STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

AARON RUSSELL HINZMAN,

Defendant-Appellant.

UNPUBLISHED
July 24, 2012

No. 308909
Oakland Circuit Court
LC No. 2010-233876-FH

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

REBECCA MARIE HINZMAN,

Defendant-Appellant.

No. 308910
Oakland Circuit Court
LC No. 2010-233880-FH

Before: DONOFRIO, P.J., and RONAYNE KRAUSE and BOONSTRA, JJ.

PER CURIAM.

Defendants, Aaron Russell Hinzman and Rebecca Marie Hinzman, were both charged with manufacturing between 5 and 45 kilograms of marijuana in violation of MCL 333.7401. They appeal by leave granted the trial court's denial of their motion to dismiss the charges.[1] Because defendants are not immune from prosecution under § 4, MCL 333.26424, of the Michigan Medical Marijuana Act (MMMA), MCL 333.26421 *et seq*., they do not meet the requirements of the MMMA's § 8 affirmative defense, MCL 333.26428, the trial court did not abuse its discretion by admitting Exhibit 19, and defendants are not entitled to vacation of the trial court's order because the court ultimately recused itself, we affirm.

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[1] See *People v Aaron Hinzman*, unpublished order of the Court of Appeals, entered April 6, 2012 (Docket No. 308909); *People v Rebecca Hinzman*, unpublished order of the Court of Appeals, entered April 6, 2012 (Docket No. 308910).

Defendants first argue that the trial court abused its discretion by denying their motion to dismiss on the basis that they are not entitled to immunity from prosecution under § 4 of the MMMA. We review for an abuse of discretion a trial court's decision on a motion to dismiss. *People v Bylsma*, 294 Mich App 219, 226; __ NW2d __ (2011). A trial court abuses its discretion when its decision "falls outside the range of principled outcomes." *Michigan v McQueen*, 293 Mich App 644, 652-653; 811 NW2d 513 (2011), lv gtd 491 Mich 890 (2012). We review for clear error the trial court's findings of fact. *Id*. at 653; see also MCR 2.613(C). "A finding is clearly erroneous when a reviewing court is left with a definite and firm conviction that a mistake has been made, even if there is evidence to support the finding." *McQueen*, 293 Mich App at 653. Further, we review de novo issues of statutory interpretation, including interpretation of the MMMA. *Bylsma*, 294 Mich App at 226; *McQueen*, 293 Mich App at 653.

The trial court did not abuse its discretion by denying defendants' motion based on its determination that defendants are not entitled to immunity from prosecution. Under § 4 of the MMMA, "qualifying patient[s]" who hold "registry identification card[s]" are granted broad immunity from criminal prosecution for the medical use or possession of marijuana. See MCL 333.26424(a); *People v Kolanek*, __ Mich __; __ NW2d __ (Docket No. 142695, issued May 31, 2012), slip op at 10-11. MCL 333.26424(a) provides:

> 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.

"Accordingly, a defendant is immune from arrest, prosecution, or penalty pursuant to § 4(a) if he or she (1) is a qualifying patient; (2) who has been issued and possesses a registry identification card; and (3) possesses less than 2.5 ounces of usable marijuana." *People v Nicholson*, __ Mich App __; __ NW2d __ (Docket No. 306496, issued June 26, 2012), slip op at 4.

The MMMA also grants immunity to primary caregivers who have been issued a registry identification card, as long as the primary caregiver does not possess more than 2.5 ounces of usable marijuana and "12 marijuana plants kept in an enclosed, locked facility" for each qualifying patient. See MCL 333.26424(b).

This Court has defined "possession" with respect to the MMMA as follows:

> The term "possession," when used in regard to controlled substances, signifies dominion or right of control over the drug with knowledge of its presence and character. Possession may be actual or constructive, and may be joint or exclusive. The essential issue is whether the defendant exercised dominion or control over the substance. A person can possess a controlled

substance and not be the owner of the substance. [*McQueen*, 293 Mich App at 654 (quotation marks and citations omitted).]

In *Bylsma*, 294 Mich App at 230-231, this Court determined that because the defendant had access to all 88 marijuana plants in a growing facility, he had possession of all of them, even though he alleged that they belonged to other qualifying patients and caregivers.

In this case, defendants do not qualify for immunity from prosecution under § 4 of the MMMA because they possessed more than 12 rooted marijuana plants each.[2] See MCL 333.26424(a). When the police recovered the marijuana plants growing in defendants' basement, on May 25, 2010, both Rebecca and Aaron possessed registry identification cards for the medical use of marijuana. Therefore, they could each possess up to 12 marijuana plants and qualify for immunity from prosecution under § 4 of the MMMA. See MCL 333.26424(a). While Sergeant Dwayne Warner testified that there were approximately 50 rooted plants in the basement, Rebecca and Aaron claimed that there were approximately 35 rooted plants in the basement. Regardless of whether there were 35 or 50 plants, defendants possessed more than the 24 total plants they were permitted under § 4. Moreover, both defendants had possession of the plants. Both Aaron and Rebecca had keys to the basement. The plants were not kept in separate, locked rooms within the basement, so they each had access to all of the plants. Therefore, both defendants possessed all of the plants because they had "dominion or right of control" over all of the plants in the basement. See *McQueen*, 293 Mich App at 654 (quotation marks and citation omitted).

