

NO. 38792-1-II

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

STATE OF WASHINGTON,

Respondent,

v.

NANCY TILLET,

Appellant.

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COURT OF APPEALS
STATE OF WASHINGTON

ON APPEAL FROM THE SUPERIOR COURT OF
KITSAP COUNTY, STATE OF WASHINGTON
Superior Court No. 08-1-01008-1

BRIEF OF RESPONDENT

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This brief was served, as stated below, via U.S. Mail or the recognized system of interoffice communications. I certify (or declare) under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.
DATED October 16, 2009, Port Orchard, WA _____
Original AND ONE COPY filed at the Court of Appeals, Ste. 300, 950 Broadway, Tacoma WA 98402; Copy to counsel listed at left.

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I. COUNTERSTATEMENT OF THE ISSUES

1. Whether the evidence was sufficient to show that Tillett maintained her house for the substantial purpose of selling or storing drugs and/or allowing persons to resort to it for the purpose of using drugs?

2. Whether the trial court properly excluded the testimony relating to George Tillett, Sr.'s automotive business that he (apparently illegally) operated out of the garage?

II. STATEMENT OF THE CASE

A. PROCEDURAL HISTORY

Nancy Tillett was charged by information filed in Kitsap County Superior Court with maintaining a drug house in violation of RCW 69.50.402(1)(f). CP 15. The jury found her guilty as charged, and entered special verdicts finding her guilty under each of the two alternative means of committing the offense. CP 100, 101.

B. FACTS

Destine Swedberg was working as a confidential informant. 3RP 210. She reported to the police that she believed a man named Erik McShepherd was dealing methamphetamine from defendant Nancy Tillett's residence. 2RP 99. Under police supervision Swedberg conducted two controlled buys from McShepherd. 2RP 99.

Swedberg knew Tillett well before the buys. 3RP 225. She had previously stayed at the house for a few months during the Summer of 2008. 3RP 225. Swedberg and Tillett had done drugs together “whenever [they] could.” 3RP 225. They did it a lot in her house, probably more than 20 times. 3RP 226. She also saw drugs sold in the house more than 15 times. 3RP 226. A lot of times when they did drugs at the house, there were various other people doing drugs there as well. 3RP 252.

There was no couch in the living room because it was in the process of being remodeled. 3RP 251. The kitchen was done. 3RP 251. The rooms upstairs were being remodeled as well. 3RP 251. The process had been ongoing for as long as Swedberg had been going there. 3RP 251.

On September 3, 2008, Swedberg purchased a quantity of methamphetamine. 2RP 99-103. It weighed 1.1 grams. 2RP 107. Swedberg stated that when she arrived at the house she was taken upstairs by Tillett to McShepherd’s room. 2RP 108. Two others were present in the room, Jessica Jeffcoat, and a man named Cedell. 2RP 108. McShepherd had packaged the meth before she got there. 3RP 220. She gave him the money, and he gave her the baggie. 3RP 220.

While Swedberg was there Tillett came in and asked Swedberg if she wanted to smoke a “pipe load” with her, i.e., a bowl of methamphetamine.

3RP 219. Swedberg told her she could not. 3RP 219. Tillett had a pipe. 3RP 219. She saw the drugs Swedberg was purchasing. 3RP 219. Tillett was wanting some of the methamphetamine that Swedberg had just bought. 3RP 219. Swedberg told Tillett that she could not because she was buying it for someone else. 3RP 220. Then she left. 3RP 220.

The next buy occurred on September 8, 2008. 2RP 109. During surveillance the police observed Tillett on the roof deck before Swedberg entered the house. 3RP 172. When Swedberg arrived, everyone was outside looking for the dog, which had gotten loose. 3RP 223. Swedberg went inside and waited for McShepherd to return. 3RP 223.

When he returned, they went up to Tillett's bedroom, and she purchased the drugs from him there. 2RP 113, 3RP 223. Tillett was there also. 3RP 223. Several people were present and they and Tillett were smoking methamphetamine during the transaction. 2RP 113. McShepherd weighed the drugs out in front of Swedberg this time. 3RP 223. Tillett wanted to smoke a bowl again, but Swedberg again told her she had to go, and left. 3RP 224.

