

COURT OF APPEALS  
DIVISION II  
COUNCIL CHAMBERS  
STATE OF WASHINGTON  
BY: *DM*

Nº. 38792-1-II

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

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STATE OF WASHINGTON  
Respondent,

v.

NANCY TILLET,  
Appellant.

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OPENING BRIEF OF APPELLANT

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Appeal from the Superior Court of Kitsap County,  
Cause No. 08-1-01008-1  
The Honorable Theodore Spearman, Presiding Judge

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A. ASSIGNMENTS OF ERROR

1. The State presented insufficient evidence to convict Ms. Tillett of the crime of maintaining premises for using or selling controlled substances.
2. Ms. Tillett was denied her ability to present a defense by the trial court's erroneous ruling excluding the testimony of Mr. George Tillett Sr. as irrelevant.

B. ISSUES PRESENTED

1. Did the State present sufficient evidence to establish that Ms. Tillett maintained her home for the purpose of permitting people to resort to her home to use methamphetamine? (Assignment of Error No. 1)
2. Did the State present sufficient evidence to establish that a "substantial purpose" of Ms. Tillett in maintaining her home was the use of controlled substances where evidence was introduced that Ms. Tillett, her husband, and at least two other people lived in the home and that a business was operated out of the home and that Ms. Tillett worked in that business? (Assignment of Error No. 1)
3. Was Ms. Tillett deprived of her right to present a defense where the trial court excluded the testimony of her father-in-law as irrelevant where her father-in-law would have offered testimony that he ran a business out of the garage attached to the house and that Ms. Tillett worked with him at the business? (Assignment of Error No. 2)

C. STATEMENT OF THE CASE

**Factual and Procedural Background**

In Early 2008, Ms. Destine Swedberg was pulled over by a police officer. RP 210, 215. During the course of the stop, the police discovered a pipe in Ms. Swedberg's vehicle and were going to charge her with

possession, so Ms. Swedberg agreed to become a confidential informant. RP 210. Ms. Swedberg was put in touch with Detective Polonsky of the Bremerton Police Department. RP 96, 126, 215.

For several months in the summer of 2008, while she was a police informant, Ms. Swedberg was living with Ms. Nancy Tillett. RP 225, 243-244. Ms. Swedberg had known Ms. Tillett for roughly one year. RP 225. Ms. Swedberg and Ms. Tillett consumed methamphetamine together as often as they could. RP 225-226. Ms. Swedberg saw drugs being sold more than 15 times in Ms. Tillett's home while Ms. Swedberg lived there. RP 226.

Prior to participating in controlled buys regarding this case, Ms. Swedberg had been involved with building cases against two prior individuals. RP 96, 227. In this case, the target of the investigation was Mr. Erik McShepherd, a man who lived in Ms. Tillett's house, and who would have been the last individual Ms. Swedberg would have had to assist the police in arresting before she completed the terms of her agreement to be an informant. RP 96-99, 214, 216-217, 227. Before performing the controlled buys in this case, Ms. Swedberg moved out of Ms. Tillett's house. RP 225.

On September 3, 2008, Ms. Swedberg contacted Det. Polonsky and informed him that she had scheduled a drug buy with Mr. McShepherd.

RP 99-102, 216-219. Ms. Swedberg met with the police, was searched, was provided with marked "buy money", and then was followed to Ms. Tillett's residence where she went upstairs and purchased methamphetamine from Mr. McShepherd. RP 102-109, 216-219. After Ms. Swedberg had purchased the methamphetamine from Mr. McShepherd, Ms. Tillett entered Mr. McShepherd's bedroom and asked Ms. Swedberg if she and Ms. Swedberg could smoke meth together. RP 108, 219. Ms. Swedberg declined, then exited the house and met up with the police and turned over the methamphetamine she had purchased. RP 103-108, 219-221.