Rebecca argues that she was a primary caregiver for three patients for whom she was allowed to cultivate marijuana. The evidence shows, however, that Rebecca had not been issued a caregiver registry identification number or caregiver card for any patient as of May 25, 2010, the date that the police discovered the plants. In addition, the change form of Rebecca's third patient did not indicate that his primary caregiver could cultivate marijuana on his behalf. Therefore, the designation defaulted to the patient, and Rebecca never had authorization to cultivate marijuana for the third patient. Because defendants each possessed more than 12 rooted marijuana plants, they are not immune from prosecution under § 4 of the MMMA and the trial court did not abuse its discretion by denying defendants' motion to dismiss on this basis.

Defendants next argue that they established an affirmative defense to the charges against them pursuant to § 8 of the MMMA, or in the alterative, that there exists a question of fact regarding this issue and they should be allowed to assert the § 8 defense at trial. Section 8 of the MMMA, MCL 333.26428, provides that "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," when the defendant shows the following:

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[2] Because defendants unquestionably possessed more marijuana plants than they were permitted under § 4 of the MMMA, it is unnecessary to determine if their basement was an enclosed, locked facility. See MCL 333.26424(a).

> (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.

The Michigan Supreme Court recently clarified that the showing required by § 8 "does not require compliance with the requirements of § 4." *Kolanek*, __ Mich at __, slip op at 17. Therefore, an individual who possesses more than 2.5 ounces of usable marijuana or 12 marijuana plants, or whose plants are not kept in an enclosed, locked facility, may still be able to establish a § 8 defense. *Id.* at 19-20. If the defendant establishes the elements of § 8 during a pretrial evidentiary hearing, and there are no material questions of fact, then the defendant is entitled to dismissal of the charges. *Id* at 28. If the defendant establishes evidence of each element listed in § 8 but there are still material questions of fact, then the § 8 affirmative defense must be submitted to the jury. *Id*. Finally, if no reasonable juror could conclude that a defendant has satisfied the elements of the § 8 defense, then the defendant is precluded from asserting the defense at trial. *Id.* at 29.

In this case, defendants failed to present any evidence that they possessed only the amount of marijuana reasonably necessary to ensure them an uninterrupted supply for the treatment of their conditions.[3] See MCL 333.26428(a)(2). Aaron did not testify regarding how much or how often he used marijuana for medical purposes. Dr. Mary Bridges, who signed Aaron's physician certification for the medical use of marijuana, did not testify regarding how much marijuana Aaron should use. It is unclear whether she instructed him at all regarding how much he should use for treatment. Similarly, Rebecca failed to present any evidence showing

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[3] Because Rebecca was not certified as a caregiver for any patients on May 25, 2010, defendants were required to show that they possessed no more plants than were "reasonably necessary to ensure the uninterrupted availability of marihuana for the purpose of treating" their conditions alone. See MCL 333.26428(a)(2).

that she possessed no more marijuana than was reasonably necessary to ensure an uninterrupted availability for her treatment. Rebecca testified that after using marijuana, she was able to function for at least four or five hours without experiencing debilitating pain, seizures, migraines, nausea, or other problems. She did not testify, however, regarding how much marijuana she used at one time. Dr. Frederick K. Lewerenz, who signed Rebecca's physician certification for the medical use of marijuana, never told Rebecca how much marijuana she should use or discussed with her how much she was using. He claimed that his patients determined on their own how much marijuana to use through trial and error.

Further, defendants claimed that the plants in the basement were for Rebecca, Aaron, and Rebecca's three patients. This indicates that the marijuana they intended to harvest from the plants was for five people to use, thus showing that the 35 to 50 plants in the basement were more than what was reasonably necessary for Aaron's and Rebecca's use only. Because defendants failed to create a question of fact with respect to this element of the § 8 defense, they cannot assert the § 8 defense at trial.[4] Accordingly, the trial court did not abuse its discretion when it denied defendants' motion to dismiss on the basis that they failed to establish the MMMA's § 8 affirmative defense as a matter of law.

Defendants next argue that the trial court abused its discretion by admitting Exhibit 19, which was a certified letter and documents regarding Rebecca's caregiver status, sent from the Michigan Department of Licensing and Regulatory Affairs. We review evidentiary issues for an abuse of discretion. *People v Orr,* 275 Mich App 587, 588; 739 NW2d 385 (2007).

