STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee, v ROBERT LEE REDDEN, Defendant-Appellant.	FOR PUBLICATION September 14, 2010 9:20 a.m. No. 295809 Oakland Circuit Court LC No. 2009-009020-AR

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee, v TOREY ALISON CLARK, Defendant-Appellant.	 No. 295810 Oakland Circuit Court LC No. 2009-009020-AR

Before: O'CONNELL, P.J., and METER and OWENS, JJ.

METER, J.

In this case involving the Michigan Medical Marihuana Act (MMMA), MCL 333.26421 *et seq*., defendant Robert Lee Redden and defendant Torey Alison Clark appeal by leave granted from a December 10, 2009, circuit court order reversing for each defendant the district court's dismissal of a single count of manufacturing 20 or more but less than 200 marijuana plants, MCL 333.7401(2)(d)(ii). We affirm the circuit court's decision to reinstate the charges.

I. FACTS

This case arose from the execution of a search warrant at defendants' residence in Madison Heights, which resulted in the discovery of approximately one and one-half ounces of marijuana and 21 marijuana plants. Officer Kirk Walker and Officer Mark Moine of the Madison Heights Police Department testified that on March 30, 2009, at approximately 7:50 p.m., they arrived at the residence with four other officers to execute a search warrant for the purpose of looking for marijuana and other illegal substances.

Defendants and another unidentified individual were found in the residence and were secured by the officers. The officers found proof of residency for defendants and $531 in cash. Officers also found three bags of marijuana in a bedroom. In addition, they found 21 marijuana plants, which were all between three and four inches tall, on the floor of a closet in the same bedroom. Field tests of these items were positive for marijuana. Officers did not find any scales, small plastic bags, or packaging materials in the residence.

At some point during the search, Redden stated that he was in pain. Defendants also each turned over documents regarding their use of marijuana for medical purposes. The documents, which were dated March 3, 2009, for Redden, and March 4, 2009, for Clark, were admitted into evidence. Each document stated:

> I, Eric Eisenbud, MD, am a physician, duly licensed in the State of Michigan. I have completed a full assessment of this patient's medical history, and I am treating this patient for a terminal illness or a debilitating condition as defined in Michigan's medical marijuana law. I completed a full assessment of this patient's current medical condition. The assessment was made in the course of a bona fide physician-patient relationship. I have advised the patient about the potential risks and benefits of the medical use of marijuana. I have formed my professional opinion that the potential benefits of the medical use of marijuana would likely outweigh any health risks for the patient. This patient is 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 the serious or debilitating medical condition. [Emphasis in original.]

The MMMA went into effect on December 4, 2008, but, according to Walker, the state of Michigan did not begin issuing registry identification cards until April 4, 2009. The Michigan Department of Community Health issued medical marijuana registry identification cards to each defendant on April 20, 2009, but this was after the search in this case took place.

As part of the preliminary examination, defendants asserted the affirmative defense contained in § 8 of the MMMA, MCL 333.26428.[1] In support of the defense, defendants presented testimony from Dr. Eric Eisenbud, M.D., who testified that he attended the University of Colorado Medical School and has been a physician for 37 years. He is licensed to practice in

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[1] MCL 333.26428, which is quoted in its entirety *infra*, states that a medical-purpose defense shall be presumed valid if, among other things:

> (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 . . . .

seven states, including Michigan, and is board certified in ophthalmology. Dr. Eisenbud also had worked in the past as an emergency room practitioner and a family practitioner. At the time of the preliminary examination, Dr. Eisenbud had worked for the past 19 months for The Hemp and Cannabis Foundation (THCF) Medical Clinic. He testified that he is "not from Michigan" and was currently working in six out of the seven states in which he is licensed to practice medicine, although he later suggested that he was working in all seven states.[2]

Dr. Eisenbud testified that defendants were his patients and he examined each of them on March 3, 2009, when both were seeking to be permitted to use medical marijuana under the MMMA. A clinic technician screened defendants before their appointment in a telephone interview and by reviewing their medical records. Dr. Eisenbud met with each defendant for about half an hour, spending five minutes reviewing the medical records and about ten minutes on the physical examination; he also interviewed them. For both defendants, during the ten-minute physical examination, Dr. Eisenbud examined their general appearance and skin, listened to their lungs, examined their abdomen, examined their head and neck, did a neurological and cardiovascular assessment, and assessed mental health.