On September 10, 2008, the police obtained a warrant to search Tillett's house. 2RP 116. During surveillance of the house, the police had observed several vehicles that were associated with individuals known to be

involved with narcotics and weapons. 2RP 120.

McShepherd and the Tilletts lived in the house, but there was also an auto parts business being run out of the garage. 2RP 121. Swedberg confirmed that there was a business at the house. 3RP 246. The business was in the garage, however, not in the house itself. 3RP 251.

As the police approached the house to execute the warrant, the police could hear people speaking through the open door of business. 2RP 121. Tillett's father-in-law was there. 3RP 175. They proceeded to the front door of the house, which was also open. 2RP 121. They knocked loudly and announced themselves. 2RP 121. When there was no response, they proceeded into the house. 2RP 121.

After they entered, Jeffcoat came down from upstairs, followed by Tillett. 2RP 122. Tillett was told to lie down several times, and was eventually "aided" to the ground and was handcuffed. 2RP 122.

Tillett was taken outside, and after waiving her rights, denied that there were any narcotics in the house. 2RP 123. She said there might be some marijuana pipes in her bedroom. 2RP 123. When she was informed they were serving a narcotics search warrant, Tillett commented that it was probably because of "the Count," *i.e.* Cedell. 2RP 123. Tillett became belligerent and the interview ended. 2RP 125. Then she and her husband

George (also known as Tom) were taken to jail. 2RP 125.

The house was in a poor state of repair. 2RP 123. The upstairs was only semi-finished. 3RP 199. There were sheets in many places instead of walls. 2RP 123, 3RP 199. Wiring was exposed in every room and there were holes in the ceiling, revealing the floor above. 2RP 123. Some of the heating vents had holes to the outside. 2RP 123. The outside wall upstairs had been broken out, apparently for an addition over the garage that had been begun but not completed. 2RP 123. There may have been a fire a few years earlier. 3RP 271. There were burn marks on the stairs. 3RP 271. There was a large unfinished area past the bedrooms upstairs where burn marks could be seen on the wood. 3RP 271. There was visible water damage. 3RP 271. The downstairs stove had a makeshift pipe for a chimney. 3RP 271. There was trash strewn in several areas. 3RP 271. There were no sheets on the mattress in McShepherd's room. 3RP 274.

After the house was secured, the police searched McShepherd's room, where they found several items of paraphernalia: clear baggies, used straws, a used glass pipe and cotton balls, and a cooking spoon. 3RP 176-77, 181.

In a dresser in the living room downstairs, they found a silver eyeglass case, a straw, and some baggies. 3RP 185. Inside the glass case were another straw a clear-topped container and some baggies. 3RP 187. The straw was

burnt on one end like commonly used to ingest narcotics. 3RP 187. One of the baggies had what appeared to be methamphetamine in it. 3RP 187. There was paperwork belonging to Tillett and her husband in the living room. 3RP 188. In the kitchen they found a stone marijuana pipe. 3RP 190-91.

The police also located a significant amount of paraphernalia in Tillett's bedroom. There were papers and baggies. 3RP 283. The baggies had methamphetamine residue. 3RP 284-85. There was a light bulb converted into a pipe, and another glass pipe. 3RP 286. Both had residue on them. 3RP 286. There were also several bong, which are used for consuming marijuana. 3RP 288. Also located were a quantity of Seroquel pills, not in a prescription container.¹ 3RP 289-90. Several of the items were later confirmed to contain methamphetamine. 3RP 302-05.

¹ Reports of abuse of Seroquel have emerged in the medical literature. The drug is usually abused through the crushing and snorting of tablets, and there have also been reports of intravenous abuse and intravenous co-administration with cocaine. Brian M. Waters and Kaustubh G. Joshi, *Intravenous Quetiapine-Cocaine Use ("Q-Ball")*, Am J Psychiatry (American Psychiatric Association Jan. 2007).

III. ARGUMENT

A. THE EVIDENCE WAS SUFFICIENT TO SHOW THAT TILLET MAINTAINED HER HOUSE FOR THE SUBSTANTIAL PURPOSE OF SELLING OR STORING DRUGS AND/OR ALLOWING PERSONS TO RESORT TO IT FOR THE PURPOSE OF USING DRUGS.

