STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED January 22, 2013
v	No. 305725 Oakland Circuit Court
BARBARA AGRO, Defendant-Appellant.	LC No. 2010-233920-FH

Before: HOEKSTRA, P.J., and K. F. KELLY and BECKERING, JJ.

PER CURIAM.

A jury convicted defendant of manufacturing marijuana, MCL 333.7401(2)(d)(*iii*), and she was sentenced to 90 days' probation. Defendant contends that the trial court erred in refusing to allow her to present an affirmative defense under the Michigan Medical Marihuana Act (MMMA), MCL 333.26421 *et seq*. The prosecution concedes error and agrees that defendant was not required to meet the immunity requirements of § 4 of the MMMA, MCL 333.26424, in order to raise an affirmative defense under § 8 of the MMMA, MCL 333.26428. At issue in this appeal is the appropriate remedy. We conclude that the matter must be remanded to the trial court for a continuation of the evidentiary hearing.

I. BASIC FACTS AND PROCEDURAL HISTORY

Defendant was seventy years old and lived with her husband until his death in September 2010. Both defendant and her husband were qualifying patients for purposes of the MMMA.[1] Defendant had approximately 17 marijuana plants growing in her basement. In defendant's pretrial motion to dismiss, defendant argued that she was protected from prosecution under the immunity provided in § 4 of the MMMA.[2] Alternatively, defendant argued that she could raise a

[1] Defendant and her husband had applied for caregiver cards, but defendant had not received her card at the time of the raid.

[2] MCL 333.26424(a) and (b) provide:

> (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, or denied any right or privilege, including but not limited to civil penalty

or disciplinary action by a business or occupational or professional licensing board or bureau, 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.

(b) A primary caregiver who has been issued and possesses a registry identification card shall not be subject to arrest, prosecution, or penalty in any manner, or denied any right or privilege, including but not limited to civil penalty or disciplinary action by a business or occupational or professional licensing board or bureau, for assisting a qualifying patient to whom he or she is connected through the department's registration process with the medical use of marihuana in accordance with this act, provided that the primary caregiver possesses an amount of marihuana that does not exceed:

(1) 2.5 ounces of usable marihuana for each qualifying patient to whom he or she is connected through the department's registration process; and

(2) for each registered qualifying patient who has specified that the primary caregiver will be allowed under state law to cultivate marihuana for the qualifying patient, 12 marihuana plants kept in an enclosed, locked facility; and

(3) any incidental amount of seeds, stalks, and unusable roots.

(c) A person shall not be denied custody or visitation of a minor for acting in accordance with this act, unless the person's behavior is such that it creates an unreasonable danger to the minor that can be clearly articulated and substantiated.

(d) There shall be a presumption that a qualifying patient or primary caregiver is engaged in the medical use of marihuana in accordance with this act if the qualifying patient or primary caregiver:

(1) is in possession of a registry identification card; and

(2) is in possession of an amount of marihuana that does not exceed the amount allowed under this act. The presumption may be rebutted by evidence that conduct related to marihuana was not for the purpose of alleviating the qualifying patient's debilitating medical condition or symptoms associated with the debilitating medical condition, in accordance with this act.

§ 8 affirmative defense at trial.[3] Defendant claimed that she and her husband were qualifying patients and caregivers, the plants were kept in an enclosed, locked facility, and she did not have more than the allowable amount of plants.

At the evidentiary hearing on defendant's motion, the trial court instructed the parties that, in keeping with *People v King*, 291 Mich App 503; 804 NW2d 911 (2011), "I think this is ultimately going to be a question of law that I will rule on . . .I think it is whether or not a home with locks on the door, where a lower level has a growing operation, is a secured, locked facility." The trial court, therefore, limited the hearing to a determination as to whether defendant grew the marijuana in an enclosed, locked facility. Following testimony on the issue, the trial court found that defendant failed to show that her home or basement was an enclosed, locked facility for purposes of § 4. Because defendant failed to show that she was in compliance

[3] MCL 333.26428 (a) and (b) provide:

> (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.
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> (b) A person may assert the medical purpose for using marihuana in a motion to dismiss, and the charges shall be dismissed following an evidentiary hearing where the person shows the elements listed in subsection (a).

with the MMMA, the trial court concluded that, again in keeping with *King*, defendant could not assert an affirmative defense under § 8.