Dr. Eisenbud testified that he signed the authorization for each defendant in his professional capacity because each qualified under the MMMA and each would benefit from using medical marijuana. He opined that his relationship with each defendant was a bona fide physician-patient relationship because he interviewed defendants, examined them, and looked at their medical records in order to gain a full understanding of their medical problems. Dr. Eisenbud acknowledged that the THCF Medical Clinic did not require patients to bring their complete medical records. The records from Redden were from two years before his examination by Dr. Eisenbud, and Clark's records were from a year before her examination by Dr. Eisenbud.

Regarding Redden, Dr. Eisenbud concluded that he had a debilitating condition that caused pain, satisfying the MMMA. Regarding Clark, Dr. Eisenbud concluded, based on her medical records and interviewing her, that she suffered from nausea. Dr. Eisenbud did not testify regarding what caused Redden's pain and Clark's nausea. Dr. Eisenbud only examined each defendant once. He viewed the only risk of defendants' using marijuana as related to driving; he indicated that they should not drive within four hours of using it.

Dr. Eisenbud testified that defendants did not consult with any other doctors regarding medical-marijuana authorization before their appointments with him. According to Dr. Eisenbud, each defendant was using other narcotics for their conditions, and he opined that access to marijuana would give them the opportunity to wean themselves off of those narcotics.

The parties stipulated that Redden had two previous convictions for possession with intent to distribute marijuana.

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[2] We note that Dr. Eisenbud did not indicate where his "home base" is, he did not indicate where his examinations of defendants took place, and he did not indicate where the TCHF Medical Clinic is located.

During the preliminary examination, the prosecution argued that defendants were not entitled to assert the affirmative defense from § 8 of the MMMA because they did not each have a registry identification card at the time of the offense as required by § 4(a) of the MMMA, MCL 333.26424(a).[3] The prosecution acknowledged that defendants could not have obtained a card previously because the state had yet to begin issuing them. However, the prosecution contended that defendants were required to abstain from marijuana use until they were able to obtain a card. Defendants argued that the plain language of § 8 of the MMMA did not require possession of a card.

The prosecution argued that under the probable-cause standard, the evidence showed that defendants were engaged in the manufacturing of marijuana. The prosecution contended that defendants failed to comply with § 8 of the MMMA because they had not shown a bona fide patient-physician relationship with Dr. Eisenbud and also failed to establish that they possessed an amount of marijuana that was not more than was reasonably necessary to ensure uninterrupted availability for the purpose of treating their conditions. Defendants argued that they each met the requirements of § 8 because they each had a signed authorization from a licensed physician with whom they had a bona fide physician-patient relationship and who concluded that they each had conditions covered under the MMMA. Defendants also argued that the amount of marijuana was reasonably necessary.

II. LOWER-COURT RULINGS

The district court noted that the MMMA "is probably one of the worst pieces of legislation I've ever seen in my life," and went on to state:

> [S]ection 8 says section 4 doesn't really have any meaning. If you don't have a card and you happen to be arrested, just make sure you have a doctor who will testify in court that you needed medical marijuana in order to have that case dismissed.
>
> The burden's on defendant at the evidentiary hearing to have section 8 apply to show what a reasonable amount of marijuana is. It doesn't say what a

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[3] 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, 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.

> reasonable amount is. It would seem practical to me that they would have included the same amount that was in section 4 if they believed that was a reasonable amount. But, instead, they just leave it to, I guess, every other judge's decision as to what they think is reasonable.
>
> It – it's just one of the worst pieces of legislation I've ever seen. . . . [I]t appears that section 8, the intent of it is to allow anyone who possesses marijuana with a doctor's certification, I guess at the time of the hearing, that the case would have to be dismissed. Because it says in section [8]b that the charges shall be dismissed following an evidentiary hearing where the person shows the elements listed in subsection a. Well, one of the elements in subsection (a) is possessing a reasonable quantity of marijuana.
>
> I still don't know what a reasonable quantity of marijuana is unless I go to section 4. Section 4 says 2-point-5 ounces, I believe, 12 plants, but you also have to have a valid registration card.
>
> So, these people possessed no registration card, but yet they want the benefit of section 4 to apply to section 8.

