

NO. 35583-3-II

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

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STATE OF WASHINGTON,

Respondent,

v.

SANDRA L. KILBY,

Appellant.

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STATE OF WASHINGTON

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

The Honorable Frank E. Cuthbertson

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BRIEF OF APPELLANT

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A. ASSIGNMENTS OF ERROR

1. The trial court erred in admitting rebuttal evidence.
2. The trial court erred in allowing evidence of a monthly rental agreement under the business record exception to hearsay.
3. Appellant was denied her constitutional right to a fair trial.

Issues Pertaining to Assignments of Error

1. Did the trial court err in allowing rebuttal testimony when appellant did not testify to any new matters?
2. Did the trial court err in allowing evidence of a monthly rental agreement under the business record exception to hearsay because the rental agreement was not a record of a regularly conducted activity?

B. STATEMENT OF THE CASE

1. Procedural Facts

On March 3, 2006, the state charged appellant, Sandra Lorri Kilby, with one count of unlawful possession of a controlled substance, to-wit: methamphetamine; one count of unlawful possession of a controlled substance -- forty grams or less of marijuana; and unlawful possession of a firearm in the second degree. CP 6-7; RCW 69.50.4013, 69.50.101(q), 69.50.4014, 9.41.040(2)(a)(i). The state amended the information on May 30, 2006, omitting the one count of unlawful possession of firearm in the second degree and adding one count of unlawful possession of an

uncontrolled substance, to-wit: oxycodone. CP 17-19; RCW 69.50.4013, 69.50.101(q), 69.50.4014. On September 21, 2006, the court held a CrR 3.6 hearing and denied the defense motion to suppress evidence. CP 100-105; 3RP<sup>1</sup> 18-20. Kilby and her husband, co-defendant, Dennis Kilby, were tried before the Honorable Frank E. Cuthbertson on September 28, October 2 - 6, 2006. 4RP, 5RP, 6RP, 7RP, 8RP, 9RP. A jury found Kilby guilty as charged. CP 97, 98, 99; 9RP 347. On November 8, 2006, the court sentenced Kilby to six months and a day, converting the jail confinement to a BTC Facility. CP 115, 123; 10RP 13-15. Kilby filed this timely appeal. CP 127.

## 2. Substantive Facts

Deputy Sheriff Anthony Messineo testified that he assisted in serving a search warrant at a trailer in Roy, Washington at around 7 o'clock in the morning on March 2, 2006. 5RP 29-33. He and another deputy served the warrant on Kilby and her husband who were living in the trailer. No one else was at the residence. 5RP 35. As the case officer, Messineo obtained the search warrant, entered the trailer under the search warrant, and conducted a cursory search. Finding probable cause, he

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<sup>1</sup> There are ten verbatim report of proceedings: 1RP - 3/3/06; 2RP - 5/30/06; 3RP - 9/21/06; 4RP - 9/28/06; 5RP - 10/2/06; 6RP - 10/3/06; 7RP - 10/4/06; 8RP - 10/5/06; 9RP - 10/6/06; 10RP - 11/8/06.

arrested the Kilbys after advising them of their constitutional rights. 5RP 35-36.

Deputy Michael Phipps testified that he searched the kitchen and dining area of the trailer. 5RP 50, 54. During his search of the kitchen, he found a blue plate with a razor blade and a brown powdery substance. Suspecting that the brown substance was methamphetamine, Phipps gave the plate to the property officer. 5RP 55-57.

Deputy Thomas Olesen testified that he searched the master bedroom which was "messy." 5RP 60, 66. Olesen found a glass-smoking device on a dresser and while searching the drawers, he found a gram scale and a baggie containing what he suspected as marijuana. 5RP 67-68. He took no fingerprints but the evidence was photographed, bagged, and given to the property officer. 5RP 67, 76-77.

Deputy Oliver Hickman testified that he assisted Olesen in searching the master bedroom. 5RP 88, 93. In a closet, Hickman found a wooden box containing aluminum foil and a filter with a brown stain on it. 5RP 94. He searched the drawer of a nightstand next to a bed and found four white pills wrapped in plastic. 5RP 96-97. Hickman also found straws underneath the mattress and plastic baggies in a dresser drawer. 5RP 96-97. He took no fingerprints and was not aware of any fingerprinting. 5RP 104-05.

Kristen Macy testified that she was a forensic scientist with the Pierce County Sheriff's Department. 6RP 154-55. Macy analyzed the green vegetable matter submitted as evidence by conducting two tests and detected the presence of marijuana. 6RP 164-65. Franklin Boshears, a forensic scientist with the Washington State Crime Lab, testified that he analyzed evidence in the case for the presence of controlled substances. 6RP 175, 178. Boshears analyzed the tan powder residue, which tested positive for methamphetamine, and the pills contained oxycodone, a controlled substance. 6RP 180-82.