Tillett argues that the evidence was insufficient to support her conviction of maintaining a drug house. This claim is without merit because the evidence was sufficient under either of the alternative means of committing that crime. Moreover, since the jury entered special verdicts finding her guilty under both means, if the evidence is sufficient under either, her conviction should be affirmed.

1. *Standard of review*

It is a basic principle of law that the finder of fact at trial is the sole and exclusive judge of the evidence, and if the verdict is supported by substantial competent evidence it shall be upheld. *State v. Basford*, 76 Wn.2d 522, 530-31, 457 P.2d 1010 (1969). The appellate court is not free to weigh the evidence and decide whether it preponderates in favor of the verdict, even if the appellate court might have resolved the issues of fact differently. *Basford*, 76 Wn.2d at 530-31.

In reviewing the sufficiency of the evidence, an appellate court examines whether, viewing the evidence in the light most favorable to the

prosecution, a rational trier of fact could find that the essential elements of the charged crime have been proven beyond a reasonable doubt. *See State v. Green*, 94 Wn.2d 216, 220, 616 P.2d 628 (1980). The truth of the prosecution's evidence is admitted, and all of the evidence must be interpreted most strongly against the defendant. *State v. Theroff*, 25 Wn. App. 590, 593, 608 P.2d 1254, *aff'd*, 95 Wn.2d 385 (1980). Further, circumstantial evidence is no less reliable than direct evidence. *State v. Myers*, 133 Wn.2d 26, 38, 941 P.2d 1102 (1997). Finally, the appellate courts must defer to the trier of fact on issues involving "conflicting testimony, credibility of the witnesses, and the persuasiveness of the evidence." *State v. Hernandez*, 85 Wn. App. 672, 675, 935 P.2d 623 (1997).

Here the jury was informed by the to-convict instruction (Instruction 12) that it had to find the following elements before it could conclude that Tillett was guilty:

- (1) That on or about September 1, 2008, through September 10, 2008, the defendant 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 97.²

Two alternative means were thus charged. Where the court instructs the jury about alternative means of committing a crime, the jury must be unanimous on which means the defendant used. *State v. Ortega Martinez*, 124 Wn.2d 702, 707, 881 P.2d 231 (1994). If the evidence supports each alternative means, the Court will uphold a general verdict. *Ortega Martinez*, 124 Wn.2d at 707-08. Likewise, if the jury explicitly finds the particular means by a special verdict form, sufficient evidence on any means the jury explicitly found will support the conviction. *Ortega Martinez*, 124 Wn.2d at 708.

Here the jury entered special verdicts unanimously finding Tillett

² The instruction includes elements beyond those affirmatively set forth in RCW 69.50.402(1)(f), based on this Court's holding in *State v. Ceglowski*, 103 Wn. App. 346, 12 P.3d 160 (2000). See 3RP 324. Regardless of whether that case demands the additional elements, the State did not object to the instruction at trial. See 3RP 342-51. It is well-settled that "jury instructions not objected to become the law of the case," *State v. Hickman*, 135 Wn.2d 97, 102, 954 P.2d 900 (1998), and that "[i]n criminal cases, the State assumes the burden of proving otherwise unnecessary elements of the offense when such added elements are included without objection in the 'to convict' instruction." *Hickman*, 135 Wn.2d at 102. Tillett's sufficiency argument is therefore governed by the terms of instruction 12.

guilty of each means found. CP 101. As such, if the evidence is sufficient as to either means, Tillett's conviction should be affirmed.

2. Tillett's house was resorted to by persons using methamphetamine for the purpose of using methamphetamine.

With regard to this means of committing the offense, Tillett relies upon *State v. Fernandez*, 89 Wn. App. 292, 948 P.2d 872 (1997), and argues that there was insufficient evidence to show that persons other than the defendant resorted to the house for the purpose of using drugs. Her reliance is misplaced, however. The salient point in that case was that there was no evidence that persons other than the defendants/owners used the house for consuming 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 300. Here, on the other hand, Destine Swedberg specifically testified that “[a] lot” of “different people” did drugs in the house. 3RP 252. There was additional testimony that at the time of the second controlled buy, several people were present and they and Tillett were smoking methamphetamine during the transaction. 2RP 113.