The district court also noted that although Dr. Eisenbud testified regarding defendants' legitimate need to use marijuana for medical purposes, there was no testimony regarding what was a reasonably necessary amount for defendants to possess. The district court concluded that it would simply apply the amount of two and one-half ounces and 12 plants set by § 4 as what was reasonably necessary, and it granted defendants' motion to dismiss, explaining:

> For that reason, I believe that section 8 entitles the defendants to a dismissal, even though they did not possess the valid medical card, because section 8 says if they can show the fact that a doctor believed that they were likely to receive a therapeutic benefit, and this doctor testified to that [sic]. And Dr. Eisenbud is a physician licensed by the State of Michigan. And that's the only requirement that the statute has. You don't have to be any type of physician, you just have to be a licensed physician by the State of Michigan.
>
> So, based on that, I find section 8 does apply. And I believe I'm obligated to dismiss this matter based on section 8 of the statute.

Regarding the prosecution's request for a clarification about whether "the doctor's testimony rose to the level of a bona fide physician-patient relationship," the district court stated:

> Based on his testimony, he indicated that he – he read their medical records, he saw them, and I think his total time was about half an hour totally spent with them, which, based on my own personal experience, I don't find inconsistent with my own doctor. So I guess it's a bona fide relationship.

The district court then entered an order of dismissal on the same day as the hearing, July 17, 2009.

The prosecution subsequently appealed the order of dismissal to the circuit court. On December 18, 2009, the circuit court issued an opinion and order reversing the district court's order and remanding the case to the district court for further proceedings. The circuit court ruled that the district court had abused its discretion by not binding defendants over for trial because it had improperly acted as a trier of fact. The circuit court ruled that, in this case, the affirmative defense must be addressed in the trial court in order for proper discovery and rebuttal to take place.

The circuit court also considered questionable the issue regarding whether defendants should be allowed to raise the affirmative defense at all, because defendants did not have valid registry identification cards as required by § 4 of the MMMA, together possessed more than the amount of marijuana permitted under § 4, and did not keep their marijuana plants in "an enclosed, locked facility," which is also required under § 4.

The circuit court then emphasized that there was a disputed question regarding whether Dr. Eisenbud had a bona fide physician-patient relationship with defendants. The circuit court concluded:

> [T]here was competent evidence in support of the bindover. For the district judge to deny the bindover was an abuse of discretion. Specifically, the district judge failed to properly exercise his judgment by relying solely on Dr. Eisenbud's testimony, and by ignoring the evidence presented by the People regarding defendants' actions that showed that they did not meet the criteria of the affirmative defense. The evidence in support of the affirmative defense was not developed sufficiently to support the district judge's decision to deny the bindover.

III. A REGISTRY IDENTIFICATION CARD IS NOT REQUIRED FOR A § 8 DEFENSE

Defendants argue that the circuit court erred in ruling that because defendants did not obtain a registry identification card in order to satisfy the conditions of § 4 of the MMMA, they could not assert the affirmative defense contained in § 8.[4]

A. STANDARD OF REVIEW

This issue presents a question of statutory interpretation. We review issues of statutory interpretation de novo. *People v Stone Transport, Inc*, 241 Mich App 49, 50; 613 NW2d 737 (2000). Generally, the primary objective in construing a statute is to ascertain and give effect to the Legislature's intent. *People v Williams*, 475 Mich 245, 250; 716 NW2d 208 (2006). The MMMA was enacted as a result of an initiative adopted by the voters. "The words of an initiative law are given their ordinary and customary meaning as would have been understood by

[4] The circuit court's ruling was somewhat ambiguous with regard to this issue; it stated that "it is questionable whether Defendants are entitled to assert the affirmative defense contained in the MMMA."

the voters." *Welch Foods, Inc v Attorney General*, 213 Mich App 459, 461; 540 NW2d 693 (1995). We presume that the meaning as plainly expressed in the statute is what was intended. *Id*. This Court must avoid a construction that would render any part of a statute surplusage or nugatory, and "[w]e must consider both the plain meaning of the critical words or phrases as well as their placement and purpose in the statutory scheme." *People v Williams*, 268 Mich App 416, 425-426; 707 NW2d 624 (2005).

