

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

STATE OF WASHINGTON,

Respondent,

v.

NANCY JEAN TILLETT,

Appellant.

No. 38792-1-II

UNPUBLISHED OPINION

Quinn-Brintnall, J. — A jury found Nancy Tillett guilty of maintaining a premise for using, keeping, or selling controlled substances, commonly referred to as maintaining a drug house, a violation of RCW 69.50.402(1)(f).¹ By special verdict, the same jury found that Tillett had violated both alternative grounds for committing the offense; she knowingly maintained a place where people resorted to use controlled substances *and* she knowingly maintained a place used for keeping or selling controlled substances. Tillett argues that the evidence is insufficient to support her conviction and that the trial court abused its discretion by excluding a defense

¹ RCW 69.50.402(1)(f) provides,

[It is unlawful for any person k]nowingly to keep or maintain any store, shop, warehouse, dwelling, building, vehicle, boat, aircraft, 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.

witness's testimony. In a statement of additional grounds for review (SAG),² Tillett argues that her timely trial rights under CrR 3.3 were violated and that the trial court improperly admitted certain evidence. Tillett's timely trial rights were not violated, the trial court's evidentiary rulings were proper, and substantial evidence supports the jury verdict. Accordingly, we affirm.

FACTS

During the summer of 2008, Destine Swedberg and Erik McShepherd lived in Tillett's home. Tillett and Swedberg became friends and regularly smoked methamphetamine together. They also consumed drugs with other "different people" at Tillett's home. 3 Report of Proceedings (RP) at 252. By the end of the summer of 2008, Swedberg had moved out of Tillett's home.

Throughout 2008, Swedberg was an informant for the Bremerton Police Department. After she moved out of Tillett's home and to complete her informant obligations, Swedberg made arrangements to make two separate controlled buys of methamphetamine from McShepherd.³

Swedberg made the first controlled buy of 1.1 grams of methamphetamine from McShepherd on September 3, 2008. Tillett greeted Swedberg at the front door and took her to

² RAP 10.10.

³ A controlled buy is a police operation where an informant, and any vehicle being used, is searched before a scheduled drug purchase to ensure that he or she does not have any drugs, weapons, or personal money available for use. The informant receives prerecorded or otherwise traceable money from the police, purchases drugs while under police surveillance, and then turns the drugs and any money over to the police. The informant and any vehicle used are immediately searched again after the drug purchase.

McShepherd's room. After Swedberg bought the methamphetamine, Tillett came into the room with a pipe, saw the drugs Swedberg had just purchased, and asked Swedberg if she wanted to smoke some of it together. Swedberg declined, saying they were for someone else, left, and turned the drugs over to the police who completed standard controlled buy procedures.

On September 8, 2008, Swedberg returned to Tillett's home and made the second controlled buy of methamphetamine from McShepherd. This time the sale occurred in Tillett's bedroom where Tillett and others were already ingesting drugs. While Tillett watched, McShepherd pulled out a scale, weighed out the methamphetamine, and then exchanged the drugs for money with Swedberg. Tillett again asked Swedberg to smoke methamphetamine with her. Swedberg declined, left, and turned the drugs she had purchased from McShepherd over to the police who completed standard controlled buy procedures.

Two days later, on September 10, 2008, the police executed a search warrant for Tillett's home. The police entered through an open front door and secured Tillett and a friend before searching the home; McShepherd was not present during the search. After the initial search, but before a more thorough second search, the police arrested Tillett for maintaining a drug house. Tillett waived her *Miranda*⁴ rights, stating that there were no drugs in the house, that the police might find some marijuana pipes in her bedroom, and that she did not know anything about things that the police might find in McShepherd's room.

⁴ *Miranda v. Arizona*, 384 U.S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966).

The search of the house produced many pieces of drug paraphernalia.⁵ In McShepherd's room, the police found a used glass smoking pipe, several small inch-by-inch clear baggies, cotton swabs, a metal spoon with black residue on it, and some used two- to four-inch long straws. In Tillett's bedroom, they found a plastic baggie with residue, a glass pipe with white residue on it, a second pipe made from a light bulb with residue on it, a drug straw with residue on it, and several bongos. A stone pipe and lighter were found in the kitchen. Finally, in a living room dresser drawer, the police found a tin "kit" containing a straw with a burnt end and some baggies, one of which had white crystal residue in it.⁶ Only the residue on the baggie and light bulb pipe found in Tillett's bedroom were tested and confirmed as methamphetamine.

