

NO. 35207-9-II

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

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STATE OF WASHINGTON,

Respondent,

v.

NATHANIEL MILES,

Appellant.

FILED  
COURT OF APPEALS  
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STATE OF WASHINGTON  
PIERCE COUNTY

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

The Honorable Stephanie A. Arend, Judge

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OPENING BRIEF OF APPELLANT

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**A. ASSIGNMENTS OF ERROR**

1. The prosecutor committed misconduct by conducting cross-examination which assumed a factual predicate which was never established at trial.

2. The prosecutor committed misconduct in closing argument by telling the jurors, in effect, that in order to acquit Mr. Miles, they had to believe that the state's witnesses were "not correct".

**B. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR**

1. Did the prosecutor's misconduct in asking questions on cross-examination as if he had specific documentation that supported his questions and then failing to introduce that documentation in rebuttal, deny Mr. Miles his state and federal constitutional rights to due process of law and confrontation of witnesses?

2. Was the prosecutor's cross-examination not impeachment, but incompetent rebuttal evidence which deprived Mr. Miles of his right to confront the witnesses against him?

3. Did the prosecutor's misconduct in arguing to the jury that the question for them was whether to believe the state's witnesses or the defense

witnesses a misstatement of the burden of proof and a denial of a fair trial?

**C. STATEMENT OF THE CASE**

**1. Procedural history**

The Pierce County Prosecutor's Office charged Nathaniel Miles with unlawful delivery of a controlled substance. CP 1-2. By amended information, the state added a school zone enhancement. CP 3-4.

Mr. Miles was convicted as charged by jury verdict after a trial before the Honorable Stephanie A. Arend. CP 24, 25.

On July 14, 2006, the court entered judgment and sentence, imposing a Special Drug Offender Sentencing Alternative (DOSA). CP 30-43. Mr. Miles subsequently filed a timely notice of appeal. CP 44-56.

**2. Trial evidence**

The charges against Mr. Miles arose from a delivery of cocaine to a confidential informant on May 27, 2004. RP 43. On that day, confidential informant Ronald Wilmoth contacted a person he said was Mr. Miles and arranged to purchase cocaine from the person he contacted at the corner of 34th Street

and McKinley Avenue in Tacoma, Washington. RP 43. The exchange was conducted as a controlled buy which took place in a car.<sup>1</sup> RP 43-45. Wilmoth was searched for drugs and money shortly before entering the car and after leaving it. RP 43-44, 46-47, 58..

Unfortunately, even though there were a number of officers watching Wilmoth enter and leave the car and even though the police audiotaped and videotaped portions of the activity, none of the officers were able to see who was driving the car or how many people were in the car. RP 55-63, 70, 75-80. The car was not stopped and no evidence was introduced connecting the car to Mr. Miles except by Wilmoth. RP 44-45, 71, 80. No buy money was recovered. RP 69.

The issue for the jury was who was in the car.

Ronald Wilmoth testified that he was 37 years old, a long-time drug addict who had been convicted of two crimes of dishonesty, and a person who worked as a confidential informant for money. RP 39-40,

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<sup>1</sup> Forensic scientist Maureena Dudschus testified that the substance recovered tested positive for cocaine. RP 88. Maude Kelleher, routing specialist for the Tacoma School District, testified that the corner of 34th and McKinley Avenue was within 1000 feet of a school bus stop. RP 26-28.

42, 56-57. On cross-examination, Mr. Wilmoth admitted that he had ingested drugs a week or less before the transaction. RP 49. According to Mr. Wilmoth, he had known Mr. Miles for most of his life and their families visited with one another at family functions and holidays. RP 41.

Kawana Bell testified as a defense witness that she was the care provider for Mr. Miles. RP 97-98. Ms. Bell cared for Mr. Miles seven days a week from 2001 or 2002 to 2005 because of injuries he sustained when he was shot. RP 97-98. Mr. Miles was under medication and could not drive or leave the house on his own during this time. RP 98.