B. ANALYSIS

This issue involves sections 4, 7, and 8 of the MMMA. Section 4 provides, in relevant part:

> (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.
>
> * * *
>
> (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.[5] [MCL 333.26424.]

[5] It is not clear how the immunity from arrest in § 4(a) interplays with the rebuttable presumption in § 4(c)(2). However, this issue is not before the Court today.

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:
>
> (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;
>
> (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
>
> (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.
>
> (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).
>
> (c) If a patient or a patient's primary caregiver demonstrates the patient's medical purpose for using marihuana pursuant to this section, the patient and the patient's primary caregiver shall not be subject to the following for the patient's medical use of marihuana:
>
> (1) disciplinary action by a business or occupational or professional licensing board or bureau; or
>
> (2) forfeiture of any interest in or right to property. [MCL 333.26428.]

As an initial matter, the plain language of § 8 does not place any restriction on defendants' raising of the affirmative defense. Nevertheless, the prosecution argues that the affirmative defense under § 8 is unavailable to defendants because they did not possess valid registry identification cards at the time of the offense, in violation of § 4. The prosecution bases its position on the language in § 8(a) that provides:

> *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 . . . . [MCL 333.26428(a) (emphasis added).]

Section 7(b) provides a host of instances where the protection of the affirmative defense under § 8 would not be permitted, but none of those situations are at issue in this case. See MCL 333.26427(b).[6] However, the prosecution points to § 7(a), which provides that "[t]he medical

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[6] Section 7 states:

> (a) The medical use of marihuana is allowed under state law to the extent that it is carried out in accordance with the provisions of this act.
>
> (b) This act shall not permit any person to do any of the following:
>
> (1) Undertake any task under the influence of marihuana, when doing so would constitute negligence or professional malpractice.
>
> (2) Possess marihuana, or otherwise engage in the medical use of marihuana:
>
> (A) in a school bus;
>
> (B) on the grounds of any preschool or primary or secondary school; or
>
> (C) in any correctional facility.
>
> (3) Smoke marihuana:
>
> (A) on any form of public transportation; or
>
> (B) in any public place.
>
> (4) Operate, navigate, or be in actual physical control of any motor vehicle, aircraft, or motorboat while under the influence of marihuana.
>
> (5) Use marihuana if that person does not have a serious or debilitating medical condition.
>
> (c) Nothing in this act shall be construed to require:
>
> (1) A government medical assistance program or commercial or non-profit health insurer to reimburse a person for costs associated with the medical use of marihuana.

(continued…)

use of marihuana is allowed under state law to the extent that it is carried out in accordance with the provisions of this act." MCL 333.26427(a). The prosecution contends that this section justifies its position that § 4 must be adhered to in order for a defendant to invoke § 8, because the affirmative defense is only available to a defendant who complies with the other provisions of the MMMA.

However, as defendants argue, this position ignores that the MMMA provides two ways in which to show legal use of marijuana for medical purposes in accordance with the act. Individuals may either register and obtain a registry identification card under § 4 or remain unregistered and, if facing criminal prosecution, be forced to assert the affirmative defense in § 8.

The plain language of the MMMA supports this view. Section 4 refers to a "qualifying patient who has been issued and possesses a registry identification card" and protects a qualifying patient from "arrest, prosecution, or penalty in any manner . . . ."[7] MCL 333.26424(a). On the other hand, § 8(a) refers only to a "patient," not a qualifying patient, and only permits a patient to "assert the medical purpose for using marihuana as a defense to any prosecution involving marihuana . . . ." MCL 333.26428(a). Thus, adherence to § 4 provides protection that differs from that of § 8. Because of the differing levels of protection in sections 4 and 8, the plain language of the statute establishes that § 8 is applicable for a patient who does not satisfy § 4.

The language of the ballot proposal itself supports this interpretation. The ballot proposal, Proposal 08-1, stated that the law would:

> • Permit physician approved use of marijuana by registered patients with debilitating medical conditions including cancer, glaucoma, HIV, AIDS, hepatitis C, MS and other conditions as may be approved by the Department of Community Health.

