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NO. 63367-8-I

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

**REC'D**  
FEB 01 2010  
King County Prosecutor  
Appellate Unit

STATE OF WASHINGTON,

Respondent,

v.

RONALD WAYNE MILLER,

Appellant.

**REC'D**  
MAR 01 2010  
King County Prosecutor  
Appellate Unit

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

The Honorable Steven Gonzalez, Judge

REPLY BRIEF OF APPELLANT

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A. ARGUMENT IN REPLY

1. THE DETECTIVE'S TESTIMONY HE RULED OUT THE ONLY OTHER SUSPECT WAS AN IMPROPER OPINION ON GUILT AND CREDIBILITY OF THE STATE'S WITNESS.

The victim of the shooting, Arthur Shaw, initially named Jamell Webb as his assailant. 8RP 153. Later, he changed his mind and identified appellant Miller. 9RP 159. The detective testified he ruled out Jamell Webb, who was the only other suspect in this case, thereby clearly indicating his personal opinion that Miller was guilty and Shaw was telling the truth in his second identification as opposed to his first. 8RP 103.

In response, the State makes two utterly inconsistent arguments. First, the State argues this opinion was not improper because the detective was relying only on Shaw's retraction of his original identification, and thus was not implying the existence of any other investigation, information, or records that were not presented to the jury. Brief of Respondent at 10. Next, the State argues this was not an improper opinion on Shaw's credibility as a witness because 1) the detective did not accept Shaw's identification of Miller as true and 2) one need not infer from the detective's testimony that he believed Shaw's retraction of his original identification. Brief of Respondent at 15, 19. In essence, the State is arguing the detective stopped all investigation of Webb as a suspect on Shaw's say-so, but that this does

not imply he believed Shaw. The court should reject these inconsistent arguments.

Next, the State argues this opinion testimony was not problematic because Miller also relied on Shaw's conflicting identifications. Brief of Respondent at 17. This is irrelevant. The problem is not the emphasis on Shaw's conflicting identifications or his later retraction. The problem is the detective's assertion that he ruled out Webb as a suspect, which was tantamount to declaring his belief that Miller, the only other suspect, was guilty.

The State's attempt to distinguish State v. Dolan, 118 Wn. App. 323, 73 P.3d 1011 (2003) is a red herring. The State argues simply that in Dolan, the facts of the case narrowed the possible universe of suspects down to two. Brief of Respondent at 19. The same is true here, simply for different reasons based on different facts.

The State also relies on several cases holding that testimony regarding rule out of other suspects is permissible. Brief of Respondent at 19. However, the law enforcement witnesses in these cases explained the reasons for the rule out. Taylor v. State, 689 N.E.2d 699, 706 (Ind. 1997) (officer explained four-month investigation of other suspect unearthed no evidence undermining his alibi); State v. Link, 25 S.W.3d 136, 145, (Mo. 2000) (officer explained five other suspects were ruled out because they had

alibis that checked out); State v. Baker, 338 N.C. 526, 555, 451 S.E.2d 574 (1994) (officer explained other potential suspect had no motive). Here, there was no stated reason for the rule-out. 8RP 103. It may be correct, as the state points out, that the implied reason was Shaw's retraction of his identification. However, this reason does not ameliorate the situation. It merely adds an improper opinion on witness credibility to an improper opinion on guilt.

2. PROSECUTORIAL MISCONDUCT VIOLATED MILLER'S RIGHT TO A FAIR TRIAL.

The State appears to concede it was improper for the prosecutor to argue in closing that "your job as jurors is to search for the truth, not to search for reasonable doubt, but to search for the truth." 13RP 79; Brief of Respondent at 35-36, 46. Nevertheless, the State argues this error does not require reversal under State v. Anderson, 153 Wn. App. 417, 220 P.3d 1273 (2009). Brief of Respondent at 36. But the impact of this argument on the jury's understanding of the burden of proof was far greater than in Anderson.

In Anderson, the prosecutor repeatedly exhorted the jury to "declare the truth." 153 Wn. App. at 429. The court declared this argument was improper because the jury's job is not to "solve a case" or declare what happened; it is to determine whether the State has proved its case beyond a reasonable doubt. Id. However, the error did not require reversal because

the court found no substantial likelihood the argument affected the verdict in that case. Id.

Here, the prosecutor's comments went beyond asking the jury to declare the truth. The argument that the jury's job was to "search for the truth, not to search for reasonable doubt," not only misdirected the jury's attention away from the reasonable doubt standard, but also implied that standard was inimical to truth. This was flagrant misconduct incurable by instruction.

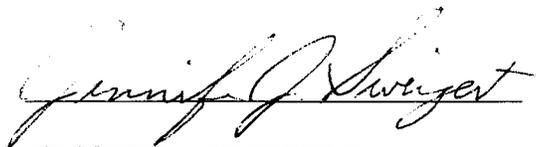
D. CONCLUSION

For the foregoing reasons and for the reasons stated in the opening Brief of Appellant, Miller requests this Court reverse his convictions.

DATED this 1<sup>st</sup> day of March, 2010.

Respectfully submitted,

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RONALD MILLER,	)	
	)	
Appellant.	)	

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**DECLARATION OF SERVICE**

I, PATRICK MAYOVSKY, DECLARE UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOLLOWING IS TRUE AND CORRECT:

THAT ON THE 1<sup>ST</sup> DAY OF MARCH, 2010, I CAUSED A TRUE AND CORRECT COPY OF THE **BRIEF OF APPELLANT** TO BE SERVED ON THE PARTY / PARTIES DESIGNATED BELOW BY DEPOSITING SAID DOCUMENT IN THE UNITED STATES MAIL.

[X] RONALD MILLER  
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SHELTON, WA 98584

**SIGNED** IN SEATTLE WASHINGTON, THIS 1<sup>ST</sup> DAY OF MARCH, 2010.

x *Patrick Mayovsky*