Mr. Miles testified that he had never met Mr. Wilmoth before and that his family lived in Houston, Texas, not Tacoma. RP 110-111. He described the injuries he received on June 12, 2002 when he had been shot three times; the shooting had left him unable to drive. RP 111. Mr. Miles had been a prize-fighter before his injury. RP 104, 113.

The prosecutor cross-examined both Ms. Bell and Mr. Mills about prize fights the prosecutor implied he was aware of Mr. Mill's having participated in after he was shot.

The prosecutor asked Ms. Bell:

Q. Okay. So based on his physical condition during that time from 2001 to 2005, he was in no condition to box, for instance?

A. No.

Q. Okay. So there's no way on August 13th, 2004, that he could have fought Neil Stevens at the Angelston Convention Center in Ogden, Utah?

A. Neil Stevens?

Q. There's no way he could have gone by a 12-round decision where it went to the judge's scorecard after 12 rounds? What I'm asking is Mr. Miles, in the condition that you observed him in, he couldn't have gone 12 rounds in a boxing fight in 2004, right?

A. No.

. . . .

Q. There's no way that he could have fought Peter O'Cain February 4th of 2005 in Winnipeg? He would have been in no physical condition, right?

A. Not to my knowledge. I don't know.

Q. Okay. Especially--that one went 12 rounds as well?

RP 107-108.

The prosecutor asked Mr. Miles:

Q. What division were you fighting in?

A. Cruiser weight.

Q. Cruiser weight. You say your date of birth is June 12th of '65?

A. Correct.

Q. Tell me if this profile describes you accurately: Sex, male; that's obvious. Nationality, you're a United States American, U.S. American?

A. Yes, sir.

Q. Nickname "Tex." . . .

Q. Okay. But if I were to find nine fights after you fought Ronnie Warren at the Emerald Queen Casino, those are all mistaken.

. . . .

A. They have to be except probably one fight off Ronnie, I think.

RP 118-119. The prosecutor continued suggesting other prize fights. RP 119-119.

In rebuttal, Detective John Ringer testified that he knew Mr. Miles and had seen him "probably on ten different occasions, talked to him on probably four or five different occasions, several times outside of Superior Court." RP 124. According to Detective Ringer, Mr. Miles had been "either in traffic or out and about."<sup>2</sup> RP 124.

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<sup>2</sup> Mr. Miles made many court appearances during the lengthy period of time between the filing of the information in September 2005 and trial in May 2006.

### 3. The prosecutor's closing argument

In closing the prosecutor argued to the jurors that they had heard two "mutually exclusive" versions of events, a version "proffered by the six witnesses who appeared on behalf of the state and the physical evidence introduced" and the version "offered by the defendant and his witnesses." RP 152.

What do I mean by that? To simplify it as much as possible, if one is true, the other cannot be, as I'm sure you all know. If the State's witnesses are correct, the defense witnesses could not be and vice versa.

RP 152.

[I]n this case you have no choice because you have two conflicting versions of events. One is not being candid with you.

RP 154.

#### D. ARGUMENT

##### 1. THE PROSECUTOR'S MISCONDUCT IN CONDUCTING IMPROPER IMPEACHMENT BY CONTRADICTION AND INNUENDO DENIED MR. MILES HIS STATE AND FEDERAL CONSTITUTIONAL RIGHTS TO DUE PROCESS AND CONFRONTATION.

The prosecutor cross-examined both Kawana Bell and Mr. Miles as if the prosecutor were looking at very specific documentation that established details of prize fights Mr. Miles participated in during the period of time he and Ms. Bell said he was

incapacitated. The prosecutor implied that he had a profile that fit Mr. Miles and that he knew from the records he had, the number of rounds, the opponent and the time and place of each fight he alluded to. Then the prosecutor failed to introduce any evidence supporting his questions. This was misconduct. Without evidentiary support, the prosecutor was improperly impeaching by innuendo and by contradiction. Impeachment by innuendo is never proper. Impeachment by contradiction is not really impeachment, but rather rebuttal evidence. As such it must be independently competent. In either case, if the impeachment is not supported by extrinsic evidence introduced at trial, it is a denial of the right to confrontation under the Sixth Amendment and the state constitution and to a fair trial.