(…continued)

> (2) An employer to accommodate the ingestion of marihuana in any workplace or any employee working while under the influence of marihuana.
>
> (d) Fraudulent representation to a law enforcement official of any fact or circumstance relating to the medical use of marihuana to avoid arrest or prosecution shall be punishable by a fine of $500.00, which shall be in addition to any other penalties that may apply for making a false statement or for the use of marihuana other than use undertaken pursuant to this act.
>
> (e) All other acts and parts of acts inconsistent with this act do not apply to the medical use of marihuana as provided for by this act. [MCL 333.26427.]

[7] A "[q]ualifying patient is defined as "a person who has been diagnosed by a physician as having a debilitating medical condition." MCL 333.26423(h).

> • Permit registered individuals to grow limited amounts of marijuana for qualifying patients in an enclosed, locked facility,
>
> • Require Department of Community Health to establish an identification card system for patients qualified to use marijuana and individuals qualified to grow marijuana.
>
> • *Permit registered and unregistered patients* and primary caregivers *to assert medical reasons for using marijuana* as a defense to any prosecution involving marijuana. [Emphasis added.]

The ballot proposal explicitly informed voters that the law would permit registered *and* unregistered patients to assert medical reasons for using marijuana as a defense to any prosecution involving marijuana. The language supports the view that registered patients under § 4 and unregistered patients under § 8 would be able to assert medical use of marijuana as a defense. Accordingly, we hold that the district court did not err by permitting defendants to raise the affirmative defense even though neither satisfied the registry-identification-card requirement of § 4.[8]

IV. THE CIRCUIT COURT PROPERLY REVERSED THE BINDOVER DECISION

Defendants next contend that the circuit court erred by ruling that the district court was precluded from ruling that defendants' use of medical marijuana was permitted under the MMMA. We find no basis on which to reverse the circuit court's disposition, because there are indeed triable issues in this case, and the district court improperly acted as a trier of fact in denying the bindover.

A. STANDARD OF REVIEW

"A district court's ruling that alleged conduct falls within the scope of a criminal law is a question of law that is reviewed de novo, but a decision to bind over a defendant based on the factual sufficiency of the evidence is reviewed for an abuse of discretion." *People v Henderson*, 282 Mich App 307, 312; 765 NW2d 619 (2009). When reviewing the bindover decision, a circuit court must consider the entire record of the preliminary examination and not substitute its judgment for that of the district court. *Id*. at 312-313. This Court reviews the bindover decision de novo to determine whether the district court abused its discretion, giving no deference to the circuit court's decision. *Id*.

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[8] Although defendants do not raise this as an issue on appeal, the prosecution argues that a § 8 defense was not viable because the marijuana in question was not kept in an "enclosed, locked facility." We note that the language concerning an "enclosed, locked facility" is set forth in the context of § 4, not in the context of § 8. Nevertheless, as with the discovery issue mentioned in footnote 11, we decline to address this issue without the benefit of full briefing by the parties. Presumably further proceedings will take place with regard to this issue.

B. ANALYSIS

"The primary function of a preliminary examination is to determine if a crime has been committed and, if so, if there is probable cause to believe that the defendant committed it." *People v Glass (After Remand)*, 464 Mich 266, 277; 627 NW2d 261 (2001). Probable cause is established by evidence "sufficient to cause a person of ordinary prudence and caution to conscientiously entertain a reasonable belief of the accused's guilt." *People v Yost*, 468 Mich 122, 126; 659 NW2d 604 (2003) (citation and quotation marks omitted). In order to establish that a crime has been committed, a prosecutor need not prove each element beyond a reasonable doubt, but must present some evidence of each element. See *id*. If the evidence conflicts or raises a reasonable doubt concerning the defendant's guilt, the defendant should nevertheless be bound over for trial, where the trier of fact can resolve the questions. *Id*. at 128.

This Court has recognized "that affirmative defenses in criminal cases should typically be presented and considered at trial and that a preliminary examination is not a trial." *People v Waltonen*, 272 Mich App 678, 690 n 5; 728 NW2d 881 (2006). In *Waltonen*, this Court went on to note that in a situation where the defense is complete and there are not conflicting facts regarding the defense, it could be argued that there would be no probable cause to believe a crime was committed. *Id*.

