STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED April 20, 2017
v	No. 331074 Oakland Circuit Court
DARREN DESHAWN JACKSON, Defendant-Appellant.	LC No. 2015-255679-FH

Before: FORT HOOD, P.J., and JANSEN and HOEKSTRA, JJ.

PER CURIAM.

Defendant appeals as of right his conviction, following a jury trial, of possession with intent to deliver marijuana, MCL 333.7401(2)(d)(*iii*).[1] We affirm.

I. FACTS

In the afternoon hours of November 8, 2014, defendant was travelling northbound on I-75, with his young daughter in the backseat, when he was pulled over by Michigan State Trooper Robert Tournaud because of the tinted windows on his vehicle. Trooper Tournaud reported smelling fresh marijuana as soon as he got out of his own vehicle and approached defendant's vehicle. When questioned by Trooper Tournaud about the smell of marijuana, defendant informed Trooper Tournaud that there were pieces of edible marijuana in the trunk of the vehicle. When Trooper Tournaud opened the vehicle's trunk, the strong smell of marijuana was "amplified[,]" and he found edible marijuana in the form of brownies, cookies and Rice Krispie treats. A more thorough search of defendant's vehicle yielded one ounce of marijuana packaged in two bags found in the pocket of a pair of jeans in a gym bag in the trunk. Trooper Tournaud also located additional marijuana packaged in separate bags in a larger Ziploc bag, as well as another Ziploc bag containing separate packages of marijuana labeled "PB." According to Trooper Tournaud, some of the items were retrieved from defendant's daughter's[2] backpack and lunch box in the trunk. Trooper Tournaud also found a brown paper bag secured with duct tape

[1] Defendant was sentenced to 12 months' probation.

[2] Defendant's daughter was nine years of age at the time of the traffic stop.

containing marijuana leaves. Trooper Tournaud did not find anything in the vehicle consistent with the personal consumption of marijuana, such as marijuana pipes, bowls or rolling papers.

Detective Charles Janczarek of the Auburn Hills Police Department was called by the prosecution as an expert to testify regarding "street level narcotics distribution and trafficking[.]" He testified that defendant possessed approximately 2 ounces, or 28 grams of marijuana, not including the edible marijuana. He estimated the total value of the marijuana in defendant's possession to be approximately $800 to 900,[3] and in his opinion, the marijuana was possessed with the intention to deliver it to others. Detective Janczarek based his opinion on the form, quality, value and quantity of the marijuana, as well as the way it was packaged. Defendant testified that he possessed the marijuana for personal use, and that he had no intention to deliver it or sell it to others.

Defendant had filed a motion in limine seeking to introduce evidence of a "debilitating medical condition" and the fact that he subsequently received a medical marijuana card following the date of this offense. The trial court denied this motion, and following trial, the jury convicted defendant of possession with intent to deliver marijuana.

II. ANALYSIS

Defendant first contends that the trial court erred in excluding evidence relating to his debilitating medical condition, as well as the fact that after the date of his arrest, he received a medical marijuana card. We disagree.

Defendant preserved his claim of evidentiary error by seeking admission of the challenged evidence and arguing that it was relevant to a material issue in the case, that being whether he intended to deliver the marijuana Trooper Tournaud found in his vehicle on November 8, 2014. *People v Metamora Water Serv, Inc*, 276 Mich App 376, 382; 741 NW2d 61 (2007). Therefore, we review the trial court's decision to exclude the evidence for an abuse of discretion. *People v Bynum*, 496 Mich 610, 623; 852 NW2d 570 (2014). An abuse of discretion occurs when the trial court selects an outcome that is "outside the range of reasonable and principled outcomes." *People v Orr*, 275 Mich App 587, 588-589; 739 NW2d 385 (2007) (footnote and citation omitted). "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 Washington*, 468 Mich 667, 670-671; 664 NW2d 203 (2003) (citation omitted).