The prosecutor concedes that the trial court's conclusion, though valid at the time, is contrary to the Supreme Court's holding in *People v Kolanek*, 491 Mich 382; 817 NW2d 528 (2012), wherein the Court held that a defendant need not satisfy the elements of immunity under § 4 in order to satisfy the elements of a § 8 affirmative defense. *Id.* at 403. "If registered patients choose not to abide by the stricter requirements of § 4, they will not be able to claim this broad immunity, but will be forced to assert the affirmative defense under § 8, just like unregistered patients. In that instance, registered patients will be entitled to the same lower level of protection provided to unregistered patients under § 8." *Id.* (footnote with citation omitted). At issue on appeal, then, is the proper remedy.

II. AFFIRMATIVE DEFENSE UNDER § 8

Defendant argues that she is entitled to a new trial. The prosecutor argues that defendant is entitled to a continuation of her pretrial hearing. Given the facts of this particular case, we agree that a continuation of the pretrial hearing is warranted. We review de novo questions of statutory interpretation. *Kolanek*, 491 Mich at 393.

The procedure to be followed when asserting a § 8 affirmative defense was explained by the Court in *Kolanek*:

> [I]f a defendant raises a § 8 defense, there are no material questions of fact, and the defendant "shows the elements listed in subsection (a)," then the defendant is entitled to dismissal of the charges following the evidentiary hearing. Alternatively, if a defendant establishes a prima facie case for this affirmative defense by presenting evidence on all the elements listed in subsection (a) but material questions of fact exist, then dismissal of the charges is not appropriate and the defense must be submitted to the jury. Conflicting evidence, for example, may be produced regarding the existence of a bona fide doctor-patient relationship or whether the amount of marijuana possessed was reasonable. Finally, if 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. A trial judge must preclude from the jury's consideration evidence that is legally insufficient to support the § 8 defense because, in this instance, no reasonable juror could conclude that the defendant satisfied the elements of the defense. [*Kolanek*, 491 Mich at 412-413 (footnotes with citations omitted).]

Therefore: 1) if there are no material questions of fact and defendant establishes the elements in § 8(a), then she is entitled to dismissal; 2) if defendant establishes a prima facie case, but there are material questions of fact, then the defense must be submitted to the jury and, in that case, defendant is entitled to a new trial; 3) if there are no material questions of fact and defendant fails to establish the elements in § 8(a), then she is not entitled to assert the defense at trial and there would be no basis to vacate defendant's conviction.

In *People v Bylsma*, ___ Mich ___; ___ NW2d ___ (Docket No. 144120, decided December 19, 2012), as here, the trial court concluded that the defendant's failure to meet the requirements of § 4 immunity made him ineligible to raise the § 8 affirmative defense. In vacating the trial court's order, the Michigan Supreme Court reiterated that a defendant need not establish the element of § 4 in order to raise the affirmative defense in § 8. *Id.* at slip op pp 16-17. Nevertheless, the Court declined to rule on the substantive merits of defendant's § 8 defense because "defendant's motion to dismiss only asserted a claim for § 4 immunity" and, accordingly the "evidentiary hearing focused on the elements of § 4 immunity." *Id.* at slip op p 17. The same is true for the case at bar. The trial court limited testimony to whether defendant complied with the requirement in § 4 that the plants be kept in an enclosed, locked facility. Because the hearing was narrowly focused, neither the prosecutor nor defendant had the opportunity to address the broader requirements in § 8, including: 1) whether a physician opined that defendant was likely to receive therapeutic or palliative benefit from the medical use of marijuana; 2) whether defendant possessed an amount of marijuana that was not more than was reasonably necessary to ensure the uninterrupted availability of the drug for the purpose of treating or alleviating her condition or symptoms; and, 3) whether defendant's primary caregiver, if any, was engaged in the acquisition, possession, cultivation, manufacture, use, delivery, transfer, or transportation of marijuana or paraphernalia to treat or alleviate her medical condition.