On September 11, 2008, the Kitsap County Prosecuting Attorney's Office charged Tillett with unlawful use of a building for drug purposes under RCW 69.53.010. On December 8, 2008, the State amended the charge to a violation of RCW 69.50.402(1)(f)—maintaining a premise for using, keeping, or selling controlled substances.

A jury trial commenced on January 13, 2009. Several police officers involved in the search testified, as did Swedberg. In addition to detailing the controlled buys she made from McShepherd, Swedberg testified that drugs were sold out of Tillett's home "all the time" and that

⁵ During the search, the police noted the overall state of the house. Detective Steven Polonsky described curtains hung and used as walls between rooms, exposed wiring in most rooms, and holes in the floor between the first and second levels. Detective Floyd May described the house as in "pretty sad shape," noting a fire seemed to have burned part of the stairs and ceiling, there was water damage in the house, the kitchen stove had a makeshift pipe chimney, and there was excess trash in the home. 3 RP at 271. At trial, Swedberg testified that when she lived at the home, Tillett was in the process of remodeling it.

⁶Accordingly, Tillett's claim that "the bulk of the evidence of drug paraphernalia was found in Mr. McShepherd's bedroom" is not supported by the record. Br. of Appellant at 18.

she personally witnessed at least 15 drug sales during the time she lived there. 3 RP at 244.

Tillett did not testify but stipulated to the use of statements she made at the time of her arrest. Tillett attempted to call her father-in-law as a witness to testify about his business located in the home's garage to show that she substantially maintained her home as a residence and business and not for drug-related activity. The trial court excluded his testimony.

On January 16, 2009, the jury found Tillett guilty as charged. The same jury also entered a unanimous special verdict finding that Tillett violated both alternative statutory means for the charged crime—that she knowingly maintained a place people resorted to for using controlled substances *and* that she knowingly maintained a place for keeping or selling controlled substances. RCW 69.50.402(1)(f). On January 23, 2009, the trial court sentenced Tillett, who had an offender score of 3, to 25 months confinement and 9 to 12 months of community custody. Tillett filed a timely appeal.

ANALYSIS

Timely Trial Rights

In her SAG, Tillett argues that her timely trial rights were violated. We hold that Tillett failed to preserve this issue for our review. Parties must make objections to the timeliness of a trial date within 10 days of receiving notice of their trial date. CrR 3.3(d)(3). Parties who fail, for any reason, to move for a trial date in accord with their CrR 3.3 timely trial rights lose the right to later make an objection on these grounds. CrR 3.3(d)(3). The record presented for

review contains no objection to the timeliness of the trial. Therefore, Tillett has failed to preserve a challenge to the timeliness of her trial.⁷

Evidence Admitted at Trial

In her SAG, Tillett contends that the trial court improperly admitted evidence of McShepherd's drug sales because she had no knowledge of them. But Swedberg testified that Tillett was present and aware of each of the controlled buys. Tillett challenges Swedberg's credibility. We do not review credibility determinations on appeal. *State v. Camarillo*, 115 Wn.2d 60, 71, 794 P.2d 850 (1990). The trial court did not err in admitting evidence of Tillett's knowledge of drug sales in her home to prove that she maintained a drug house in violation of RCW 69.50.402(1)(f).

Sufficiency of Evidence

Tillett challenges the sufficiency of the evidence supporting each ground for her conviction, arguing that the State failed to present evidence that (1) anyone other than residents of the home resorted to it to use drugs and (2) Tillett could not have had a substantial purpose of maintaining the home for illegal drug activity because "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." Br. of Appellant at 18. We disagree.

Evidence is sufficient to support a conviction if, viewed in the light most favorable to the

⁷ Tillett attempts to challenge the effective assistance of her counsel for failure to raise timely trial issues. To establish ineffective assistance of counsel, Tillett must show that (1) her counsel's performance was deficient and (2) the deficient performance resulted in prejudice. *Strickland v. Washington*, 466 U.S. 668, 687, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984); *State v. McFarland*, 127 Wn.2d 322, 334-35, 899 P.2d 1251 (1995). Tillett's ineffective assistance of counsel claim involves matters outside the record that we cannot address in a direct appeal. *McFarland*, 127 Wn.2d at 335, 338 n.5.