Defendant was charged with possession with intent to deliver marijuana. As this Court noted in *People v McGhee,* 268 Mich App 600, 610; 709 NW2d 595 (2005), the offense of possession with intent to deliver an illegal substance requires a specific intent to deliver. See also *People v Crawford*, 458 Mich 376, 389; 582 NW2d 785 (1998) (recognizing the specific intent the prosecution must establish where a defendant is charged with possession with intent to

[3] From our review of the record, Detective Janczarek's opinion did not appear to include the edible marijuana found in defendant's possession.

deliver cocaine). In his brief in support of his motion seeking admission of the evidence in the trial court, defendant argued that the "[i]ntroduction of evidence relating to [defendant's] debilitating medical condition at the time of the arrest" and the fact that defendant subsequently was approved for a medical marijuana card were "relevant to whether [defendant] had the intent to give the marijuana away to someone else, or whether he intended to use it for himself." In support of his motion, defendant included his "Michigan Medical Marijuana Program" card which bore an effective date of December 3, 2014. At the hearing on defendant's motion seeking admission of the evidence, defense counsel asserted, in pertinent part, as follows:

> I believe [the requested evidence] is relevant and makes it more likely that [defendant] does have a medical marijuana card [and] that he had this marijuana for personal use. And, because it's relevant and because it makes it more likely to a fact at issue in this case I'm asking that it be admissible. Not as a defense to the – to the charge but simply as evidence to demonstrate that my client has medical issues, these issues did exist at the time of the offense, and that [defendant] had this marijuana to treat those medical issues.

In response, the prosecution noted that "[t]here's no evidence to suggest that the defendant ever spoke with a doctor regarding his medical condition" prior to the instant offense. In the words of the prosecution, "defendant would fail under a Section 8 or Section 4 defense."[4] According to the prosecution at the motion hearing:

> It's the People's position that this is just an effort by the defendant to assert a medical marijuana defense without being – without having one available. It would mislead the jury.

The trial court declined to admit the requested evidence, concluding that the fact that defendant held a medical marijuana card after the date of the instant offense was not relevant to whether he had the intent to deliver the marijuana seized from his vehicle on November 8, 2014. The trial court, citing MRE 403, further held that in spite of any "marginal relevance" the evidence may have had, the probative value of the evidence was outweighed by the danger of misleading and confusing the jury. In sum, the trial court held, in pertinent part, as follows:

> Defendant is not entitled to assert a Michigan Medical Marijuana Act defense based on a medical diagnosis or registration occurring after the November 14 traffic stop.
>
> If defendant presents evidence that he now has a marijuana registration [sic] or was prescribed medical marijuana after the fact, the jury will likely be misled into concluding that defendant is entitled to assert a medical marijuana defense. [Citation omitted.]

[4] The prosecution was referring to MCL 333.26424 and MCL 333.26428, provisions of the Michigan Medical Marihuana Act, MCL 333.26421 *et seq*.

A. GOVERNING LAW

In *People v Henry*, 315 Mich App 130, 143-144; 889 NW2d 1 (2016), this Court set forth the following principles of law that are of guidance in determining the admissibility of evidence.

> In general, "[a]ll relevant evidence is admissible" while "[e]vidence which is not relevant is not admissible." MRE 402. As previously stated, "[e]vidence 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)]. Under this broad definition, evidence that is useful in shedding light on any material point is admissible. *Id*. at 114. In determining admissibility, "[t]he relationship of the elements of the charge, the theories of admissibility, and the defenses asserted governs what is relevant and material. In order to be material, the fact must be within the range of litigated matters in controversy." *People v Yost*, 278 Mich App 341, 403; 749 NW2d 753 (2008) (quotation marks and citations omitted). "Relevance involves two elements, materiality and probative value. Materiality refers to whether the fact was truly at issue." *People v Benton*, 294 Mich App 191, 199; 817 NW2d 599 (2011) (quotation marks and citations omitted).

As a preliminary matter, we note that in support of his motion seeking to introduce evidence of (1) his debilitating medical condition and (2) the fact that he was subsequently approved to hold a medical marijuana card, defendant did not indicate the specifics of the debilitating condition that he suffered, and the trial court was not presented with any further details regarding this matter at the motion hearing.[5] Accordingly, without specific details about the nature of the proffered evidence, the trial court was placed in a difficult position in even determining the relevance of the evidence sought to be admitted. For example, the trial court was not given specific information about the nature of defendant's medical condition, whether he had sought the assistance of a physician, and why marijuana may have been of assistance in dealing with any debilitating medical condition. However, even if we were to accept defendant's argument that evidence that he suffered from a debilitating medical condition and was subsequently approved for a medical marijuana card was relevant to his intent while in possession of the marijuana seized from his vehicle on November 8, 2014, we agree with the trial court's exclusion of the evidence pursuant to MRE 403.