On September 8, 2008, Ms. Swedberg contacted Det. Polonsky and informed him that she had set up another methamphetamine buy with Mr. McShepherd at Ms. Tillett's home. RP 109, 221. Ms. Swedberg met with police, was searched, and then was followed by the police to Ms. Tillett's home. RP 110-111. Ms. Swedberg went into Ms. Tillett's home, went upstairs to Mr. McShepherd's bedroom, and purchased methamphetamine from Mr. McShepherd while Ms. Tillett was in the room. RP 113, 221-224. During this second drug purchase, several people were smoking methamphetamine in the room, including Ms. Tillett. RP 113. After the second purchase, Ms. Tillett again asked Ms. Swedberg if Ms. Swedberg would smoke methamphetamine with her, but Ms. Swedberg again

declined. RP 224. Ms. Swedberg left Ms. Tillett's home, met with police, and turned over the methamphetamine she purchased from Mr. McShepherd in Ms. Tillett's home. RP 111-113, 224-225.

The police obtained a warrant for Ms. Tillett's home and executed the warrant on September 10, 2008. RP 116-118. Upon entry, the police located Ms. Tillett, arrested her, *Mirandized* her, and asked her if there were any narcotics or narcotics paraphernalia in the house. RP 122-123. Ms. Tillett responded that there were no drugs in the house but the police might find some marijuana pipes in her bedroom. RP 123. However, Ms. Tillett told police that there might be things in Mr. McShepherd's room that she did not know about. RP 137. During the search of Ms. Tillett's home, the police located no narcotics, but did locate narcotics paraphernalia in Mr. McShepherd's room. RP 134-136, 176-185. The police did not recover any of the buy money. RP 135.

In Mr. McShepherd's room, the police located clear baggies, straws used to ingest narcotics, a used glass pipe, and paperwork showing Mr. McShepherd had dominion and control of the room. RP 176-185. There was nothing in the baggies except residue. RP 195-196. Mr. McShepherd was not at Ms. Tillett's home when the police searched it. RP 134-135.

In the downstairs living room of Ms. Tillett's home, police

recovered an eyeglass tin which contained a drug-user's "kit", consisting of another straw, baggies containing a white crystal substance. RP 185-188. The amount of substance was "minimal" residue of a quantity insufficient to sell. RP 196-197. The kit was found in a common area of the home and there was no indication of who used it or who it belonged to. RP 196. The police also located paperwork indicating Ms. Tillett had dominion and control of the home. RP 188. In the kitchen, police found a lighter and a marijuana pipe. RP 190-191.

During the search, police noted that the house looked "pieced together," was "in bad shape," showed burn marks near the stairs and possibly had caught on fire in the previous year or two. RP 199, 271. There was exposed wiring and water damage in the home. RP 271.

While Ms. Swedberg lived at Ms. Tillett's home, there was a business being operated out of the garage connected to the home and Ms. Tillett worked at this business. RP 246, 250-251. Also, during the time that Ms. Swedberg lived with Ms. Tillett, the home was in the process of being remodeled. RP 251.

On September 11, 2008, Ms. Tillett was charged with one count of unlawful use of a building for drug purposes in violation of RCW 69.53.010. CP 1-5.

On December 8, 2008, the charge against Ms. Tillett was amended

to one count of maintaining premises for use of controlled substances in violation of RCW 69.50.402(1)(f). CP 15-17.

Jury trial in Ms. Tillett's case began on January 14, 2009. RP 88.

At trial, Ms. Tillett attempted to present the testimony of her father-in-law that his business was located in Ms. Tillett's residence and that Ms. Tillett worked at the business. RP 317-318. Ms. Tillett wanted to offer this testimony to demonstrate that her residence was maintained for a residence and a business and that use of drugs was not a "substantial purpose" for the maintenance of the dwelling. RP 318. The trial court excluded Ms. Tillett's father-in-law's testimony as irrelevant because no testimony indicated that the police searched the garage and no testimony indicated that there was any activity concerning the business in the house. RP 324-325.