Angela Kilby Gentele testified that the Kilbys were her parents and she and her two children visited their home just before Valentine's Day, February 14, 2006. 6RP 192-93. Gentele made the visit before Valentine's Day because "they were going on vacation and so we had to come over there before that." 6RP 193. While her children were playing in the house, her one-year-old son reached for some small decorative rocks on a coffee table to put in his mouth. Gentele rushed toward him to stop him and accidentally spilled her prescription pills on the floor. Gentele explained that she had just opened her bottle of pills to take a pill prescribed for pain due to a ruptured wisdom tooth. Her doctor prescribed the oxycodone for her to take until she had her wisdom tooth extracted.

6RP 194-95. Gentele picked up the pills, her children continued to play, and they drove home later that day. 6RP 196-97.

Kilby testified that she has been residing at Oakwood Arena in Roy for about three years. She lives with her husband and son in one of the four trailers on the property. 6RP 208-10. Kilby recalled that her daughter and grandchildren visited them two days before Valentine's Day, "we just had a good day." 6RP 210-12. Kilby saw her daughter picking up pills spilled on the carpet and thought she got all of them. While vacuuming after her daughter left, she found a couple of pills underneath the coffee table. Kilby did not know what kind of pills they were but kept them for her daughter. 6RP 212-13.

On or about February 19<sup>th</sup>, Kilby and her husband left for a trip to Oregon, Idaho, and Utah and returned around 2 o'clock in the morning on March 2<sup>nd</sup>. 6RP 214-15. When she walked in the door, she saw Allen,<sup>2</sup> and the "house was a mess" and "looked like somebody had been partying." 6RP 215-16. Allen was a longtime friend who had problems with drug use and was in and out of jail. 6RP 217. Although Allen had permission to stay at their home, Kilby became upset over the condition of the house, "I basically told him to get out and I went to bed." 6RP 216-18. She went to bed immediately because she was exhausted from the long

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<sup>2</sup> The record reflects Allen's full name as Allen Niemi. 7RP 262.

trip. 6RP 222. Later that morning, Kilby was awakened “quite abruptly” by police officers and arrested. 6RP 220. The items that the police collected as evidence did not belong to her and she did not see them in the house before going to bed. 6RP 220-23.

During cross-examination, Kilby acknowledged that she had been living in Roy since 2003. When the state asked Kilby if she ever indicated to anyone that she lived in Federal Way, defense counsel objected and the court held a side bar conference. 6RP 227. The state argued that it should be allowed to question Kilby about a monthly rental agreement that has an Auburn address for Kilby because it goes to her credibility. Defense counsel objected, arguing that the monthly rental agreement constituted hearsay. The court allowed the evidence, ruling that the rental agreement falls under the business record exception to hearsay. 6RP 230-34.

The defense rested after Kilby’s testimony and thereafter the state called Officer Steve Berry as a rebuttal witness. 7RP 262, 267. As an offer of proof, the state informed the court that Berry would testify that Allen Niemi was in jail from January 13 to February 27, 2006. The state argued that his testimony would rebut the inference raised by Kilby that “the objects found in the home were Allen’s responsibility.” 7RP 263. Defense counsel objected, arguing that Berry’s testimony would not contradict Kilby’s testimony, which is the purpose of rebuttal testimony.

7RP 264. The court allowed Berry to testify as a rebuttal witness. 7RP 266-69.

C. ARGUMENT

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

The trial court erred in allowing rebuttal testimony because Kilby did not testify to any new matters. Reversal is required because the court's error prejudiced Kilby's theory of defense and denied her a fair trial.

Rebuttal testimony 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). Rebuttal evidence is admitted to enable the plaintiff to answer new matter presented by the defense. Genuine rebuttal evidence is not simply a reiteration of evidence in chief but consists of evidence offered in reply to new matters. Kremer v. Audette, 35 Wn. App. 643, 647-48, 668 P.2d 1315 (1983)(rebuttal testimony was proper because it was offered to directly contradict and impeach defense testimony). Where a rebuttal witness is called by the state for the purpose of meeting new matters raised by the defense in its case in chief, it is not error to admit the testimony even though the witness's name has not been furnished to the defense for

genuine rebuttal witnesses need not be listed. State v. White, 74 Wn.2d 386, 395, 444 P.2d 661 (1968).

