STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED May 10, 2012
v	No. 304022 Emmet Circuit Court
LEWIS JOHN KELLER a/k/a LOUIS JOHN KELLER, Defendant-Appellant.	LC No. 11-003426-FH

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

PER CURIAM.

Defendant appeals as of right from his jury conviction of manufacturing marihuana, MCL 333.7401(2)(d)(*iii*). He was sentenced as a second habitual offender, MCL 769.10, to seven months in jail with credit for one day served, with the incarceration suspended pending his performance of 200 hours of community service. We affirm.

This case arose from the discovery by police of 15 marihuana plants on defendant's property. The police found the plants on or near defendant's premises, with approximately half being near some metal fencing material that had not been erected into a proper fence, and the rest not being secured at all. Defendant asserted that he had a medical marihuana card.

At trial, defendant invoked the defense in the Michigan Medical Marihuana Act (MMMA), MCL 333.26421 *et seq.*, characterized his plants as "medicine," and offered into evidence his medical marihuana card. On cross-examination, defendant stated that he understood that he was limited to 12 plants to avoid prosecution, but that he did not know that the plants had to be secured.

On appeal, defendant first argues that the trial court erred in failing to include an element of intent or knowledge in the instructions, and that the instructions did not differentiate whether defendant knew he was manufacturing marihuana, or knew he was doing so illegally. However, defense counsel expressly approved of the instructions as given. Accordingly, we deem this

issue to be waived. See *People v Carter*, 462 Mich 206, 214-216; 612 NW2d 144 (2000); *People v Lueth*, 253 Mich App 670, 688; 660 NW2d 322 (2002).[1]

Next, defendant argues that the requirement in the MMMA that medical marihuana plants be kept in an enclosed, locked facility is unconstitutionally vague. This challenge was not raised below and so is unpreserved. Our review is therefore limited to plain error affecting substantial rights. *People v Carines*, 460 Mich 750, 763; 597 NW2d 130 (1999).

A criminal statute is unconstitutionally vague if it does not provide fair notice of what conduct is proscribed, if it confers unlimited discretion on the fact finder to determine whether the statute has been violated, or if it is so broad as to threaten First Amendment expressive rights. *People v Vronko*, 228 Mich App 649, 652; 579 NW2d 138 (1998).

The MMMA authorizes qualified patients or caregivers to possess no more than 12 marihuana plants. MCL 333.26424(a) and (b)(2). The act calls for the marihuana to be kept in "an enclosed, locked facility." MCL 333.26424(a). "Enclosed, locked facility" is defined as "a closet, room, or other enclosed area equipped with locks or other security devices that permit access only by a registered primary caregiver or registered qualifying patient." MCL 333.26423(c).

We conclude that this statutory language is not vague, and that the evidence in this case cannot be interpreted as indicating that defendant's plants were in an enclosed, locked facility. Those several plants described as "partially enclosed" were described that way only because there was fencing material nearby. Those plants joined all the others as being readily accessible to a member of defendant's family, or any passerby his dogs did not decide to treat as a foe. The statute's requirement that the facility be enclosed and locked indicates that access to them is to be secured by something more than the grower's withholding of permission to unauthorized persons to access them. Because defendant grew more than 12 plants and failed to keep them in a secure, enclosed facility, the MMMA afforded him no defense to that general prohibition.[2]

Finally, defendant argues that his sentence constituted cruel and unusual punishment under the Eighth Amendment to the United States Constitution.[3] We review constitutional and statutory questions de novo. *People v Orlewicz*, 293 Mich App 96, 101; 809 NW2d 194 (2011). Unpreserved claims are reviewed for plain error that affects substantial rights. *Carines*, 460 Mich at 763. The limitation on review of a sentence within the guidelines in MCL 769.34(10) is not applicable to claims of constitutional error. *People v Powell*, 278 Mich App 318, 323; 750 NW2d 607 (2008).

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[1] Even if we were to review this issue, we would find it to be without merit.

[2] Defendant additionally argues that he was new at growing medical marihuana, and so was not intricately familiar with the applicable rules. However, ignorance of the law is no defense. *People v Weiss*, 191 Mich App 553, 561; 479 NW2d 30 (1991).

[3] "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted." US Const, Am VIII; see also Const 1963, art 1, § 16.

Under the federal constitution, "'a court's proportionality analysis under the Eighth Amendment should be guided by objective criteria, including (i) the gravity of the offense and the harshness of the penalty; (ii) the sentences imposed on other criminals in the same jurisdiction; and (iii) the sentences imposed for commission of the same crime in other jurisdictions.'" *People v Fernandez*, 427 Mich 321, 335; 398 NW2d 311 (1986), quoting *Solem v Helm*, 463 US 277, 292; 103 S Ct 3001; 77 L Ed 2d 637 (1983).

Defendant recites factors set forth in *People v Launsburry*, 217 Mich App 358, 363; 551 NW2d 460 (1996) but does not apply them,[4] and instead argues that his sentence, which included no fine and the option of avoiding incarceration entirely by performing community service, is cruel and unusual punishment on the ground that his crime was mere "negligent noncompliance with a license." This argument is inapt because manufacturing marihuana is not an activity that is licensed in this state under the provisions of the MMMA or any other authority. The MMMA provides narrow avenues to avoid prosecution if certain conditions are satisfied, but in defendant's case they were not.

Affirmed.

/s/ E. Thomas Fitzgerald
/s/ Christopher M. Murray
/s/ Elizabeth L. Gleicher

[4] *Launsburry* applied the state prohibition against cruel or unusual punishment, not the federal cruel and unusual standard, so it offers no support for his position.