State, it permits any rational trier of fact to find the essential elements of the crime 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 reasonable inferences that a trier of fact can draw from that evidence. *Salinas*, 119 Wn.2d at 201. Credibility determinations are for the trier of fact and are not subject to review. *Camarillo*, 115 Wn.2d at 71. Circumstantial evidence is no less reliable than direct evidence, and "specific criminal intent of the accused may be inferred from the conduct where it is plainly indicated as a matter of logical probability." *State v. Delmarter*, 94 Wn.2d 634, 638, 618 P.2d 99 (1980). The trier of fact is the sole and exclusive judge of the evidence. *State v. Bencivenga*, 137 Wn.2d 703, 709, 974 P.2d 832 (1999). The role as the reviewing court is not to re-weigh the evidence and substitute our judgment for that of the jury. *State v. Green*, 94 Wn.2d 216, 221, 616 P.2d 628 (1980). Instead, we defer to the trier of fact's resolution of conflicting testimony, evaluation of witness credibility, and decisions regarding the persuasiveness of evidence. *State v. Walton*, 64 Wn. App. 410, 415-16, 824 P.2d 533, *review denied*, 119 Wn.2d 1011 (1992).

In order to prove a violation of Washington's "drug house" statute, the State must show that Tillett knowingly kept or maintained a "store, shop, warehouse, dwelling, building . . . or other structure or place, which is [1] resorted to by persons using controlled substances . . . for the purpose of using these substances, *or* [2] which is used for keeping or selling them in violation of this chapter." RCW 69.50.402(1)(f) (emphasis added). Additionally, the State must provide "some evidence that the drug activity is of a continuing and recurring character; and [] that a substantial purpose of maintaining the premises is for the illegal drug activity." *State v. Ceglowski*, 103 Wn. App. 346, 352-53, 12 P.3d 160 (2000).

Here, the evidence set out above sufficiently establishes that Tillett knowingly maintained a place that people resorted to for using drugs. The only known residents of the home during the summer of 2008 were the Tilletts, McShepherd, and Swedberg. Swedberg testified that when she lived at Tillett's home, they sometimes did drugs together at the house with other people. Tillett's challenge to the credibility of this testimony is not subject to appellate review. *Camarillo*, 115 Wn.2d at 71.

In addition, Tillett's reliance on *State v. Fernandez*, 89 Wn. App. 292, 948 P.2d 872 (1997), is misplaced. Fernandez's drug house conviction was overturned because there was no evidence that people *other than residents* used drugs in the home. *Fernandez*, 89 Wn. App. at 299-300. Here, after Swedberg no longer lived in the house, Tillett suggested that they use drugs together in the house. In addition, the State presented evidence that, during the second controlled buy, people other than the residents and former residents used drugs in Tillett's home.

The evidence also established that Tillett knowingly maintained a place for keeping or selling drugs. Swedberg testified that when she lived at the home, drugs were sold there "all the time" and that she witnessed more than 15 different drug sales at the home. 3 RP at 244. Tillett's claim that she had no knowledge of the extent of McShepherd's drug activities is belied by testimony that she participated in both of the controlled buys; in the first, by taking Swedberg to McShepherd's room and in the second, by allowing McShepherd to sell drugs from her bedroom. Further, Tillett entered McShepherd's room with a pipe after the first controlled buy and asked Swedberg if she wanted to smoke the drugs that she had just purchased. Thus, the evidence presented established that Tillett knew that the purpose of Swedberg's visits were drug deals. From this evidence, a jury could reasonably infer that Tillett knew McShepherd kept and sold

drugs in her home. This evidence also established that the drug activity in Tillett's home was of a recurring or continual nature. At a minimum, the record demonstrates that Tillett knowingly allowed people to buy and use drugs in her home.

