

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

THOMAS WESLEY POE,

Defendant-Appellant.

UNPUBLISHED

April 21, 2009

No. 282451

Chippewa Circuit Court

LC No. 06-008336-FH

Before: Beckering, P.J., and Talbot and Donofrio, JJ.

PER CURIAM.

Defendant appeals as of right his jury trial conviction for delivery of a controlled substance less than fifty grams (morphine), MCL 333.7401(2)(a)(iv). Defendant was sentenced to four to 20 years' imprisonment. We affirm.

Defendant's conviction stems from the transfer of a morphine pill by defendant to Angel Jones, who was acting on behalf of the police in a controlled buy. Jones was initially stopped for a traffic violation and following the discovery of various illegal substances in her vehicle, informed police that she was acting as a go-between in ferrying drugs and payments from their sale between defendant and his relatives in Ohio. Because defendant was on a court-ordered tether he could not transport the drugs or payments himself. A controlled buy was arranged involving defendant and Jones. Police officer Lori Price accompanied Jones for the exchange, which involved defendant giving Jones a morphine pill, some cash and money orders.

Defendant contends that insufficient evidence was presented pertaining to the element of delivery to support his conviction. This Court reviews insufficient evidence claims de novo, viewing the evidence in a light most favorable to the prosecution, to determine whether a rational trier of fact would find that the essential elements of the crime were proven beyond a reasonable doubt. *People v Lange*, 251 Mich App 247, 250; 650 NW2d 691 (2002) (citations omitted). However, we must defer to the fact finder's role in ascertaining the weight of the evidence and the credibility of witnesses. *People v Fletcher*, 260 Mich App 531, 561; 679 NW2d 127 (2004). Any "conflicts in the evidence must be resolved in favor of the prosecution." *Id.* at 562. Further, circumstantial evidence, along with any reasonable inferences that arise, may serve to establish proof of the elements of the crime. *People v Schultz*, 246 Mich App 695, 702; 635 NW2d 491 (2001).

The elements of delivery of less than fifty grams of a controlled substance include: (a) defendant's delivery of a controlled substance, and (b) that the controlled substance was in an amount constituting less than fifty grams. *Schultz, supra* at 703. The term "deliver" or "delivery" has been defined as "the actual, constructive, or attempted transfer from one person to another of a controlled substance, whether or not there was an agency relationship." *Id.* citing MCL 333.7105(1). "[T]ransfer is the element which distinguishes delivery from possession." *Schultz, supra* at 703, citing *People v Steele*, 429 Mich 13, 25-26; 412 NW2d 206 (1987). Further, "[t]he cases are well settled that the act of transferring a controlled substance is sufficient to sustain a finding of an actual delivery." *Schultz, supra* at 704.

Because the parties stipulated that the controlled substance recovered contained morphine, defendant's only challenge to the sufficiency of the evidence pertains to the element of delivery. Citing to *United States v Swiderski*, 548 F2d 445 (CA 2, 1977), defendant asserts that because he and Jones were co-possessors or co-owners of the morphine, their "sharing of [the] drugs . . . does not qualify as a delivery of controlled substances." *Schultz, supra* at 704. Defendant's reliance is misplaced, as "*Swiderski* does not control the outcome of this case." *Id.* at 707.

Contrary to defendant's position, there is no evidence that he and Jones obtained or intended to share the morphine for their own "social" use or had simultaneous possession of the substance. Testimony was elicited that Jones was merely a courier between defendant and others who intended to sell the various illegal substances, including the morphine pill, to third parties for financial benefit. Further, there was no evidence that Jones had any ownership right with regard to the morphine pill. Rather, Jones merely served as a means for its transport. Based on defendant's physical transfer of the morphine pill to Jones, sufficient evidence existed for the jury to determine that a delivery had occurred in accordance with MCL 333.7105(1).

Affirmed.

/s/ Jane M. Beckering
/s/ Michael J. Talbot
/s/ Pat M. Donofrio