Both MCL 333.26426(h)(3) and Michigan Department of Community Health (MDCH) Administrative Rule 333.121(3) provide that the MDCH shall verify whether a registry identification card is valid, "without disclosing more information than is reasonably necessary to verify the authenticity of the registry identification card." A "registry identification card" is defined in the MMMA as "a document issued by the [MDCH] that identifies a person as a registered qualifying patient *or registered primary caregiver*." See MCL 333.26423(i) (emphasis added).

Here, Exhibit 19 provides only the information necessary to determine Rebecca's primary caregiver status as of May 25, 2010, the date that police discovered the marijuana plants in defendants' home. The letter and accompanying documents do not contain any identifying information with respect to Rebecca's patients. The letter does not include the patients' names, patient registry identification numbers, or even the complete caregiver registry identification number issued to Rebecca for each patient. The documents have been redacted of any identifying information. Therefore, Exhibit 19 includes no more information than is reasonably necessary to determine whether Rebecca was a caregiver for any patients on May 25, 2010. In addition, Exhibit 19 does not violate the trial court's March 2, 2011, discovery order, which

[4] Because defendants failed to present evidence regarding whether the number of marijuana plants they possessed was reasonable, it is not necessary to determine whether they created questions of fact with respect to the other elements of a § 8 defense, including whether they had a bona fide physician-patient relationship with their respective certifying physicians.

required Rebecca to provide the prosecution with her patients' registry numbers, but not their names.

Exhibit 19 is also admissible under the Michigan Rules of Evidence. It consists of self-authenticating documents, as permitted under MRE 902(4), because they are certified copies of public records. MRE 902(4) provides:

> Extrinsic evidence of authenticity as a condition precedent to admissibility is not required with respect to the following:
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> * * *
>
> (4) *Certified copies of public records.* A copy of an official record or report or entry therein, or of a document authorized by law to be recorded or filed and actually recorded or filed in a public office, including data compilations in any form, certified as correct by the custodian or other person authorized to make the certification, by certificate complying with paragraph (1), (2), or (3) or complying with any law of the United States or of this state.

The letter accompanying the other documents was signed by Celeste Clarkson, the Compliance Section Manager for the Health Regulatory Division, Bureau of Health Professions, Michigan Department of Licensing and Regulatory Affairs. In the letter, Clarkson certified that the attached documents "are true copies taken from the master file maintained by the Michigan Department of Licensing and Regulatory Affairs, Bureau of Health Professions, Medical Marihuana Program." Further, the documents contained in Exhibit 19 are records of regularly conducted activity and, as such, are not excluded by the hearsay rule pursuant to MRE 803(6)

Defendants also argue that they were not served with the subpoena for the records, as required by MCR 2.107(a)(1). That provision, however, states that "every party who has filed a pleading, an appearance, or a motion must be served with a copy of every paper later filed in the action." Because the prosecution did not file the subpoena, but rather, the trial court signed it and it was thereafter served on the Department of Licensing and Regulatory Affairs, MCR 2.107(a)(1) is inapplicable.

Finally, defendants argue that this Court should vacate the trial court's opinion because the trial court judge, Judge Martha D. Anderson, ultimately recused herself from the proceedings. Because defendants failed to file a motion to disqualify Judge Anderson or otherwise timely assert their argument, they waived appellate review of this issue. See *Reno v Gale*, 165 Mich App 86, 90; 418 NW2d 434 (1987).

At some point after the evidentiary hearing, Rebecca was charged with perjury and Judge Anderson, as a res gestae witness in the perjury case, recused herself from the instant proceedings. By their own admission, defendants knew that Judge Anderson was a res gestae witness in the perjury case by December 21, 2011, at the latest. Defendants acknowledge that on that date Judge Anderson told the parties of her intent to recuse herself from any further proceedings. Defendants did not suggest that Judge Anderson should disqualify herself before she ruled on defendants' motion for dismiss. Rather, defendants made that claim at least 39 days after they became aware of the grounds for disqualification and well after Judge Anderson issued

her opinion denying their motion. Even if defendants had filed a motion for disqualification, MCR 2.003(D)(1)(a) requires that a party file such a motion within 14 days of ‘the discovery of the grounds for disqualification.”

In addition, defendants fail to indicate how Judge Anderson was biased or why her opinion denying their motion should be vacated. Defendants merely assert that Judge Anderson is a res gestae witness in Rebecca’s perjury case. Judge Anderson heard six days of evidentiary hearing testimony before Rebecca was charged with perjury. There is no reason to believe that her January 6, 2012, opinion was affected by her role as a res gestae witness in the separate and subsequent perjury proceeding.

Affirmed.

/s/ Pat M. Donofrio
/s/ Amy Ronayne Krause
/s/ Mark T. Boonstra