A prosecutor may not ask questions which assume a prejudicial factual predicate, then fail to prove up that predicate. Washington courts have uniformly condemned such efforts as impeachment by innuendo. State v. Beard, 74 Wn.2d 335, 338-339, 444 P.2d 651 (1968) (impeachment with alleged prior convictions during cross examination improper where there was no proof of the convictions), State v. Goodwin, 29

Wn.2d 276, 186 P.2d 935 (1947) (impeachment with unsubstantiated allegations that charges had been brought against the defense witness was improper); State v. Yoakum, 37 Wn.2d 137, 144, 222 P.2d 181 (1950) (improper to cross-examine about a transcript of a conversation with the defendant and a person wearing a wire where the examination was not followed by rebuttal introducing the transcript), State v. Lopez, 95 Wn. App. 842, 855, 980 P.2d 224 (1999) (improper to use impeachment to submit evidence that is otherwise unavailable), State v. Avendano-Lopez, 79 Wn. App. 706, 904 P.2d 324 (1995), rev. denied, 129 Wn.2d 1007 (1996) (improper to question the defendant about his status as an illegal alien), State v. Babich, 68 Wn. App. 438, 443-444, 842 P.2d 1053, rev. denied, 121 Wn.2d 1015 (1993) (improper to impeach a witness with prior inconsistent statements without proving the prior statements through a qualified witness on rebuttal), and cases cited in Babich: United States v. Bohle, 445 F.2d 54, 74 (9th Cir. 1971) ("[T]he duty to follow up foundation with evidence is breached at the risk of reversal of any tainted victory"), United States v. Silverstein, 737 F.2d 864, 868

(10th Cir. 1984) ("[A] prosecutor may not use impeachment as a guise for submitting to the jury substantive evidence that is otherwise unavailable").

In Yoakum, the court noted that the unfairness and prejudice was that the prosecutor's questions left the jurors with impression "that in the mind of the county prosecutor the witness had made the statements inquired of, without any testimony except the questions of the county prosecutor." Yoakum, 37 Wn.2d at 141 (quoting Thurmond v. State, 57 Okla. Crim. 388, 48 P.2d 845 (1935)). The Yoakum court concluded:

A person being tried on a criminal charge can be convicted only by evidence, not by innuendo. The effect of the cross-examination as conducted by the deputy prosecutor was to place before the jury, as evidence, certain questions and answers purportedly given in the office of the chief of police, without the sworn testimony of any witness. This procedure, followed with such persistence and apparent show of authenticity, was prejudicial to the rights of appellant.

Yoakum, at 144.

In Babich, the court explained that if a defendant admits a prior inconsistent statement during cross-examination, extrinsic evidence of a statement is not allowed. But, if the defendant or

witness denies the prior statement, unless the issue is collateral, it is error not to introduce extrinsic evidence to establish the prior inconsistent statement. Babich, 68 Wn. App. at 443.

The Babich court quoted Professor Tegland:

[I]f foundation questions are asked and the witness denies making the inconsistent statement, there may be error under particular circumstances if the cross-examiner does not later introduce extrinsic evidence of the statement. If the rule were otherwise, cross-examination could be abused by making insinuations about statements that the witness did not in fact make, and the jury could be misled into thinking that the statements allegedly attributable to the witness were evidence.

Babich, at 443-444 (citing 5A. K. Tegland, Wash. Prac., Evidence § 258(2), at 316 (3d ed. 1989)).

In Lopez, the court held "[d]eciding if the questions are inappropriate requires examining whether the focus of the questioning is to impart evidence within the prosecutor's personal knowledge without the prosecutor formally testifying as a witness." Lopez, 95 Wn. App. at 855 (citing 5A K. Tegland, Wash. Prac., Evidence, § 258 at 125 (3d ed. Supp. 1998-1999)). The facts of this case clearly meet the Lopez test. The prosecutor was imparting to the jury evidence allegedly known personally to

him without the prosecutor actually formally testifying.