Here, Kilby testified that she and her husband returned home from a road trip at around 2 o'clock in the morning. 6RP 214-15. When she walked in the door, she saw Allen and the house was a "mess" and "looked like somebody had been partying." 6RP 215-16. Allen was a longtime friend who had problems with drug use and had been in and out of jail. 6RP 217. Although Allen had permission to stay at their home, Kilby was upset over the condition of the house and told him "to get out." 6RP 216-18. Kilby went to bed immediately because she was exhausted from the long trip. 6RP 222. Later that morning, she was awakened by police officers who searched the home. The uncontrolled substances that the officers found did not belong to her and she did not know they were in the house. 6RP 220-23.

During cross-examination, the state questioned Kilby about the understanding she had with Allen before leaving on the trip:

Q. You ever indicated to anyone that Allen was going to be housesitting for you while you were gone?

A. I thought that he was going to be there, yes.

Q. And prior to the time that you -- what led you to believe he was going [to] be there? Had you talked to him about it?

A. I talked to him prior -- prior to this, yes.

Q. Okay. How long before you left did you talk to him about staying at the place and keeping an eye on things?

A. Well, it wasn't -- like I said, it wasn't actually for him to have an -- you know, keep an eye on the place. It was actually if he was to be there. The door was open. My girls knew that he could be there.

Q. But Allen was aware that you were going to be gone on this trip?

A. I don't think that he actually knew. It wasn't a -- it wasn't a -- you know, we're going on vacation, come over and watch this.

Q. When was the last time you talked to Allen before leaving for this trip to Idaho and Utah?

....

A. I really don't know.

THE COURT: Okay. I think there are two different questions. One question was when did she talk to Allen about watching the house and staying at the house? I think this is a different question now, which is, how long before the Kilbys left on their trip did Ms. Kilby talk to Allen, if she talked to Allen? Is that the question, Ms. Ludlow?

MS. LUDLOW: Yes, Your Honor.

THE COURT: Okay. You can answer that.

A. Again, I really don't know as far as how many -- you know, how long it was which it was before or

after. I really don't know. And how long, I don't know.

.....

Q. Okay. Ms. Kilby, were you aware Allen was in jail from January 13 to February 27<sup>th</sup> of 2006?

A. No. I knew that he was in and out, but I had no idea of the dates.

6RP 239-44.

After Kilby's testimony the defense rested and the state informed the court that it had a rebuttal witness. The state asserted that Officer Berry, a records custodian for the Pierce County Jail, would testify that Allen Niemi was incarcerated from January 13 to February 27, to rebut the inference raised by Kilby's testimony "that the objects found in the home were his responsibility." 7RP 262-63. Defense counsel objected, pointing out that the purpose of rebuttal testimony is to contradict something a witness has said on the stand. Counsel argued that Berry's testimony would not rebut Kilby's testimony that she did not know the dates of Allen's incarceration, he was at the home when she returned from her trip on March 2<sup>nd</sup>, and there was no testimony as to when Allen might have arrived at the house. 7RP 264. Over defense counsel's objection, the court allowed Berry's testimony. 7RP 266-69.

The record substantiates that Kilby did not raise any new matters during her testimony. The state knew what Kilby would testify to and that

she was asserting unwitting possession as her defense pursuant to the rules of discovery. Kilby's testimony was therefore no surprise to the state. Clearly, Berry's testimony that Allen was incarcerated in the Pierce County Jail from January 13 to February 27, 2006 did not impeach Kilby's testimony. The fact that Allen was in jail until February 27<sup>th</sup> does not contradict Kilby's testimony that he was at her home when she returned on March 2. Kilby explained that Allen understood that he could stay at her home at any time, "[t]here was an open door policy." 6RP 217. Furthermore, Kilby repeatedly stated that she did not know when she last spoke with Allen before leaving on her trip and she never made arrangements for him to stay at the house at any specific time. 6RP 241.

The trial court erred in allowing improper rebuttal testimony that bolstered the state's case. Berry's testimony prejudiced Kilby's theory of defense because it placed further emphasis on the time of Allen's incarceration. Reversal is required because the court denied Kilby her right to a fair trial.

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

The trial court erred in allowing evidence of a monthly rental agreement under the business record exception to hearsay because the

monthly rental agreement was not a record of a regularly conducted activity. The court's error requires reversal because the evidence prejudiced Kilby and denied her right to a fair trial.

Records of a regularly conducted activity are an exception to the general hearsay rule. ER 803(a)(6). Admission of such records are governed by RCW 5.45.020. State v. Hopkins, 134 Wn. App. 780, 789, 142 P.3d 1104 (2006), rev. denied, 160 Wn.2d 1020, 163 P.3d 793 (2007).