Jury instruction 12, the "to convict" instruction, informed the jury that it could find Ms. Tillett guilty of maintaining premises for drug use if the jury found each of the following elements was proved beyond a reasonable doubt:

- (1) That on or about September 1, 2008, through September 10, 2008, [Ms. Tillett] knowingly kept or maintained a store, shop, warehouse, dwelling, building, vehicle, boat, aircraft, or other structure or place;
- (2) That the store, shop, warehouse, dwelling, building,

vehicle, boat, aircraft or other structure or place -

- (a) was resorted to by persons using controlled substances for the purpose of using these controlled substances, to-wit: Methamphetamine, its salts, isomers, or salts of its isomers; or
  - (b) was used for keeping or selling controlled substances, to wit: Methamphetamine, its salts, its isomers, or salts or its isomers; and
- (3) That the drug activity was of a continuing and recurring character and;
  - (4) That a substantial purpose of maintaining the premises was for illegal drug activity, and;
  - (5) That the acts occurred in the State of Washington.

CP 82-99.

Jury instruction 12 continued,

If you find from the evidence that elements (1), (3), (4), (5), and either (2)(a) or (2)(b) have been proven beyond a reasonable doubt, then it will be your duty to return a verdict of guilty. Elements (2)(a) and (2)(b) are alternatives and only one need be proved. You must unanimously agree that (2)(a) has been proved, or that (2)(b) has been proved. On the other hand, if, after weighing all the evidence, then it will be your duty to return a verdict of not guilty.

The jury found Ms. Tillett guilty of the crime charged. RP 404;

CP 100, 101.

Notice of Appeal was timely filed on January 23, 2009. CP 114.

D. ARGUMENT

1. **The State presented insufficient evidence to establish that Ms. Tillett violated RCW 69.50.402.**

In a criminal matter, the State must prove every element of the crime charged. *State v. Teal*, 152 Wn.2d 333, 337, 96 P.3d 974 (2004). Where a criminal defendant challenges the sufficiency of the evidence, appellate courts review the evidence in the light most favorable to the State to determine whether any rational trier of fact could have found guilt beyond a reasonable doubt. *State v. Salinas*, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992). A claim of insufficiency admits the truth of the State's evidence and all of the inferences that can reasonably be drawn therefrom. *Salinas*, 119 Wn.2d at 201, 829 P.2d 1068. Evidence is sufficient to support a conviction if, viewed in the light most favorable to the State, it permits any rational trier of fact to find the essential elements of the crime beyond a reasonable doubt. *Salinas*, 119 Wn.2d at 201, 829 P.2d 1068.

A fact finder is permitted to draw inferences from the facts, so long as those inferences are rationally related to the proven fact. *State v. Bencivenga*, 137 Wn.2d 703, 707, 974 P.2d 832 (1999). If there is insufficient evidence to prove an element, reversal is required and retrial is 'unequivocally prohibited.' *State v. Hickman*, 135 Wn.2d 97, 103, 954 P.2d 900 (1998).

Ms. Tillett was charged with maintaining premises for use of controlled substances in violation of RCW 69.50.402(1)(f). Under RCW 69.50.402(1)(f),

It is unlawful for any person:...Knowingly to keep or maintain any...dwelling, building,...or other structure or place, which is resorted to by persons using controlled substances in violation of this chapter for the purpose of using these substances, or which is used for keeping or selling them in violation of this chapter.

As charged, and as the jury was instructed in jury instruction number 12, the State could prove Ms. Tillett was guilty in two ways: (1) proving that Ms. Tillett's home was resorted to by persons for the purpose of using methamphetamine; or (2) that a substantial purpose of Ms. Tillett in maintaining her home was to keep or sell methamphetamine.

*a. The State presented insufficient evidence to establish that Ms. Tillett's home was resorted to by persons for the purpose of using controlled substances.*

In *State v. Fernandez*, 89 Wn.App. 292, 948 P.2d 872 (1997), three defendants were charged with and convicted for operating a drug house in violation of RCW 69.50.402(a)(6). At the time, RCW 69.50.402(a)(6) provided,

It is unlawful for any person ... knowingly to keep or maintain any ... dwelling ... which is resorted to by persons using controlled substances in violation of this chapter for the purpose of using these substances, or which is used for keeping or selling them in violation of this chapter.