In *People v Blackston*, 481 Mich 451, 461; 751 NW2d 408 (2008), the Michigan Supreme Court, citing MRE 403, stated, in pertinent part, as follows:

[5] A review of the lower court file confirms that, in an unrelated motion filed earlier in the lower court proceedings, defendant alleged he suffered from a debilitating medical condition arising from a gunshot wound to his lower right leg that occurred in January 2014.

> [I]t is within the trial court's discretion to exclude . . . evidence "if it's 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." [Footnote and citations omitted.]

Additionally, the *Blackston* Court recognized:

> "Rule 403 determinations are best left to a contemporaneous assessment of the presentation, credibility, and effect of testimony" by the trial judge. *People v VanderVliet*, 444 Mich 52, 81; 508 NW2d 114 (1993) [, amended 445 Mich 1205 (1994)]. Assessing probative value against prejudicial effect requires a balancing of several factors, including the time required to present the evidence and the possibility of delay, whether the evidence is needlessly cumulative, how directly the evidence tends to prove the fact for which it is offered, how essential the fact sought to be proved is to the case, the potential for confusing or misleading the jury, and whether the fact can be proved in another manner without as many harmful collateral effects. *People v Oliphant*, 399 Mich 472, 490; 250 NW2d 443 (1976). Unfair prejudice may exist where there is a danger that the evidence will be given undue or preemptive weight by the jury or where it would be inequitable to allow use of the evidence. *People v Mills*, 450 Mich 61, 75–76; 537 NW2d 909 (1995), mod on other grounds 450 Mich 1212 (1995). [*Blackston*, 481 Mich at 462.]

The trial court's assessment pursuant to MRE 403 was correct. As the prosecution and the trial court correctly recognized, the Michigan Medical Marihuana[6] Act, MCL 333.26421 *et seq*., is a key part of this case and pivotal to our analysis. The Michigan Supreme Court stated in *People v Hartwick*, 498 Mich 192, 209; 870 NW2d 37 (2015), "the possession, manufacture, and delivery of marijuana are punishable criminal offenses under Michigan law." (Footnote and citation omitted.) While the MMMA's purpose is to allow "a limited class of individuals" to partake in the use of marijuana for medical purposes, "[t]he MMMA does *not* create a general right for individuals to use and possess marijuana in Michigan." *People v Kolanek*, 491 Mich 382, 393, 394; 817 NW2d 528 (2012).

> Under the MMMA, though, "*[t]he medical use of marihuana is allowed under state law to the extent that it is carried out in accordance with the provisions of th[e] act*." *The MMMA grants to persons in compliance with its provisions either immunity from, or an affirmative defense to, those marijuana-related violations of state law*. [*Hartwick*, 498 Mich at 209 (footnote and citation omitted; emphasis added).]

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[6] While the MMMA uses the term "marihuana[,]" decisions of this Court use the spelling "marijuana[.]" See *People v Byslma*, 315 Mich App 363, 365; 889 NW2d 729 (2016). Therefore, our opinion will use the term "marijuana" except when referring to portions of the MMMA.

Where a person complies with the provisions of the MMMA, they are protected from prosecution. *People v Latz*, ___ Mich App ___, ___; ___ NW2d ___ (2016) (Docket No. 328274); slip op at 3. For example, individuals in compliance with the MMMA can seek immunity from arrest and prosecution, or raise an affirmative defense to the charges. *People v Bylsma*, 315 Mich App 363, 376-377; 889 NW2d 729 (2016). However, to avail one's self of these legal protections, an individual must meet the requirements of the governing statutory provisions. *Id*. at 376.

For example, MCL 333.26424 provides immunity from prosecution arising from marijuana-related offenses, and, at the time that defendant was arrested on November 8, 2014,[7] provided, in pertinent part, as follows:

> (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. *The privilege from arrest under this subsection applies only if the qualifying patient presents both his or her registry identification card and a valid driver license or government-issued identification card that bears a photographic image of the qualifying patient*.
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> * * *
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> (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:
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> (1) is in possession of a registry identification card; and
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> (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. [Emphasis added.]

