

NO. 35583-3-II

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION TWO

STATE OF WASHINGTON,

Respondent,

v.

SANDRA L. KILBY,

Appellant.

FILED
COURT OF APPEALS
DIVISION II
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STATE OF WASHINGTON
DEPUTY

ON APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR PIERCE COUNTY

The Honorable Frank E. Cuthbertson

REPLY BRIEF OF APPELLANT

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TABLE OF CONTENTS

	Page
A. <u>ARGUMENT IN REPLY</u>	1
B. <u>CONCLUSION</u>	4

TABLE OF AUTHORITIES

Page

WASHINGTON CASES

In re Personal Restraint Petition of Lord,
123 Wn.2d 296, 868 P.2d 835 P.2d 835 (1994) 3

State v. Copeland,
130 Wn.2d 244, 922 P.2d 1304 (1996) 1

RULES, STATUTES, OTHERS

RCW 5.45.020 2

A. ARGUMENT IN REPLY

1. THE TRIAL COURT ERRED IN ALLOWING REBUTTAL TESTIMONY BECAUSE KILBY DID NOT TESTIFY TO ANY NEW MATTERS.

The state argues that the trial court “properly admitted the evidence to rebut the inference created by the defendant that Niemi left drugs all over her home.” Brief of Respondent (BOR) at 7. Importantly, the state, does not dispute that it knew what Kilby would testify to or that Kilby’s testimony did not raise any new matters. Consequently, the state’s argument fails because rebuttal evidence is permitted in response to new matters raised by the defense. State v. Copeland, 130 Wn.2d 244, 288-89, 922 P.2d 1304 (1996).

The state argues further that any error in allowing the testimony was harmless because “[e]vidence that Niemi was in custody several days before the drugs were found, while marginally relevant, did not prejudice the defendant.” BOR at 7-8. To the contrary, as acknowledged by the state, it’s “theory was that Niemi could not have left drugs and paraphernalia all over the residence in such a short amount of time.” BOR at 7. Officer Berry’s improperly admitted rebuttal testimony was therefore prejudicial because it bolstered the state’s theory of the case.

2. THE TRIAL COURT ERRED IN ALLOWING EVIDENCE OF A MONTHLY RENTAL AGREEMENT UNDER THE BUSINESS RECORD EXCEPTION TO HEARSAY.

Without citing any authority, the state asserts that “the rental agreement likely qualified as a business record,” but admits that “the record below does not include any testimony that the record was kept in the normal course of business.” BOR at 5. The state’s concession substantiates that the trial court erred in admitting the rental agreement as a business record because it was not a record of an act, condition, or event made in the regular course of business, a requirement under RCW 5.45.020. See Brief of Appellant at 12.

The state argues further that any error in admitting the rental agreement was harmless because of the overwhelming evidence and the rental agreement did not damage Kilby’s credibility. BOR 5-6. The record reflects otherwise. Kilby testified that she and her husband left on a trip on or about February 19 and returned on March 2, finding Niemi at their home, which was a mess and looked like the aftermath of a party. Niemi was a longtime friend who faced problems with drug use and was in and out of jail. 6RP 214-16. The state provided no evidence to the contrary. Consequently, the state’s improper questioning about the rental

agreement, attacking Kilby's honesty, was prejudicial because her credibility was critical to her defense of unwitting possession.

3. REVERSAL IS REQUIRED BECAUSE CUMULATIVE ERROR DEPRIVED KILBY OF HER CONSTITUTIONAL RIGHT TO A FAIR TRIAL.

The state argues that Kilby is not entitled to relief under the cumulative error doctrine because "[s]he has failed to show that there was any prejudicial error much less an accumulation of it." BOR at 12. The state's argument is unsubstantiated by the record.

It is evident from the record that Kilby's credibility was a central issue in the case. Berry's rebuttal testimony gave the jury reason to question the plausibility of Niemi leaving drugs and paraphernalia throughout the house, and evidence of the rental agreement gave the jury a basis to doubt Kilby's honesty. The court's erroneous admission of the testimony and evidence therefore had the combined effect of discrediting Kilby's testimony. Consequently, the court's errors cumulatively denied Kilby a fair trial. In re Personal Restraint Petition of Lord, 123 Wn.2d 296, 332, 868 P.2d 835 (1994)(under the cumulative error doctrine, a defendant may be entitled to a new trial where errors cumulatively produced a trial that was fundamentally unfair).

B. CONCLUSION

For the reasons stated here, and in appellant's opening brief, this Court should reverse Ms. Kilby's convictions.

DATED this 26th day of February, 2008.

Respectfully submitted,



VALERIE MARUSHIGE

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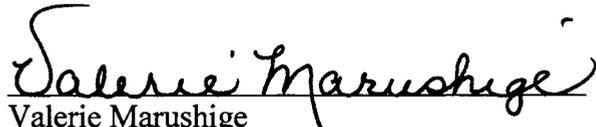
Attorney for Appellant

DECLARATION OF SERVICE

On this day, the undersigned sent by U.S. Mail, in a properly stamped and addressed envelope, a copy of the document to which this declaration is attached to Michelle Hyer, Pierce County Prosecutor's Office, 930 Tacoma Avenue South, Tacoma, Washington 98402.

I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

DATED this 26th day of February, 2008 in Kent, Washington.


Valerie Marushige
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