*Fernandez*, 89 Wn.App. at 299, 948 P.2d 872. This language is identical to RCW 69.50.402(1)(f), the statute Ms. Tillett is charged with violating.

The defendants in *Fernandez* were Jeffrey Cummings and Maria Huerta, a married couple, and Juvenito Fernandez, Ms. Huerta's son by another man. *Fernandez*, 89 Wn.App. at 295, 948 P.2d 872. Mr. Cummings and Ms. Huerta admitting to living at the house, and the evidence indicated that Mr. Fernandez also lived there. *Fernandez*, 89 Wn.App. at 295, 948 P.2d 872. After five controlled buys at the defendants' home, the police executed a search warrant at the house. They found Fernandez asleep in the living room. Huerta and Cummings were in a bedroom. In the house's only bathroom, the police found a number of items that indicated drug activity: pipes, a beaker, measuring spoons with white residue and burn marks, burnt tweezers, sandwich bags, and a propane torch. They also found a knife with a hollow handle that contained about 14 grams of cocaine. The cocaine was evenly packaged in seven plastic bags. Empty plastic bags in the bathroom had been tied in knots and ripped open. A detective testified that this was a common way to package cocaine and that the cocaine that the informants had purchased was similarly packaged. *Fernandez*, 89 Wn.App. at 298-299, 948 P.2d 872.

In Huerta and Cummings' bedroom, the police found a fireproof

strong box. Inside it were 20 bags, each containing about a half gram of cocaine. The police also found a number of weapons and a triple beam scale in the bedroom. The witnesses testified that these items were common in the drug trade. *Fernandez*, 89 Wn.App. at 299, 948 P.2d 872.

At trial, the State presented the testimony of one of the two confidential informants used by the State to make the five controlled buys. The informant stated that she had bought cocaine at the defendants' house on a number of occasions and that all three had been there. She claimed that she did not need to ask for drugs because whoever happened to be home would ask “How much?” The informant remembered buying drugs from Cummings on one occasion. Although she could not recall whom she had dealt with on other days, the informant testified that either Cummings, Huerta, or Fernandez would sell the drugs, depending on who was at the house to “take care of it[.]” Huerta once told her that she was stupid for doing drugs while she was pregnant. The informant also related the defendants' threats. *Fernandez*, 89 Wn.App. at 297-298, 948 P.2d 872.

Four members of the drug task force testified about the controlled buys. Three neighbors also testified to a dramatic increase in pedestrian and vehicular traffic on their street after the defendants moved in. Numerous visitors would come to the house for two to ten minutes and then leave. One witness estimated that as many as 15 cars an hour were

coming and going from the house. Fernandez appeared to greet their visitors with the greatest frequency, but the other two defendants also did so at various times. One neighbor said that Fernandez and Cummings would lean into the cars that stopped on the street. The unusual activity occurred at all hours of the day and occasionally the traffic completely blocked the street. *Fernandez*, 89 Wn.App. at 298, 948 P.2d 872.

The jury found all three defendants guilty of operating a drug house and they appealed, arguing that the State had presented insufficient evidence that they knowingly kept or maintained a house which others resorted to for the purpose of using drugs. *Fernandez*, 89 Wn.App. at 299, 948 P.2d 872.

The court of appeals agreed with the defendants and remand the case for a new trial. In so ruling, the court held,

The defendants argue that there is insufficient evidence that they knowingly kept or maintained a house which others resort to for the purpose of using drugs. We agree that the evidence did not support this alternative means of violating the statute and therefore reverse and remand the drug house convictions.

Initially, we note that the evidence was sufficient to show that the defendants knowingly kept or maintained the house. As discussed above, the jury was entitled to find that Fernandez lived with Huerta and Cummings in the small house where a substantial amount of drug trafficking occurred. It could also find that the defendants maintained the house to sell or store drugs.