[7] MCL 333.26424 was amended by 2016 PA 283, effective December 20, 2016, and, as pertinent to this appeal, now provides that the medical use of marijuana includes "usable marihuana equivalents[.]"

Like the defense of entrapment, immunity pursuant to § 4 will not invalidate the elements of a marijuana-related crime, but it does "provide[ ] immunity from arrest, prosecution, or penalty to marijuana users *who meet certain delineated requirements*." *People v Jones*, 301 Mich App 566, 576; 837 NW2d 7 (2013) (emphasis added). The fact-finding necessary to determine whether § 4 is applicable to the facts of a particular case is a question left to the trial court's consideration and ultimate determination. *Id*. at 577. Likewise, MCL 333.26428 provides an affirmative defense to prosecution for marijuana related offenses, and provides, in pertinent part, as follows:

> (a) Except as provided in [MCL 333.26427] 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). [Footnote omitted.]

MCL 333.26428 thus allows an individual to claim an affirmative defense to a marijuana-related charge, even when that individual is not a "registered cardholding patient[ ] . . . ." *Kolanek*, 491 Mich at 398.

On appeal, defendant concedes that he has not met the requirements of § 4 or § 8 of the MMMA. However, defendant advances the novel legal theory that evidence of his debilitating medical condition, and the fact that he subsequently acquired a medical marijuana card allowing him to use marijuana for medical purposes, ought to have been nonetheless presented to the jury to assist it in determining whether defendant had the requisite intent to deliver the marijuana that was seized from his possession on November 8, 2014. Defendant's argument is very nuanced, in

that he claims that he is not attempting to avail himself of the protections of § § 4 and 8 of the MMMA, but merely wishes to present evidence relevant to his intention at the time of possessing the marijuana. While defendant frames his arguments as seeking to correct an evidentiary error on the part of the trial court, we note that defendant's assertions, both in the trial court and this Court, are merely a creative attempt to sidestep and subvert the clear dictates of the MMMA, which was approved by the citizens of this state in 2008, *Bylsma*, 315 Mich App at 377, and sets forth certain stringent requirements that an individual must meet before receiving the legal protections of the MMMA from prosecution for marijuana-related offenses.[8] Put another way, while defendant claims he is not seeking the protections of the MMMA from prosecution of a marijuana-related offense, an indirect result of admitting the proffered evidence would be that defendant would be able to avoid conviction of a marijuana-related offense, even where he did not comply with the requirements of the MMMA. It is both telling and supportive of our conclusion that defendant refers in the trial court and this Court to his "debilitating medical condition[,]" the same language that is employed in the MMMA. MCL 333.26423(b)(1), (2).[9] Moreover, had evidence of defendant's alleged need to partake of marijuana for medical purposes been submitted to the jury, its probative value would have undoubtedly been outweighed by the risk of confusing the issues at trial and misleading the jury. Put another way, it would have been highly confusing to a jury to hear that defendant required the marijuana in his possession for medical purposes where defendant did not seek immunity from the charge pursuant to § § 4 of the MMMA, or to present an affirmative defense pursuant to § 8 of the

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[8] On appeal, the prosecution contends that defendant was seeking to request that the jury exercise "its power of nullification." *People v Demers*, 195 Mich App 205, 206; 489 NW2d 173 (1992). In *Demers*, this Court described jury nullification as the jury's "power to dispense mercy by nullifying the law and returning a verdict less than that required by the evidence." *Id*. (Citation omitted.)

[9] At the time defendant was charged, MCL 333.26423(b) defined "debilitating medical condition" in the following manner:

> (b) "Debilitating medical condition" means 1 or more of the following:
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> (1) Cancer, glaucoma, positive status for human immunodeficiency virus, acquired immune deficiency syndrome, hepatitis C, amyotrophic lateral sclerosis, Crohn's disease, agitation of Alzheimer's disease, nail patella, or the treatment of these conditions.
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> (2) A chronic or debilitating disease or medical condition or its treatment that produces 1 or more of the following: cachexia or wasting syndrome; severe and chronic pain; severe nausea; seizures, including but not limited to those characteristic of epilepsy; or severe and persistent muscle spasms, including but not limited to those characteristic of multiple sclerosis.