A record of an act, condition or event, shall in so far as relevant, be competent evidence if the custodian or other qualified witness testifies to its identity and the mode of its preparation, and if it was made in the regular course of business, at or near the time of the act, condition or event, and if, in the opinion of the court, the sources of information, method and time of preparation were such as to justify its admission.

RCW 5.45.020.

RCW 5.45.020 does not require examination of the person who actually made the record. State v. Iverson, 126 Wn. App. 329, 337, 108 P.3d 799 (2005). Testimony by one who has custody of the record as a regular part of his work or who has supervision of its creation will be sufficient to properly introduce the evidence. Id. at 338.

Here, during cross-examination, Kilby testified that she has been living in Roy since 2003. 6RP 227. Thereafter, the state sought to introduce a monthly rental agreement that had an address in Auburn as

Kilby's residence, arguing that it "goes to the credibility of her testimony." 6RP 230; Ex. 46. The court reviewed the rental agreement and determined that it "would fall within the business records exception." 6RP 232. Defense counsel objected, "it doesn't come in under the hearsay exception business record until it's authenticated by someone who can so testify." 6RP 233. The court nonetheless allowed the state to question Kilby about the rental agreement:

Q. Okay. I'll hand you what's been marked for identification as State's or Plaintiff's Exhibit No. 46 and have you look at -- actually it would be the third page. Do you recognize the signature there on that second page over on the left hand -- I guess it would be the right-hand side.

A. Yeah, my husband's signature.

....

Q. This document is titled a monthly rental agreement; is that correct?

A. Yes.

Q. Entered into on the 15<sup>th</sup> day of May, 2006?

A. Yes.

Q. That would have been after charges were filed in this case?

A. Yes.

Q. The address here indicates residence at 4050 South 296<sup>th</sup> Place; is that correct?

A. Yes.

Q. Auburn?

A. That's what it says, yes.

Q. Not Roy?

A. That's -- but this is not for me. This is not mine.

Q. You adopted that address in any court proceedings as being where you were living?

A. Did I?

Q. Yes.

A. No.

Q. But you do agree that it is entitled, "Monthly Rental Agreement," that includes both you and your husband; is that correct?

A. Yes. That's not any of our writing, though, yes.

6RP 235-37.

It is evident from the record that the monthly rental agreement does not constitute a business record under RCW 5.45.020. Clearly, the rental agreement is not a record of an act, condition, or event made in the regular course of business. Furthermore, no custodian or other qualified witness testified to its identity and the mode of its preparation.

Consequently, the trial court erred in allowing the state to introduce the rental agreement as evidence under the business exception to

hearsay. The court's error was prejudicial because the state's improper questioning damaged Kilby's credibility and cast her in a bad light before the jury. The prejudicial effect was particularly critical because the case hinged on whether the jury believed Kilby's defense of unwitting possession. See State v. Padilla, 69 Wn. App. 295, 302, 846 P.2d 564 (1993)(when a case turns on the credibility of the witnesses, the likelihood of the jury's verdict being affected by improper questioning is substantial).

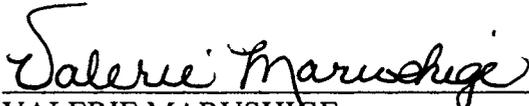
Reversal is required because the court's error prejudiced Kilby's defense and denied her the right to a fair trial.

D. CONCLUSION

The trial court's errors allowed the state to shed doubt on Kilby's honesty and discredit her testimony. Cumulatively, the court's errors denied Kilby her constitutional right to a fair trial.<sup>3</sup> For the reasons stated, this Court should reverse Ms. Kilby's convictions.

DATED this 24<sup>th</sup> day of September, 2007.

Respectfully submitted,

  
VALERIE MARUSHIGE  
WSBA No. 25851  
Attorney for Appellant

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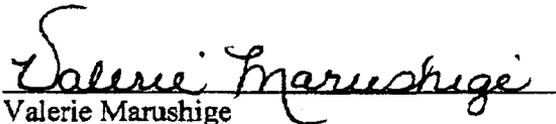
<sup>3</sup> State v. Cox, 101 Wn.2d 772, 789, 684 P.2d 668 (1984).

**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 Kathleen Proctor, Pierce County Prosecutor's Office, 930 Tacoma Avenue South, Tacoma, Washington 98402 and Sandra Kilby, P.O. Box 764, Roy, Washington 98580-9504.

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

DATED this 24<sup>th</sup> day of September, 2007 in Des Moines, Washington.

  
Valerie Marushige  
Attorney at Law  
WSBA No. 25851

COURT OF APPEALS  
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