There was no evidence, however, to support a finding that drug users resorted to their house for the purpose of using cocaine. RCW 69.50.402(a)(6). The totality of the circumstances and the items seized during the search allow an inference that someone had used drugs in the house. But there is nothing in the record to indicate who. We disagree with the State that the drug house statute's use prong applies regardless of who uses the controlled substances. We construe the statute to prohibit maintaining a house that others resort to for the purpose of using drugs. While persons other than the defendants may have resorted to the house to use drugs, it is just as likely, if not more probable, that the defendants were the ones using the drugs.

Because the record contains insufficient evidence that anyone other than those accused of maintaining the house ever used drugs in the house, the jury was not entitled to convict under this prong of the drug house statute.

*Fernandez*, 89 Wn.App. at 299-300, 948 P.2d 872.

This case is like *Fernandez*. Here, as in *Fernandez*, the evidence was sufficient to demonstrate that Ms. Tillett lived in the home and even that Ms. McShepherd sold methamphetamine out of the home, possibly with Ms. Tillett's knowledge. However, as in *Fernandez*, there was no evidence to suggest that people other than Ms. Tillett or other residents of the home resorted to Ms. Tillett's home to *use* the methamphetamine. The evidence presented at trial was that Ms. Tillett smoked methamphetamine in her house, and that some other unidentified people were smoking methamphetamine in the house during the second controlled buy. However, the State presented no evidence that anyone other than the

residents of Ms. Tillett's house ever used drugs in the house or that people went to Ms. Tillett's house specifically to use drugs. As in *Fernandez*, the State presented insufficient evidence to support a finding by the jury that Ms. Tillett knowingly kept a house to which others resorted to consume methamphetamine.

b. *The State presented insufficient evidence to establish that a substantial purpose of Ms. Tillett in maintaining her home was to keep or sell methamphetamine.*

In *State v. Ceglowski*, 103 Wn.App. 346, 12 P.3d 160 (2000), the Court of Appeals addressed what quantum of proof was necessary to establish that an individual was keeping a premises for the purpose of selling drugs.

Washington cases have not yet examined the issue of whether a single instance of sale or possession is sufficient to convict under our drug house statute. The requirement that the defendant "maintain" the premises, however, necessarily connotes a course of continuing conduct. Although "maintain" is not specifically defined under the drug house statute, "[i]n the absence of a statutory definition of a word, we employ the plain and ordinary meaning of the word as found in a dictionary." *State v. Batten*, 95 Wn.App. 127, 129, 974 P.2d 879 (1999), *aff'd*, 140 Wn.2d 362, 997 P.2d 350 (2000) (citation omitted). Black's Law Dictionary defines "maintain" as "hold or preserve in any particular state or condition;" and "sustain" or "uphold." Black's Law Dictionary 953 (7th ed.1999). And the ordinary meaning of "maintain" encompasses this concept of continuing conduct: "to keep or keep up; continue in or with; carry on." Webster's New World Dictionary, 854 (2d College Ed.1976). Furthermore, "knowingly maintaining" a place under the federal crack

house statute, 21 U.S.C. 856(a)(1) (1986), has been described to include acts evidencing “control, duration ... and continuity [.]” *United States v. Clavis*, 956 F.2d 1079, 1090-91 (11th Cir.), *cert. denied*, 504 U.S. 990, 112 S.Ct. 2979, 119 L.Ed.2d 597 (1992). *See also United States v. Morgan*, 117 F.3d 849, 857 (5th Cir.) (holding that “maintain” connotes a degree of continuity and duration that is not an attribute of mere possession of the premises where drugs are found), *cert. denied*, 522 U.S. 987, 118 S.Ct. 454, 139 L.Ed.2d 389 and 522 U.S. 1035, 118 S.Ct. 641, 139 L.Ed.2d 619 (1997). Moreover, federal courts have held that this element requires proof that a substantial purpose for maintaining the premises was to conduct the drug activity. *See, e.g., Clavis*, 956 F.2d at 1093-94 (holding that evidence that defendant had lived on the premises where drugs were found five days after his arrest, and that he had distributed cocaine elsewhere was insufficient to evidence that he maintained the premises for the purpose of distributing drugs); *United States v. Verners*, 53 F.3d 291, 296 (10th Cir.1995) (holding that evidence supported conclusion that defendant's primary purpose in maintaining her house was as a residence for her and her daughters, not for illegal drug activity). Consequently, under the federal statute, “[t]he casual’ drug user does not run afoul of this prohibition because he does not maintain his house for the purpose of using drugs but rather for the purpose of residence, the consumption of drugs therein being merely incidental to that purpose.” *Verners*, 53 F.3d at 296 (*quoting United States v. Lancaster*, 968 F.2d 1250, 1253 (D.C.Cir.1992)).

