

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

UNPUBLISHED
June 16, 2011

v

JAMES GEORGE FUNTUKIS,

Defendant-Appellant.

No. 297098
Macomb Circuit Court
LC No. 2009-001169-FH

Before: FORT HOOD, P.J., and DONOFRIO and RONAYNE KRAUSE, JJ.

PER CURIAM.

Defendant was convicted, following a jury trial, of delivery of a controlled substance, MCL 333.7401(2)(b)(ii), and possession of a switchblade knife, MCL 750.226a. He was sentenced to 18 months of probation. Defendant appeals as of right, and we affirm.

Defendant's convictions arise from a pre-arranged drug sale. A confidential informant contacted Patrick Valente and asked if he had a source for Vicodin pills, a controlled substance. Valente testified that he contacted defendant and arranged for the sale of 50 pills in exchange for \$200. Valente asked that the pills be divided into two separate baggies, with 20 pills in one bag and 30 in the other. The drug enforcement team watched as Valente entered the school where defendant worked as a custodian. Valente testified that he gave defendant \$200¹ in cash and retrieved the 50 pills in two baggies. On the contrary, defendant testified that Valente called to state that he would visit defendant to pay back a loan. However, when he arrived, Valente asked for pills instead. Defendant testified that he shoved Valente and did not give him any Vicodin pills. After the transaction, a search of defendant's vehicle revealed additional Vicodin pills as well as Valium and Viagra. A switchblade knife was also found in the bag with the pills. Despite the contradictory testimony presented by the witnesses, defendant was convicted of delivery of a controlled substance and possession of a switchblade knife, but acquitted of the charge of possession of a controlled substance. Defendant appeals as of right.

First, defendant contends that the jury verdict was against the great weight of the evidence. We disagree. Because defendant failed to preserve this issue by raising it in a motion

¹ The cash was pre-recorded funds given by police to the confidential informant.

for new trial, we review the issue for plain error affecting defendant's substantial rights. *People v Musser*, 259 Mich App 215, 218; 673 NW2d 800 (2003). To prevail on appeal, the defendant must establish that: (1) an error occurred, (2) the error was plain, meaning clear or obvious, and (3) the plain error affected the defendant's substantial rights. *People v Carines*, 460 Mich 750, 763; 597 NW2d 130 (1999). A trial court may grant a new trial premised on a challenge to the great weight of the evidence only if the evidence preponderates so heavily against the verdict that it would be a miscarriage of justice to allow the verdict to stand. *People v Lemmon*, 456 Mich 625, 627; 576 NW2d 129 (1998). Issues surrounding conflicting testimony and witness credibility are resolved by the trier of fact and present an insufficient reason to grant a new trial. *Id.* at 642-643. Absent exceptional circumstances, issues of witness credibility are for the jury, and the court may not substitute its view of witness credibility for the constitutionally guaranteed jury determination thereof. *Id.* at 642. When addressing a challenge to the great weight of the evidence, it must be determined if the defendant is truly attacking the weight of the evidence or whether the challenge presents a question regarding the credibility of witnesses testifying to diametrically opposed assertions of fact. *Id.* at 645.

In the present case, defendant does not challenge the elements of delivery of a controlled substance, but contends that the verdict was against the great weight of the evidence because of a "substandard police investigation." Specifically, defendant cites to the fact that police did not recover the pre-recorded funds used to purchase the Vicodin pills. However, contrary to the assertion by defendant, recovery of pre-recorded funds is not an element of the crime of delivery of a controlled substance. See *People v Mass*, 464 Mich 615, 626; 628 NW2d 540 (2001). Additionally, although defendant contends that the confidential informant and Valente were not searched after the transaction occurred, a review of the trial transcript reveals that a drug enforcement officer testified that he did perform a search after the transaction, but the second search was not reflected in the police report.² Defendant's challenge to the great weight of the evidence does not attack the elements of the crime of delivery, but rather the credibility of the testimony of the witnesses, an issue that is reposed in the trier of fact. Accordingly, this issue does not entitle defendant to appellate relief.³

Next, defendant asserts that the delivery conviction must be set aside because the jury relied on evidence "produced as a result of police entrapment." The issue of police entrapment was never raised in the trial court, and therefore, the issue has been waived. *People v Crall*, 444

² Detective Harry Otal testified that he searched the car and the two individuals after the transaction, and the "buy money" was not located. He also testified that he recovered over 200 Valium pills, 56 additional Vicodin pills, and two Viagra pills from the brown bag in defendant's vehicle.

³ Defendant also challenged the weight of the evidence to support the possession of a switchblade knife conviction. However, defendant failed to cite any authority in support of his position. In any event, this challenge is without merit. Possession occurs when the defendant knowingly has the power and intention to exercise dominion and control over the item. See *People v Burgenmeyer*, 461 Mich 431, 439 n 12; 606 NW2d 645 (2000).

Mich 463, 464; 510 NW2d 182 (1993); see also *People v Carter*, 462 Mich 206, 214-215; 612 NW2d 144 (2000).⁴

Affirmed.

/s/ Karen M. Fort Hood
/s/ Pat M. Donofrio
/s/ Amy Ronayne Krause

⁴ Defendant did not raise the issue of entrapment below, and therefore, an evidentiary hearing did not occur in the trial court. Accordingly, we do not have a sufficient factual basis to analyze the twelve factors addressing the claim of entrapment. However, we note that, when questioned by *defense* counsel, Valente testified that his father wanted him to stop taking drugs and his father worked at the school with defendant. Valente further testified that his father asked defendant “not to sell to me [Valente],” and that if his father saw Valente with defendant, it would be to purchase drugs. This testimony introduced by defense counsel on cross-examination contradicts the entrapment defense raised for the first time on appeal.