Note: Decisions of a three-justice panel are not to be considered as precedent before any tribunal.

ENTRY ORDER

SUPREME COURT DOCKET NO. 2005-291

OCTOBER TERM, 2006

State of Vermont	}	APPEALED FROM:
	}	
	}	
v.	}	District Court of Vermont,
	}	Unit No. 2, Rutland Circuit
Charles Crannell	}	
	}	DOCKET NO. 1327-10-92 Rdcr

Trial Judge: Francis B. McCaffrey

In the above-entitled cause, the Clerk will enter:

Defendant appeals the district court=s order denying his motion for return of property. We affirm.

Defendant filed a motion under Vermont Rule of Criminal Procedure 41(e) seeking the return of property seized during the investigation of the murder for which he was eventually convicted. The district court ordered the State to return all of defendant=s property not needed for its evidentiary value. When the State reported that it was not in possession of items claimed by defendant, the court ordered the State to make an accounting

for each of the items. The State did so, and the district court accepted its accounting; however, we reversed the court=s order in part, ruling that (1) with respect to items seized from defendant=s car, the State had failed to show that the items had any evidentiary value, as required by the court=s order; and (2) defendant had raised a significant question as to whether the State seized his cell phone. See State v. Crannell, 171 Vt. 623, 625-26, 768 A.2d 1260, 1263-64 (2000). Following an evidentiary hearing on remand, the district court concluded that the State did not seize the cell phone and no longer had possession of defendant=s jumper cables or hair sample. Defendant=s only argument on appeal is that neither the evidence nor the district court=s own findings support its conclusion that the State is no longer in possession of the jumper cables.

In considering this argument, we first reject defendant=s contention that our review is nondeferential and plenary. After considering the testimony of various witnesses as to the chain of custody with respect to the jumper cables, the court determined that the State had provided an accounting of its handling of the cables, and that, based on this accounting, there was insufficient evidence to conclude that the State still had the cables. Notwithstanding defendant=s argument to the contrary, this determination is a finding of fact, not a conclusion of law. See Mueller v. Dep=t of Transp., 657 A.2d 90, 92-93 (Pa. Commw. Ct. 1995) (finding of fact Ais a determination . . . that certain things do exist or that certain events . . . actually occurred,@ while conclusion of law is application of facts to relevant law). Therefore we will not disturb the finding unless it is clearly erroneous or unsupported by the evidence. State v. Zaccarro, 154 Vt. 83, 86, 574 A.2d 1256, 1259 (1990) (trial court=s findings of fact will not be disturbed on review unless they are unsupported by evidence or clearly erroneous).

Here, after weighing the evidence and considering the credibility of the witnesses, the trial court determined that it was impossible to know what became of the jumper cables, but that, whatever happened to them, there is no reasonable basis to conclude that they are still in the State=s possession. The court also determined that there was no reasonable basis to impose monetary sanctions on the State because it had provided an accounting of the cables, as it was required to do. We will not disturb the court=s findings insofar as it is the province of the trial court, not this Court, to consider the credibility of witnesses and weigh the evidence. See State v. Ives, 162 Vt. 131, 135, 648 A.2d 129, 131 (1994) (trial court determines credibility of

witnesses and persuasive effect of testimony). Here, defendant has failed to demonstrate that the court=s findings are unsupported by the evidence or clearly erroneous.

Affirmed.

BY THE COURT:

_____

Paul L. Reiber, Chief Justice

_____

John A. Dooley, Associate Justice

_____

Marilyn S. Skoglund, Associate Justice