Additionally, Ceglowski cites two cases from other jurisdictions to support his proposition that sporadic or isolated incidents of drug use are not enough to prove criminal conduct under the drug house statute. In *People v. Fiedler*, the New York court held that evidence that parents allowed their children to smoke marijuana in their home was insufficient to support the parents' conviction under a criminal nuisance statute, which made it a crime to “maintain[ ] a place where any narcotic drug is unlawfully used.” *Fiedler*, 31 N.Y.2d 176, 335 N.Y.S.2d 377, 286

N.E.2d 878, 879 (1972). The court examined New York case law to determine that “maintain” means more than knowledge of existence of the nuisance, but also includes “preserving and continuing its existence.” *Fiedler*, 335 N.Y.S.2d 377, 286 N.E.2d at 880 (citations omitted). In *Shrader v. State*, the Nevada supreme court reversed a conviction under a drug house statute because, as a matter of law, a few cited incidents of marijuana use were too isolated to establish that the defendant “opened or maintained his apartment for the purpose of distributing or using drugs.” *Shrader*, 101 Nev. 499, 706 P.2d 834, 838-39 (1985). *Shrader* relied upon *Fiedler* and a broad interpretation of “open” and “maintains” under the Nevada drug house statute. *Shrader*, 706 P.2d at 838.

RCW 69.50.402 derives from the Uniform Controlled Substances Act. 9 U.L.A. § 402 (1970). In other states that have adopted drug house statutes modeled after the Uniform Act, the courts have held that more than a single isolated instance of drug activity is required to support a conviction. *See, e.g., Barnes v. State*, 255 Ga. 396, 339 S.E.2d 229, 234 (1986); *Howard v. State*, 1991 OK CR 76, 815 P.2d 679, 683 (1991); *Hunt v. State*, 20 Md.App. 164, 314 A.2d 743, 745 (1974) (holding drug activity must be of “continuing and recurring” character); *People v. Holland*, 158 Cal.App.2d 583, 322 P.2d 983, 986 (1958) (holding there must be “some purpose of continuity in the use of the place for the proscribed illegal conduct”).

These out of state authorities persuasively support the conclusion that the keeping or maintaining element of our drug house statute contemplates a continuing pattern of criminal behavior, beyond an isolated incident of possession or sale at a defendant's business. The statute was clearly designed to do more than punish mere possession. Therefore, we hold that to constitute the crime of maintaining a premises for the purpose of unlawfully keeping or selling controlled substances there must be: (1) some evidence that the drug activity is of a continuing and recurring character; and (2) that a substantial purpose of maintaining the premises is for the illegal drug activity.

*Barnes*, 339 S.E.2d at 234. This rule does not mean that a small quantity of drugs or evidence found on only “a single occasion cannot be sufficient to show a crime of a continuing nature.” *Barnes*, 339 S.E.2d at 234. The evidence could be sufficient if the totality of the evidence proves that the defendant “maintained” the premises for selling or keeping controlled substances.

*Ceglowski*, 103 Wn.App. at 350-352, 12 P.3d 160.

