STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED September 24, 1999
v	No. 205543 Recorder's Court
MICHAEL P. MATTHEWS, Defendant-Appellant.	LC No. 96-001981

Before: Gribbs, P.J., and O'Connell and R.B. Burns*, JJ.

PER CURIAM.

Defendant appeals as of right from his conviction of delivery of fifty grams or more, but less than 225 grams, of cocaine, MCL 333.7401(2)(a)(iii); MSA 14.15(7401)(2)(a)(iii), for which he was sentenced to ten to twenty years' imprisonment. We affirm.

Defendant first argues that there was insufficient evidence presented to support his conviction. When reviewing the sufficiency of the evidence presented at trial, we view the evidence in the light most favorable to the prosecutor to determine whether a rational trier of fact could find that the essential elements of the crime were proved beyond a reasonable doubt. *People v Wolfe*, 440 Mich 508, 515; 489 NW2d 748, amended 441 Mich 1201 (1992). We also bear in mind that we must not interfere with the role of the jury to weigh the evidence and determine the credibility of testimony. *Id.*, 514-515.

Defendant disputes only the amount of cocaine that he was convicted of delivering. At trial, defendant admitted to delivering cocaine but argued that he delivered less than fifty grams. Defendant testified that, although the buyer had asked for two ounces of cocaine, he only delivered one ounce of cocaine, along with one ounce of baking soda. Because an ounce is the equivalent of 28.349 grams, defendant argued that he could not be found guilty of delivering fifty grams or more, since he only delivered one ounce of cocaine.

* Former Court of Appeals judge, sitting on the Court of Appeals by assignment.

MCL 333.7401(2)(a)(iii); MSA 14.15(7401)(2)(a)(iii) provides that the delivery of "any mixture" of at least fifty but less than 225 grams that contains cocaine is a felony punishable by ten to twenty years' imprisonment. Defendant argues that the prosecutor failed to present

sufficient evidence that defendant delivered a "mixture" of at least fifty grams containing cocaine. Defendant maintains that, although both the cocaine and the baking soda were placed into the same bag, the powder was not a "mixture" because he did not mix or stir the contents together. Defendant does not dispute that the entire amount of the powder in the bag was over fifty grams; rather, he contends that because it was not a mixture, he actually only delivered one ounce of cocaine, or approximately twenty-eight grams.

However, defendant's testimony contradicted that of the laboratory scientist who analyzed the powder. The scientist testified that, while testing the powder for the presence of various controlled substances, it was subjected to acids that would have caused a foaming action if baking soda were present in the powder. He also testified that his notes did not indicate that any foaming action occurred and that he would have noted such a reaction had he observed it. The jury could therefore conclude that no baking soda was present in the powder at all. Alternatively, the jury could believe defendant's testimony that the powder contained one ounce of baking soda. Whether baking soda was present in the powder was therefore an issue of credibility. We will not interfere with the jury's resolution of credibility issues. Therefore, viewing the evidence in the light most favorable to the prosecutor, we conclude that sufficient evidence was presented from which the jury could conclude that defendant was guilty of the charged offense.

Moreover, we note that even if defendant's testimony were accepted as true, the jury was free to conclude that the powder was a "mixture" containing cocaine. Defendant relies on *People v Barajas*, 198 Mich App 551; 499 NW2d 396 (1993), aff'd 444 Mich 556 (1994), in which this Court held that a box containing a rock of cocaine along with baking soda did not constitute a "mixture." The rock of cocaine was taped to the inside of the box, and remained in place when the baking soda was poured out of the box. The panel utilized the dictionary definitions of "mixture," "mix," and "blend" to reach its conclusion, and noted that a mixture "must be reasonably homogeneous or uniform." *Id*. at 556. The panel further noted that "[a] sample from anywhere in the mixture should reasonably approximate in purity a sample taken elsewhere in the mixture." *Id*. Although the judgment was affirmed by our Supreme Court in a memorandum opinion, the Supreme Court specifically noted, "However, we emphasize that the analysis employed by the Court of Appeals is limited strictly to the facts of this case." *People v Barajas*, 444 Mich 556, 557; 513 NW2d 772 (1994). The facts of the instant case are clearly distinguishable from those in *Barajas*. Here, both powder cocaine and baking soda were placed into the same bag, with no effort to keep the two substances separate from each other. It is reasonable to conclude that some settling would take place with both powder substances in the same bag. Although defendant claims that the powder was neither shaken nor stirred, we conclude that a jury could reasonably conclude that it was a mixture nonetheless.

Defendant next argues that the trial court erred by admitting evidence that he had delivered cocaine to the same buyer on a previous occasion. However, defendant failed to object to this evidence at trial; therefore, the issue is unpreserved. MRE 103(a)(1); *People v Griffin*, 235 Mich App 27, 44; 597 NW2d 176 (1999). In order to avoid forfeiture of this issue, defendant must demonstrate plain error that was prejudicial, i.e., that could have affected the outcome of the trial. *People v Grant*, 445 Mich 535, 553; 520 NW2d 123 (1994); *People v Carines*, 460 Mich 750, 763-764; 597 NW2d 130 (1999).

Defendant admitted that he delivered cocaine, and the only issue for the jury to resolve was whether the cocaine he delivered was in a "mixture" weighing fifty grams or more. Therefore, whether he delivered cocaine to the buyer on a previous occasion was completely immaterial to the jury's determination of defendant's guilt or innocence in this case. Therefore, defendant has not demonstrated plain error that was outcome determinative and has forfeited review of this unpreserved issue. Moreover, defendant himself testified about the prior delivery, claiming that he had "shortchanged" the buyer on that occasion, and defense counsel referred to this evidence during closing argument to corroborate defendant's claim that he shortchanged the buyer during the delivery in question by only delivering one ounce of cocaine along with one ounce of baking soda. Defendant may not claim that error requiring reversal exists based on the introduction of evidence that he purposely used to support his defense theory. *People v Potra*, 191 Mich App 503, 512; 479 NW2d 707 (1991). See also *Griffin*, *supra* at 45-46 ("[E]rror requiring reversal cannot be error to which the aggrieved party contributed by plan or negligence . . . .").

Finally, defendant claims that the trial court erroneously instructed the jury regarding the definition of "mixture." We review claims of instructional error de novo. *People v Reid*, 233 Mich App 457, 466; 592 NW2d 767 (1999). The instructions are reviewed as a whole to determine whether any error requiring reversal exists. *People v Bartlett*, 231 Mich App 139, 143; 585 NW2d 341 (1998). "Even if somewhat imperfect, instructions do not create error if they fairly present to the jury the issues tried and sufficiently protect the defendant's rights." *Id*., 143-144.

"Where a statute does not define one of its terms it is customary to look to the dictionary for a definition." *People v Lee*, 447 Mich 552, 558; 526 NW2d 882 (1994). Therefore, the trial court properly resorted to a dictionary to answer the jury's request for a definition of the term "mixture." Defendant maintains that the trial court erred in relying on a different dictionary than did this Court in *Barajas*, *supra* at 555-556. Defendant points to no authority to support his contention that a particular dictionary must be used instead of another. We also note that, in light of our Supreme Court's opinion strictly limiting *Barajas* to its facts, the analysis employed was not binding on the trial court because the facts of the instant case are distinguishable from those in *Barajas*. The dictionary used by the panel in *Barajas* was therefore certainly not binding on the trial court. We find no error in the trial court's reliance on the dictionary definition of "mixture."

Affirmed.

/s/ Roman S. Gribbs
/s/ Peter D. O'Connell
/s/ Robert B. Burns