The district court must consider not only the weight and competency of the evidence, but also the credibility of the witnesses, and it may consider evidence in defense.[9] *People v King*, 412 Mich 145, 153-154; 312 NW2d 629 (1981). As noted, however, the district court cannot discharge a defendant if the evidence conflicts or raises reasonable doubt concerning a defendant's guilt, because this presents an issue for the trier of fact. *Id*.

Here, there was evidence that the defense was *not* complete, cf. *Waltonen*, 272 Mich App at 690 n 5, and there were colorable issues for the trier of fact, see *King*, 412 Mich at 153-154. Specifically, we find that there were colorable issues concerning whether a bona fide physician-patient relationship existed, whether the amount of marijuana defendants possessed was reasonable under the statute, whether the marijuana in question was being used for medical purposes, and whether defendants suffered from serious or debilitating medical conditions.

(1) BONA FIDE PHYSICIAN-PATIENT RELATIONSHIP

MCL 333.26428(a)(1) states that a medical-purpose defense shall be presumed valid if:

> 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*

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[9] With regard to preliminary examinations, MCL 766.12 permits "witnesses for the prisoner, if he [has] any . . . [to] be sworn, examined and cross-examined," and MCR 6.110(C) permits "[e]ach party . . . [to] subpoena witnesses, offer proofs, and examine and cross-examine witnesses at the preliminary examination."

> *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 . . . .

We find that there was evidence in this particular case that the doctor's recommendations did not result from assessments made in the course of bona fide physician-patient relationships.[10] Dr. Eisenbud testified that he was board-certified in ophthalmology. He answered "That's right," when asked the following question: "So, your sole employment, at this point, is to review people to see whether or not you think they can have marijuana under the Michigan Medical Marijuana -- or any other medical marijuana law, correct?" He testified that he saw Clark and Redden once each and was currently working in at least six states. He refused to divulge what defendants' debilitating medical conditions were. Dr. Eisenbud indicated that he was not scheduled to see defendants again until they were due to renew their documentation for using marijuana for medical purposes.

The MMMA does not define the phrase "bona fide physician-patient relationship." When words or phrases are not defined in a statute, a dictionary may be consulted. *People v Peals*, 476 Mich 636, 641; 720 NW2d 196 (2006). Random House Webster's College Dictionary (1997) defines "bona fide" as "1. made, done, etc., in good faith; without deception or fraud. 2. authentic; genuine; real." We do not intend to legislate from the bench and define exactly what must take place in order for a bona fide physician-patient relationship to exist. We do find, however, that the specific facts in this case, as set forth in the prior paragraph, were sufficient to raise an issue for the trier of fact concerning whether the doctor's recommendations resulted from assessments made in the course of bona fide physician-patient relationships between Dr. Eisenbud and Redden and between Dr. Eisenbud and Clark. Indeed, the facts at least raise an inference that defendants saw Dr. Eisenbud not for good-faith medical treatment but in order to obtain marijuana under false pretenses. Accordingly, the district court erred in finding as a matter of law that defendants had satisfied all the requirements of a § 8 defense.

(2) AMOUNT OF MARIJUANA POSSESSED

MCL 333.26428(a)(2) states that the § 8 affirmative defense will be presumed valid if

> [t]he 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

[10] We reject defendants' argument that the prosecution waived the issue concerning whether a bona fide physician-patient relationship existed. First, the prosecution clearly did raise the issue below. Second, the district court had a duty to determine whether there was an issue for trial; in doing so, it was obligated to review § 8 in its entirety to determine whether any triable issues existed.

> treating or alleviating the patient's serious or debilitating medical condition or symptoms of the patient's serious or debilitating medical condition . . . .

There was no testimony or evidence presented regarding whether the amount of marijuana possessed by defendants was "not more than was reasonably necessary to ensure the uninterrupted availability of marihuana for the purpose of treating or alleviating the patient's . . . condition or symptoms . . . ." *Id.* Defendants were found in possession of approximately one and one-half ounces of marijuana and 21 marijuana plants. The district court addressed this element of the affirmative defense and concluded that because the amount of marijuana, when divided between defendants, was less than that of the two and one-half ounces and 12 marijuana plants permitted under § 4, this portion of the affirmative defense was satisfied.