Thus, under Washington law, in order for a person to be found guilty of maintaining a premises for the purpose of unlawfully keeping or selling controlled substances, there must be: (1) some evidence that the drug activity is of a continuing and recurring character; and (2) that a substantial purpose of maintaining the premises is for the illegal drug activity. Further, a drug user who maintains a home does not violate the statute because he or she does not maintain his house for the purpose of using drugs but, rather, for the purpose of residence, and the consumption of drugs is in the home incidental to residing in the home.

Here, the State produced ample evidence that Ms. Tillett and her houseguests (Mr. McShepherd, the drug seller, and Ms. Swedberg, the confidential informant) used drugs at Ms. Tillett’s residence over a long period of time, at least several months. However, the State presented insufficient evidence to establish that a “substantial purpose” of Ms. Tillett in maintaining her home was to keep or sell methamphetamine.

The evidence introduced at trial was that Ms. Tillett and her

husband lived at the home, that Mr. McShepherd lived at the home, that Ms. Swedberg had lived at the home, and that Ms. McShepherd worked in the home at a business operated out of the garage of the home. Ms. Swedberg also testified that the home was in the process of being remodeled.

While it is undeniable that drug activity was occurring at Ms. Tillett's home, the evidence clearly indicates that the drug activity was merely incidental to Ms. Tillett's residing in the home. In fact, Ms. Tillett was not even involved in the drug sales occurring in the home. The drug sales were conducted by Mr. McShepherd, a tenant, and there was no evidence that Ms. Tillett was aware of the extent of Mr. McShepherd's illicit activities or that she encouraged or was involved in them in any way. The bulk of the evidence of drug paraphernalia was found in Mr. McShepherd's bedroom.

The inference supported by the evidence is that Ms. Tillett and her husband maintained the home for purposes of residence and operation of the business located in the home's garage. The fact that drug activity was occurring in the home was only incidental to the occupation of the home by drug addicts. The selling and keeping of drugs was not a substantial purpose for the maintenance of the home.

The State presented insufficient evidence to convict Ms. Tillett of

violating RCW 69.50.402(1)(f) under any of the means of violating that statute.

**2. The trial court's exclusion of Ms. Tillett's father-in-law as a witness deprived Ms. Tillett of her right to present a defense.**

A criminal defendant has a constitutional right to present a defense. *Washington v. Texas*, 388 U.S. 14, 19, 87 S.Ct. 1920, 18 L.Ed.2d 1019 (1967). The *Washington* Court described importance of the right as follows:

The right to offer the testimony of witnesses, and to compel their attendance, if necessary, is in plain terms the right to present a defense, the right to present the defendant's version of the facts as well as the prosecution's to the jury so it may decide where the truth lies. Just as an accused has the right to confront the prosecution's witnesses for the purpose of challenging their testimony, he has the right to present his own witnesses to establish a defense. This right is a fundamental element of due process of law.

*Washington*, 388 U.S. at 19, 87 S.Ct. at 1923, *cited with approval* by *State v. Smith*, 101 Wn.2d 36, 41, 677 P.2d 100 (1984).

The right to compulsory process includes the right to present a defense. *State v. Burri*, 87 Wn.2d 175, 181, 550 P.2d 507 (1976).

Washington defines the right to present witnesses as a right to present material and relevant testimony. *See State v. Smith*, 101 Wn.2d 36, 41, 677 P.2d 100 (1984).

A constitutional error is harmless if the appellate court is

convinced beyond a reasonable doubt that any reasonable jury would have reached the same result in the absence of the error. Violation of the defendant's constitutional right to compulsory process is assumed to be prejudicial, and the State has the burden of showing the error was harmless. *State v. Maupin*, 128 Wn.2d 918, 928-29, 913 P.2d 808 (1996).

a. *The trial court abused its discretion in excluding the testimony of Ms. Tillett's father-in-law as irrelevant.*

The admission and exclusion of relevant evidence is within the sound discretion of the trial court. *State v. Swan*, 114 Wn.2d 613, 658, 790 P.2d 610 (1990), *cert. denied*, 498 U.S. 1046 (1991). Appellate courts will not disturb a trial court's rulings on a motion in limine or the admissibility of evidence absent an abuse of its discretion. *State v. Powell*, 126 Wn.2d 244, 258, 893 P.2d 615 (1995). A trial court abuses its discretion if its decision is manifestly unreasonable, or based on untenable grounds or untenable reasons. *Powell*, 126 Wn.2d at 258.