People v Anderson (On Remand), __ Mich App __; __ NW2d __ (Docket No. 300641, issued September 18, 2012) further supports the need to continue the evidentiary hearing. In *Anderson*, the trial court denied the defendant's motion to dismiss the charges against him, finding that the defendant "possessed more than [was] reasonably necessary because the amount he possessed was more than the amounts provided under § 4 and he otherwise failed to show that his condition was so unique he needed to grow and use more than that" and that defendant failed to keep the marijuana in an enclosed, locked facility, as required under §4. *Id.* at slip op p 4. In vacating the trial court's order denying defendant's pretrial motion to dismiss, we first emphasized the trial court's role in conducting an evidentiary hearing:

> As explained in *Kolanek*, the trial court's role at the evidentiary hearing is limited: it must determine whether the defendant has presented sufficient evidence from which a reasonable jury could conclude that the defendant established the elements of his or her § 8 defense and then determine, given the evidence presented at the hearing, if there is a material factual dispute concerning one or more of those elements. The trial court may not weigh the evidence, assess credibility, or resolve factual disputes at the hearing. ("Questions of fact are the province of the jury, while questions of law are reserved to the courts."). Rather, the trial court must determine—as a matter of law—if the defendant established his or her right to have the charges dismissed under § 8, or if there are material factual disputes that must be resolved by a jury. [*Id.* at slip op p 3 (citations omitted).]

We concluded that, in light of *Kolanek*, the trial court erred in finding that the provisions in § 4 applied to the defendant's § 8 affirmative defense. We further concluded that the trial court erred:

> by assessing the weight and credibility to be given [the defendant's] evidence and by resolving any factual disputes. The trial court's sole function at the hearing was to assess the evidence to determine whether, as a matter of law, [the defendant] presented sufficient evidence to establish a prima facie defense under § 8 and, if he did, whether there were any material factual disputes on the elements of that defense that must be resolved by the jury. [*Anderson*, slip op p 4.]

Instead of conducting a de novo review of the evidence to determine whether the defendant could raise a § 8 affirmative defense at trial, we vacated the trial court's order and remanded for a new hearing:

> Having concluded that the trial court erred, we nevertheless decline to review de novo the evidence presented at the hearing to determine whether Anderson established his defense. It is clear that both Anderson's lawyer and the prosecutor presented their proofs on the mistaken assumption that the trial court had the authority to assess the weight and credibility of the evidence and make findings of fact. This mistaken assumption likely affected the parties' decisions in preparing and presenting their cases to the trial court at the hearing. In addition, although the issue of expert testimony came up at the evidentiary hearing, the trial court's rulings on that issue were not clear; it did not directly rule on the evidentiary matters—matters that are traditionally committed to the discretion of the trial court—and on whether it was necessary for either party to support or contest a particular element with expert testimony. The parties, for that reason, did not have an adequate opportunity to offer testimony on the various witness' expert qualifications, if any. Given the limited value of the existing record, we elect to exercise our discretion to "grant further or different relief as the case may require", see MCR 7.216(A)(7), and remand this case to the trial court for a new evidentiary hearing. [*Id.* at slip op p 5 (footnote omitted).]