Finally, Tillett contends that the State failed to prove that a substantial purpose for her maintaining her home was to use, keep, or sell drugs. Tillett appears to argue that she maintained her home as a residence and an auto parts business and that, therefore, she could not have had a substantial purpose of maintaining the home for illicit drug activity. But "a substantial purpose" is not synonymous with "sole purpose" and an individual can have more than one substantial reason for maintaining a premise. Put differently, one substantial purpose does not preclude other substantial purposes. *See Ceglowski*, 103 Wn. App. at 352-53 (holding that one of the elements of the crime of maintaining a premise for unlawfully keeping or selling controlled substances is "that a substantial purpose of maintaining the premises is for the illegal drug activity") (emphasis added). Evidence is sufficient to prove maintaining a drug house charge if it establishes that the home was maintained for *any reoccurring illegal drug activity*, including using or selling. *See Ceglowski*, 103 Wn. App. at 353. Here, the evidence is overwhelming that at least one of Tillett's purposes for maintaining her home was for illegal drug activity. Drug deals regularly occurred at her home, Tillett frequently ingested drugs with residents and other people in the home, and drug paraphernalia was located throughout the house including common areas such as the kitchen and living room. On the evidence presented, any rational jury could find beyond a reasonable doubt that Tillett maintained a drug house in violation of RCW 69.50.402(1)(f) under either of the statute's alternative means. Substantial evidence supports the jury's guilty verdict.

Witness Exclusion

Related to her challenge to the sufficiency of the evidence, Tillett challenges the trial court's exclusion of her father-in-law's testimony that he ran an auto parts business in her garage. She argues that the testimony was necessary to her defense that her purpose for maintaining her home was residential and business related and not for drug activity. As discussed above, the use of the garage for a legitimate purpose does not preclude use of the house for illegal drug activity. We hold that the trial court did not abuse its discretion when it excluded this irrelevant testimony.

We review a trial court's decision to admit or refuse evidence under an abuse of discretion standard. *State v. Powell*, 126 Wn.2d 244, 258, 893 P.2d 615 (1995). Abuse occurs when the trial court's discretion is "manifestly unreasonable, or exercised on untenable grounds, or for untenable reasons." *State ex rel. Carroll v. Junker*, 79 Wn.2d 12, 26, 482 P.2d 775 (1971). A defendant has the right to present testimony and call material witnesses to present a defense. *State v. Smith*, 101 Wn.2d 36, 41, 677 P.2d 100 (1984) (citing *Washington v. Texas*, 388 U.S. 14, 23, 87 S. Ct. 1920, 18 L. Ed. 2d 1019 (1967)). A defendant does not have a constitutional right to present irrelevant evidence and even relevant evidence can be excluded if it is overly prejudicial. *State v. Hudlow*, 99 Wn.2d 1, 15, 659 P.2d 514 (1983) (citing *Washington v. Texas*, 388 U.S. at 16). Relevant evidence is any evidence that makes the existence of any consequential fact more or less probable than it would be without the evidence. ER 401.

Tillett asserts that her father-in-law's testimony that he operated an auto parts business in the garage shows that her purpose for maintaining her home was residential and business related rather than for illicit drug purposes. As demonstrated above, an individual can have multiple substantial purposes for maintaining a particular premise and the existence of one purpose does

not exclude other simultaneous purposes. Thus, even if Tillett proved that her father sold auto parts from the garage, such proof would not negate evidence that Tillett, along with her residents and guests, used and sold drugs in the main residence. Accordingly, Tillett's father-in-law's testimony was not evidence that makes the existence of any consequential fact more or less probable than it would be without the evidence. The testimony was irrelevant and the trial court properly excluded it. ER 402.

Moreover, Tillett's father-in-law's testimony would have been cumulative of other testimony presented at trial. Both Detective Polonsky and Swedberg testified that a business existed in the attached garage. The State's case focused on the activities conducted inside the house—drug use and sales. There was no trial testimony that the police searched the garage, and no testimony established that legitimate business activities occurred in the residential part of the house which was the structure or place that the State alleged Tillett knowingly maintained as a drug house.⁸ Accordingly, evidence of business activities conducted in the garage was not relevant to charges that Tillett's house was a drug house. Because the testimony is not relevant, its exclusion could not have prejudiced Tillett's case. The trial court's decision to exclude irrelevant cumulative testimony did not deny Tillett's right to present a defense to the crime charged.

⁸ Outside the presence of the jury, Tillett's attorney asserted that the police did search the garage but acknowledged that no drug-related evidence was found there and, thus, that any error related to the search of it was irrelevant.

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Tillett's timely trial rights were not violated, the trial court's evidentiary rulings were proper, and substantial evidence supports the jury verdict. Accordingly, we affirm.

A majority of the panel having determined that this opinion will not be printed in the Washington Appellate Reports, but will be filed for public record pursuant to RCW 2.06.040, it is so ordered.

QUINN-BRINTNALL, J.

We concur:

BRIDGEWATER, P.J.

ARMSTRONG, J.