However, the plain language of the statute does not support that the amount stated in § 4 is equivalent to the "reasonably necessary" amount under § 8(a)(2). Indeed, if the intent of the statute were to have the amount in § 4 apply to § 8, the § 4 amount would have been reinserted into § 8(a)(2), instead of the language concerning an amount "reasonably necessary to ensure . . . uninterrupted availability . . . ." MCL 333.26428(a)(2). Without any evidence on this element of the affirmative defense, the district court could not have properly found the affirmative defense established as a matter of law. There was a colorable question of fact concerning whether the amount possessed was in accordance with the statute.

(3) PURPOSE OF MARIJUANA IN QUESTION

MCL 333.26428(a)(3) indicates that, for the medical-purpose defense to be valid, evidence must show that

> [t]he 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.

Here, there was testimony and evidence that Redden and Clark could benefit from the medical use of marijuana. However, although an inference could be made that the specific marijuana they allegedly manufactured was being manufactured for medical purposes, there was no explicit testimony or other evidence establishing this fact. Therefore, we find that there was considerable doubt concerning whether defendants satisfied this portion of the defense, see *King*, 412 Mich at 153-154, and the district court therefore should not have concluded that the defense was established as a matter of law.

(4) SERIOUS OR DEBILITATING MEDICAL CONDITIONS

Dr. Eisenbud did not identify the nature of defendants' debilitating medical conditions, beyond stating that Redden had "pain" and Clark had "nausea." Section § 7(b)(5) states that the MMMA "shall not permit any person to . . . [u]se marihuana if that person does not have a serious or debilitating medical condition." MCL 333.26427(b)(5). Section 3, the definitions section of the MMMA, states:

> (a) "Debilitating medical condition" means 1 or more of the following:
>
> (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.
>
> (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.
>
> (3) Any other medical condition or its treatment approved by the department, as provided for in section 5(a). [MCL 333.26423.]

Section 3 does not define the phrase "serious medical condition." MCL 333.26423.

In his written documents, Dr. Eisenbud stated that each defendant was likely to receive benefit from marijuana to "treat or alleviate a serious or debilitating medical condition . . . ." However, he stated only that he was treating each defendant for "a terminal illness or a debilitating condition as defined in Michigan's medical marijuana law." He then stated at the preliminary examination that Redden had a "debilitating condition." When asked what the condition was, he replied "pain." Dr. Eisenbud stated that Clark's debilitating condition was "nausea."

We find that defendants did not establish at the preliminary examination as a matter of law that they had serious or debilitating medical conditions as required by the MMMA. With regard to the phrase "serious medical condition," Random House Webster's College Dictionary (1997) defines "serious," in this context, as "weighty, important, or significant" and "giving cause for apprehension; critical or threatening[.]" Without knowing the nature of defendants' medical conditions, it is not possible to determine whether they are "serious." With regard to the phrase "debilitating medical condition," MCL 333.26423(a)(2) indicates that this phrase includes "[a] chronic or debilitating disease or medical condition or its treatment that produces 1 or more of the following: . . . severe and chronic pain; severe nausea . . . ." Dr. Eisenbud indicated that Redden suffered merely from "pain" and that Clark suffered merely from "nausea." This evidence was not sufficient to satisfy the definition set forth in MCL 333.26423(a)(2). The district court therefore erred in concluding that defendants satisfied the requirements of the MMMA as a matter of law. Whether each defendant suffered from a serious or debilitating medical condition is yet another matter for further proceedings.[11]

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[11] Defendants tangentially raise the issue regarding whether the prosecution is entitled to discovery of their medical records. The prosecution does not substantively address this argument in its appellate brief. We find that this issue is not currently ripe for review and decline to address it without the benefit of full briefing by the parties. The circuit court was evidently
(continued…)

The circuit court's decision to reverse the district court's bindover ruling is affirmed, and this case is remanded for further proceedings. We do not retain jurisdiction.

/s/ Patrick M. Meter
/s/ Donald S. Owens

(…continued)

cognizant of the implications of further discovery and presumably further proceedings will occur with respect to it.