All relevant evidence is admissible, except as limited by constitutional requirements, statute, the evidentiary rules, or other rules applicable in Washington courts. ER 402. To be relevant, evidence must have a tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence. ER 401.

Here, Ms. Tillett sought to introduce the testimony of her father-in-law that he operated a business out of the garage of Ms. Tillett's home and that Ms. Tillett worked at the business with him. The trial court excluded this testimony as being irrelevant because no evidence of drug use or sales was found in the garage of the home.

The trial court abused its discretion in so ruling because the testimony of Ms. Tillett's father-in-law was directly relevant to her defense that she maintained her home for purposes of residence and working at the business located in her home and that selling or keeping methamphetamine was not a substantial purpose of Ms. Tillett in maintaining her home. This made the testimony relevant and admissible, even if no drug evidence was found in the garage.

*b. The exclusion of Ms. Tillett's father-in-law's testimony deprived Ms. Tillett of her right to present a defense.*

As discussed above, the testimony of Ms. Tillett's father-in-law was directly relevant to Ms. Tillett's defense. Excluding this testimony deprived Ms. Tillett of the ability to present her defense to the jury. As discussed above, the State presented insufficient evidence that Ms. Tillett maintained her home for purposes of allowing people to resort to it to consume methamphetamine, and the State's evidence that the home was maintained for purposes of keeping or selling methamphetamine was weak

at best. Denying Ms. Tillett the ability to present the testimony of her father-in-law violated her right to call witnesses on her behalf and to present material and relevant evidence in her defense.

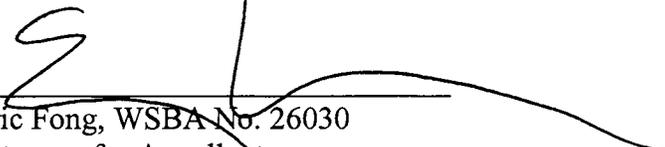
The trial court's erroneous exclusion of Ms. Tillett's father-in-law's testimony deprived Ms. Tillett of the right to present a defense.

E. CONCLUSION

For the reasons stated above, this court should vacate Ms. Tillett's convictions and remand either for dismissal of the charges with prejudice or for a new trial where the testimony of Ms. Tillett's father-in-law is admissible.

DATED this 3<sup>rd</sup> day of June, 2009.

Respectfully submitted,



Eric Fong, WSBA No. 26030  
Attorney for Appellant

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**IN THE COURT OF APPEALS, DIVISION II  
STATE OF WASHINGTON**

STATE OF WASHINGTON, )  
 )  
 Respondent, ) Appeal No. 38792-1-II  
 ) Superior Court No. 08-1-01008-1  
 )  
 vs. )  
 ) **DECLARATION OF MAILING**  
 )  
 NANCY JEAN TILLET, )  
 )  
 Appellant. )  
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On this day, I deposited in the United States Mail at Port Orchard, Washington, a properly stamped and addressed envelope directed to:

Mr. David Ponzoha  
Clerk of the Court  
Court of Appeals  
950 Broadway Street, Suite 300  
Tacoma, WA 98402

the original and one (1) copy of the Opening Brief of Appellant, and to

Mr. Randall Sutton Attorney at Law 614 Division Street, MS-35 Port Orchard, WA 98366	Ms. Nancy Jean Tillett DOC #825593 Washington Correction Center for Women 9601 Bujacich Road NW Gig Harbor, WA 98332-8300
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a true copy of the Opening Brief of Appellant.

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

Dated this 23<sup>rd</sup> day of June, 2009, at Port Orchard, Washington.

[Signature]  
SARAH L. STRECK