Because defendant was not entitled to assert the section 8 affirmative defense, given the record evidence, defendant cannot show that the instructions, even if they were erroneous, deprived him of a defense.

Defendant's final, unpreserved argument is that his trial counsel was constitutionally ineffective for not presenting evidence to satisfy the first element of the section 8 affirmative defense. We disagree. Assuming that counsel's failure to present the certification form[2] signed

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[1] "'Primary caregiver' means a person who is at least 21 years old and who has agreed to assist with a patient's medical use of marihuana and who has never been convicted of a felony involving illegal drugs." MCL 333.26423(g).

[2] The form stated that Dr. Bukhari had responsibility for the care and treatment for defendant and that defendant suffered from cancer, hepatitis C, and severe nausea. Further, the form provided

by Dr. Ather M. Bukhari as evidence at trial was unreasonable under prevailing professional norms, we conclude that defendant has not established a reasonable probability that, but for counsel's error, the jury would have acquitted defendant on the basis of the affirmative defense. *Strickland v Washington*, 466 US 668, 687-688, 694; 104 S Ct 2052; 80 L Ed 2d 674 (1984). As previously discussed, defendant's own admissions demonstrated that he did not meet the second prong of the section 8 affirmative defense. As such, defendant cannot establish that, but for the challenged error, the outcome of the trial would have been any different.

Affirmed.

/s/ Kurtis T. Wilder
/s/ Joel P. Hoekstra
/s/ Stephen L. Borrello

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that defendant's use of medical marijuana "is likely to be palliative or provide therapeutic benefits for the symptoms or effects of [defendant's] condition."