Here, we conclude that a continued evidentiary hearing is necessary. At the hearing, the trial court must determine whether there are questions of fact related to defendant's § 8 affirmative defense. Again, 1) if there are no material questions of fact and defendant establishes the elements in § 8(a), then "the charges *shall* be dismissed", MCL 333.26428(b) (emphasis added); 2) if defendant establishes a prima facie case, but there are material questions of fact, then the defense must be submitted to the jury and, in that case, defendant is entitled to a new trial; 3) if there are no material questions of fact and defendant fails to establish the elements in § 8(a), then she is not entitled to assert the defense at trial and there would be no basis to vacate defendant's conviction.

III. RIGHT TO PRESENT A DEFENSE

Defendant also contends that she was not permitted to raise any defense, including mistake or necessity, which reflected on her intent to commit a crime. "We review de novo the question whether a defendant was denied the constitutional right to present a defense." *People v Unger*, 278 Mich App 210, 247; 749 NW2d 272 (2008).

Defendant contends that she was not allowed to argue that she mistakenly believed she was complying with the law or that she had a medical necessity for marijuana, both of which were relevant to her intent to commit the crime. However, "ignorance of the law or a mistake of law is no defense to a criminal prosecution." *People v Motor City Hosp & Surgical Supply, Inc*, 227 Mich App 209, 215; 575 NW2d 95 (1997). Moreover, there is no relevant defense of necessity to the crime of manufacturing marijuana, other than that provided for in the MMMA. Finally, to convict a defendant of the unlawful manufacture of marijuana, the prosecution must prove that (1) the defendant manufactured a controlled substance, (2) the manufactured substance was marijuana, and (3) the defendant knew that he was manufacturing marijuana. MCL 333.7401(2)(d)(iii); see also CJI2d 12.1. Thus, the crime of manufacturing marijuana only requires that the defendant knew she was manufacturing marijuana. Defendant testified that she was growing marijuana in her basement. Accordingly, there was no error.

IV. DUE PROCESS

We decline to address this issue given our resolution in section II and the Michigan Supreme Court's decision in *Kolanek.*

V. PROSECUTORIAL MISCONDUCT

Finally, defendant contends that the prosecutor's comments deprived her of a fair trial. We agree that the prosecutor's comments were improper, but that the trial court's jury instructions cured any potential harm to defendant.

"The test of prosecutorial misconduct is whether the defendant was denied a fair and impartial trial. Prosecutorial misconduct issues are decided on a case-by-case basis, and the reviewing court must examine the record and evaluate a prosecutor's remarks in context." *People v Brown,* 294 Mich App 377, 382-383; 811 NW2d 531 (2011) (citations omitted).

During voir dire, the prosecutor asked the jurors if the judge said defendant's conduct was illegal, whether they could convict and asked an individual juror if he found defendant grew marijuana in her house and the judge said that was illegal, whether he would hesitate to find her guilty. The prosecutor also stated, "And you know that if it was legal that we wouldn't be here." Additionally, in the prosecution's closing argument rebuttal, the prosecutor stated:

> And then what happens is once charges are brought, we go before a Judge and the case begins to be argued. And the Judge makes legal rulings and determines what evidence is admissible and what evidence is not admissible, and whether a case is legally sound; that's her job. If this case was improperly before you, it wouldn't be *before* you. That -the Judge would have kicked it a long time ago. That is her job. If that -police officers acted poorly, or if there was something that was done that - it was illegal, the Judge rules on that. The Judge makes those decisions.

The prosecutor's comments suggested that the trial court believed the case against defendant was "legally sound" or it would not be before the jury. We conclude that such comments were improper. Nevertheless, "[c]urative instructions are sufficient to cure the prejudicial effect of most inappropriate prosecutorial statements, and jurors are presumed to

follow their instructions." *Unger*, 278 Mich App at 235 (citations omitted). The trial court instructed the jury as follows: "If you believe I have an opinion about how you should decide this case, you must pay no attention to that opinion." The jury is presumed to have followed this instruction.

Remanded for proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ Joel P. Hoekstra
/s/ Kirsten Frank Kelly
/s/ Jane M. Beckering