Tillett was certainly free to argue that Swedberg's testimony was not credible. And indeed she argued just that. *See, e.g.*, 4RP 385. But as

discussed above, such credibility determinations are for the jury, not for the appellate court. Because the evidence, if believed, was sufficient to show that persons other than the defendant resorted to the home to use methamphetamine, Tillett's contention must be rejected and her conviction affirmed.

3. *Tillett's house was used for keeping or selling methamphetamine.*

With regard to the second means of committing the offense Tillett argues that the use and sale of drugs was only incidental to Tillett's use of the home as her residence.

Tillett relies on *State v. Ceglowski*, 103 Wn. App. 346, 12 P.3d 160 (2000), where the Court concluded that there was insufficient evidence to establish more than a single drug buy and insufficient evidence to support the reasonable inference that selling drugs was a substantial purpose for maintaining the premises. *Ceglowski*, 103 Wn. App. at 353. The court concluded that a conviction under RCW 69.50.402(a)(6) based on keeping or selling controlled substances required a showing (1) that the drug activity was continuing and recurring in character, and (2) that a substantial purpose of maintaining the premises was for the illegal drug activity. *Ceglowski*, 103 Wn. App. at 352-53.

Tillett argues that 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." Brief of Appellant at 18. This assertion is contrary to the testimony at trial, which showed that Tillett was present during both sales and sought to have Swedberg share her purchase on both occasions. 3RP 219, 224. The second time, McShepherd weighed out the drugs and conducted the sale in Tillett's bedroom and in her presence. 3RP 223. Swedberg had also observed drugs being sold in the house more than 15 times. 3RP 226.

From the faulty premise noted above, Tillett than asserts that the evidence was insufficient to support the conclusion that drug sales and storage were a substantial purpose of her maintenance of the house. Tillett's argument, however, would not require that illicit activity be a substantial purpose, but that it be the only or primary purpose of maintaining the premises. As noted, the drugs sales were of a recurring nature, Tillett was well aware of them, sought to get a share of the drugs every time Swedberg bought them, and the testimony was replete with evidence that drugs were sold, used and stored in McShepherd's bedroom, in Tillett's bedroom, and in the common areas of the home. This contention should also be rejected and Tillett's conviction affirmed.

B. THE TRIAL COURT PROPERLY EXCLUDED THE TESTIMONY RELATING TO GEORGE TILLET, SR.'S BUSINESS OPERATED OUT OF THE GARAGE.

Tillett next claims that the trial court abused its discretion when it excluded testimony from Tillett's father-in-law that he conducted an automotive business in her garage. This claim is without merit because the evidence was simply not relevant to the issues presented, and even if it were, was properly excluded under ER 403.

The admission and exclusion of evidence are within the sound discretion of the trial court and, thus, are reviewed for abuse of discretion. *State v. Thomas*, 150 Wn.2d 821, 856, 83 P.3d 970 (2004). A decision to admit or exclude evidence, therefore, will be upheld absent an abuse of discretion, which may be found only when no reasonable person would have decided the same way. *Thomas*, 150 Wn.2d at 869. The burden is on the appellant to prove an abuse of discretion. *State v. Hentz*, 32 Wn. App. 186, 190, 647 P.2d 39 (1982), *reversed on other grounds*, 99 Wn.2d 538, 663 P.2d 476 (1983).

Below, Tillett made the following offer of proof:

I intend his testimony to be relatively short. I'm just attempting to establish, first of all, that he was the father-in-law of my client, you know, some general background questions, that he's lived in Bremerton, that he operated a business, that at some point in the last few years that business

was relocated to the address that's been talked about during this trial, that it's an attached garage, that he's on the property. Well, first of all, also, that the business pays business taxes and so on, that he sees Nancy, that she works in the office, and that --

3RP 317-18. She argued that evidence concerning Tillett's father-in-law's use of her garage was relevant to rebut evidence that a substantial purpose of her maintenance of the dwelling was for illicit drug purposes:

The relevance to me is the defense's proposed instruction is having to do -- One of the proposed elements is that "substantial" use of the building or dwelling, whatever we're going to call it here, was for drug purposes.