MCL 333.26423(b) was amended by 2016 PA 283, effective December 20, 2016, and the statutory amendments to this provision of the MMMA are not relevant to this appeal.

MMMA. Accordingly, the trial court properly exercised its discretion in excluding the evidence of his medical condition and his subsequently acquired medical marijuana card pursuant to MRE 403.

Defendant also asserts that the exclusion of the evidence violated his constitutional right to present a defense. We disagree.

The issue regarding defendant's constitutional right to present a defense has not been preserved for appeal because defendant did not argue in the trial court that the exclusion of the evidence violated his right to present a defense. *People v King*, 297 Mich App 465, 472; 824 NW2d 258 (2012). "An objection based on one ground is usually considered insufficient to preserve an appellate attack based on a different ground." *People v Kimble*, 470 Mich 305, 309; 684 NW2d 669 (2004). Whether a defendant's right to present a defense was violated by the exclusion of evidence is a constitutional question that is reviewed de novo on appeal. *People v Kurr*, 253 Mich App 317, 327; 654 NW2d 651 (2002). However, we review unpreserved issues for plain error affecting defendant's substantial rights. *King*, 297 Mich App at 472; *People v Carines*, 460 Mich 750, 763-764; 597 NW2d 130 (1999).

"A criminal defendant has a state and federal constitutional right to present a defense." *Kurr*, 253 Mich App at 326 (citations omitted). "However, an accused's right to present evidence in his defense is not absolute." *People v Unger*, 278 Mich App 210, 250; 749 NW2d 272 (2008) (citations omitted).

> It is well settled that the right to assert a defense may permissibly be limited by "established rules of procedure and evidence designed to assure both fairness and reliability in the ascertainment of guilt and innocence," *Chambers v. Mississippi*, 410 US 284, 302; 93 S Ct 1038; 35 L Ed 2d 297 (1973). [*People v Toma*, 462 Mich 281, 294; 613 NW2d 694 (2000).]

A defendant's right to present a defense thus extends only to evidence that is "relevant and admissible." *People v Solloway*, 316 Mich App 174, 198; 891 NW2d 255 (2016) (citation omitted).

As we have concluded above, the trial court correctly determined that MRE 403 precluded the admission of the requested evidence. Accordingly, defendant's right to present a defense yielded to the rules of evidence, meant to ensure fairness and reliability in these proceedings. *Toma*, 462 Mich at 294. However, we also note that during trial, defendant testified that he possessed the marijuana that was found in his vehicle on November 8, 2014, "just for personal use[,]" and he denied ever selling or giving marijuana to another person. During cross-examination, defendant testified that he paid $600 for the marijuana, the marijuana was his alone to consume, he reiterated that he did not intend to sell or give the marijuana to anyone, and he expected it to last approximately six to eight weeks. During questioning from the trial court, defendant testified that some of the marijuana was packaged separately in two different baggies because the marijuana was of two different types. One, according to defendant, was a "sativa" type of marijuana, which is used for relaxation. The other, as defendant testified, was an "indica" variety, which is used for "numbing" and "pain relief[.]" During closing

argument, defense counsel reiterated that the marijuana was in defendant's possession merely for his personal use.

> As [defendant], himself, testified he had [the marijuana] for personal use. There was never a time that [he] even considered selling it or giving it to anyone. He had it for himself. And in terms of the witnesses and – and what you're going to do when you go back to the jury room, I don't think it's even a question at this point in time that -- that [defendant] had this marijuana for his own personal use. This is all it is. He had it for himself, and – and I believe he testified truthfully because that's what he had it for.

Under these circumstances we are not persuaded that defendant was denied the opportunity to present his defense to the jury, and he has therefore not established plain error in this regard. *Carines*, 460 Mich at 763.

III. CONCLUSION

The trial court correctly exercised its discretion in excluding the evidence relating to defendant's debilitating medical condition and the fact that he subsequently acquired a medical marijuana card. Under the circumstances of this case, defendant was afforded his right to present his defense to the jury, and he has not established a showing of plain error.

Affirmed.

/s/ Karen M. Fort Hood
/s/ Kathleen Jansen
/s/ Joel P. Hoekstra