

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

MILTON PAUL HERRO,

Defendant-Appellant.

UNPUBLISHED

May 29, 2003

No. 239914

Schoolcraft Circuit Court

LC No. 01-006281-FC

Before: Smolenski, P.J., and Griffin and O'Connell, JJ.

PER CURIAM.

Defendant Milton Paul Herro appeals as of right his jury convictions for keeping a drug house, MCL 333.7405(1)(d), possession with the intent to deliver less than five kilograms of marijuana, MCL 333.7401(2)(d)(iii), and two counts of possessing a controlled substance, MCL 333.7403(2)(b)(ii), for which he was sentenced as a fourth habitual offender, MCL 769.12(1)(c), to concurrent sentences of two to fifteen years' imprisonment on each count. We affirm.

Defendant's sole contention on appeal is that the trial court erred in denying his motion for directed verdict or new trial based on a witness' posttrial affidavit indicating the witness had testified incorrectly. We disagree.

First, plaintiff correctly notes that defendant did not at any time before the instant appeal file a motion for new trial. Therefore, that issue is not properly before this Court. *People v Grant*, 445 Mich 535, 546; 520 NW2d 123 (1994).

Defendant did timely file a motion for directed verdict under MCR 6.419(B), and the trial court denied the motion. This Court reviews de novo a trial court's ruling on a defendant's motion for directed verdict. *People v Mayhew*, 236 Mich App 112, 124-125; 600 NW2d 370 (1999). A motion for directed verdict of acquittal is appropriate where, viewed in the light most favorable to the prosecution, the evidence could not persuade a rational trier of fact to conclude that all elements of the crime charged were proved beyond a reasonable doubt. *Mayhew, supra* at 124-125; *People v Mehall*, 454 Mich 1, 6; 557 NW2d 110 (1997).

Possession of a controlled substance required the prosecution to present evidence proving beyond a reasonable doubt that defendant knowingly possessed a controlled substance without proper authorization or prescription. MCL 333.7403(2)(b)(ii); CJI2d 12.5. Defendant did not dispute that he knowingly possessed hydrocodone. In fact, the only element at issue was

whether defendant possessed the drug pursuant to a valid prescription. Defendant presented evidence that established his receipt of hydrocodone prescriptions from two different pharmacies on a monthly basis. His contention on appeal is that his pharmacist's corrected testimony would provide the additional evidence defendant needed to merit a directed verdict on Count III – that is, had defendant's pharmacist witness testified that hydrocodone was the same as dihydrocodeinone, the jury would have acquitted defendant of Count III because it would have concluded that the pills found in defendant's house were the same pills dispensed by his pharmacist.

Even if the pharmacist had correctly testified at trial that hydrocodone and dihydrocodeinone were different names for the same chemical compound, sufficient evidence existed to support the jury's guilty verdict. Credibility is an issue within the exclusive province of the jury, and a court may not interfere with the jury's assessment of credibility in ruling on a defendant's motion for directed verdict. *People v Lemmon*, 456 Mich 625, 637, 642; 576 NW2d 129 (1998). Corrected, the pharmacist's testimony was cumulative to the prosecution's expert witness' testimony; uncorrected, the pharmacist's testimony was consistent with the testimony of defendant's other pharmacist witness. Regardless, the evidence was already before the jury. In fact, defendant approved of the court's response to the jury's specific question regarding the difference between hydrocodone and dihydrocodeinone – a response favorable to defendant that emphasized the prosecution's expert's testimony that the two words were interchangeable. The prosecution's expert testified that hydrocodone and dihydrocodeinone were the same substance – testimony that was favorable to defendant because it supported his contention that he was lawfully in possession of the pills. A directed verdict is improper where the jury's verdict is supported by sufficient evidence from which a rational trier of fact could conclude each element of the crime charged was proved beyond a reasonable doubt. *Mayhew, supra* at 124-125; *Mehall, supra* at 6. Here, evidence existed to support a finding of guilt or acquittal. Therefore, the trial court properly denied the motion.

Affirmed.

/s/ Michael R. Smolenski
/s/ Richard Allen Griffin
/s/ Peter D. O'Connell