3RP 318. The trial court found that the evidence was not relevant and further that it would be excludable under ER 403:

I'm not going to allow Mr. Tillett to testify about the garage any further because there has been no testimony that the search was in the garage, that there was any activity concerning the business in the house. It's a single focus on this residence. That's what they did and that's what this involves. The fact that there may have been an attached garage and a business was conducted in it, I'm not -- The premises we're talking about is the living portion of the house, not the garage. For that reason, I believe Mr. Tillett's testimony is irrelevant to the underlying issues. There's already been testimony that there was a business going on out of the garage. That's in there. Any more focus on the garage I think is not pertinent or relevant, or, if it is, it is more prejudicial than probative. So for that reason I am at this point ... I am going to not let Mr. Tillett testify about any of the things concerning the business.

3RP 324-25.

ER 401 defines relevant evidence as “evidence having any 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.” Here, Nancy Tillett was charged with maintaining her *residence* as a drug house. There was no allegation that she conducted or permitted any of these activities in the garage. Nor is there any evidence or offer of proof that Tillett was in any way involved in the carrying on of her father-in-law’s business. As such, whether her father-in-law was carrying on a legitimate business in the garage or not,³ failed to make it any more or less probable that Tillett was maintaining the residence for the substantial purpose of providing a place for others to do drugs or for the sale or storage of drugs. The trial court thus properly excluded the evidence as irrelevant.

In addition to finding the evidence irrelevant, the trial court also concluded that if it had some minimal relevance it would be excludable under ER 403, which provides:

Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.

As the trial court noted, the jury had already heard that the senior Mr. Tillett

³ The proceedings in limine suggested that the senior Mr. Tillett’s activities were unlawful as well. 1RP 30-32.

was conducting an automotive business in the garage. 2RP 121, 3RP 246, 251. There was no suggestion to the jury that that business was anything but legitimate. Had Mr. Tillett's testimony been allowed, however, the State likely would have been permitted to call the code enforcement officer to discuss the illegal nature of the business, leading the trial far afield from the central issues presented. *See* 1RP 32 (Trial court excluded code enforcement officer's testimony, but not for rebuttal purposes). Thus even if this evidence had minimal probative value, the trial court properly concluded that the danger of waste of time, confusion of the issues and the needless presentation of cumulative evidence justified its exclusion.

Further, even if the trial court should have admitted the evidence, an evidentiary error that does not result in prejudice to the defendant is not grounds for reversal. *State v. Bourgeois*, 133 Wn.2d 389, 403, 945 P.2d 1120 (1997). The error is "not prejudicial unless, within reasonable probabilities, the outcome of the trial would have been materially affected had the error not occurred." *State v. Everybodytalksabout*, 145 Wn.2d 456, 469, 39 P.3d 294 (2002) (*quoting Bourgeois*, 133 Wn.2d at 403). The error is harmless if the evidence is of minor significance compared to the overall evidence as a whole. *Everybodytalksabout*, 145 Wn.2d at 469 (*citing Bourgeois*, 133 Wn.2d at 403).

Here, the issue was the use of the residence, not the garage. Moreover, as noted, the jury heard that Tillett's father was operating apparently lawful⁴ automotive business out of the garage. Additional testimony on that subject, particularly in light of its potential to have opened the door to additional evidence that the Tilletts were essentially scofflaws, would not have within any reasonable probability altered the outcome of the trial. Any error would thus be harmless.

Finally, Tillett's contends that exclusion of this evidence violated her Sixth Amendment right to present testimony in her defense. While such a right exists, it is not unlimited. A defendant does not have the right to present irrelevant evidence. *State v. Hudlow*, 99 Wn.2d 1, 15, 659 P.2d 514 (1983). Even if evidence is relevant, the trial court may exclude the evidence Under ER 403. *Hudlow*, 99 Wn.2d at 15. As discussed above, the trial court correctly determined that the evidence was irrelevant, and even if relevant, its probative value was overcome by the danger of confusion and prejudice. No constitutional error occurred.

⁴ Of course, introduction of Mr. Tillett's testimony could have opened the door to evidence contradicting that impression as well.

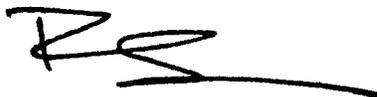
IV. CONCLUSION

For the foregoing reasons, Tillett's conviction and sentence should be affirmed.

DATED October 16, 2009.

Respectfully submitted,

RUSSELL D. HAUGE
Prosecuting Attorney

A handwritten signature in black ink, appearing to read 'RAS', with a long horizontal flourish extending to the right.

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