"Improper impeachment of witnesses by referring to extrinsic evidence never introduced may rise to a violation of the right to confrontation." Lopez, 95 Wn. App. at 855, Babich, 68 Wn. App. at 445-446. Given this importance and specificity of the evidence improperly put before the jury by the prosecutor's cross-examination, which Mr. Miles had no opportunity to confront, he was denied his rights to confrontation under the state and federal constitutions.

Here, the prosecutor's cross-examination did not involve impeachment with prior convictions under ER 609, impeachment with prior inconsistent statements under ER 613, or character for truthfulness under ER 608. The "impeachment" was actually impeachment by contradiction, which is rebuttal evidence and not impeachment at all. State v. Hubbard, 103 Wn.2d 570, 576, 693 P.2d 718 (1985). As rebuttal evidence, it is not within any exception to the hearsay rule and must be independently competent. Hubbard, 103 Wn.2d at 576; Anderson v.

Dobro, 63 Wn.2d 923, 389 P.2d 885 (1964); State v. Argren, 28 Wn. App. 1, 622 P.2d 388 (1982).

In Hubbard, the court held that because impeachment by contradiction must be independently competent, it was improper to allow a witness to be impeached with an un-Mirandized confession by the defendant, even if the defendant could have been impeached with his statements had he testified inconsistently with his confession at trial. Hubbard, 103 Wn.2d at 577-578. To impeach another witness with the defendant's statements would be merely to contradict the witness, not to impeach the witness.

Here, the state did not even seek to admit the hearsay evidence. In effect, the prosecutor was providing evidence which had not been admitted at trial or shown to be admissible.

The misconduct was serious in this case and constituted a denial of the constitutional due process right to a trial based on the properly-admitted evidence and of the constitutional right to confrontation of witnesses. There was no way that Mr. Miles could confront the witnesses who provided

the evidence allegedly about him and his prize-fighting bouts.

The denial of confrontation can be raised for the first time on appeal because it is a manifest constitutional error that has "practical and identifiable consequences in the trial of the case." State v. Lynn, 67 Wn. App. 339, 345, 835 P.2d 251 (1992). Denial of the right to confrontation is a constitutional error; the error is manifest; and, under clear and well-established authority, Mr. Miles should be entitled to prevail on the merits. Lynn, at 354. The error was not harmless.

As constitutional error it was presumptively prejudicial and not harmless beyond a reasonable doubt. Chapman v. California, 386 U.S. 18, 87 S. Ct. 824, 17 L. Ed. 2d 705 (1967). While the state made a strong case that Wilmoth purchased drugs from *someone*, the case establishing that Mr. Miles was the seller of the drugs was weak. Wilmoth was the only person who identified Mr. Miles as the person who sold him the drugs. The state was unable even to associate Mr. Miles with the car involved in the transaction. Wilmoth was clearly an unreliable witness; he had past convictions for crimes of

dishonesty, had an on-going drug addiction and worked as an informant for pay. The fact that he had to be searched before and after transactions showed that the police themselves found him inherently untrustworthy.

Most importantly, where a defendant testifies in his own behalf on disputed matters and gives a plausible explanation which is facially believable, an appellate court cannot find beyond a reasonable doubt that the error was harmless; it cannot find that a reasonable jury would have found the defendant guilty in the absence of the constitutional error. State v. Heller, 58 Wn. App. 414, 421, 793 P.2d 461 (1990); State v. Gutierrez, 50 Wn. App. 583, 591, 749 P.2d 213 (1988). Here, Mr. Miles testified in his own behalf and his testimony was supported by the testimony of his care-giver. Had the prosecutor not intimated that he had evidence establishing that Mr. Miles continued as a prize fighter, the jury might well have had a reasonable doubt about Mr. Miles' guilt.

The prosecutor's misconduct was not harmless error and requires reversal of Mr. Miles' conviction.

**2. THE PROSECUTOR'S MISCONDUCT IN CLOSING ARGUMENT WAS FLAGRANT AND ILL-INTENTIONED AND DENIED MR. MILES A FAIR TRIAL.**

In closing the prosecutor told the jurors that the truth of the testimony of the state's witnesses and the defense witnesses were "mutually exclusive," that the state's witnesses and the defense witness could not be both "correct," and that the jurors had to choose to believe one version or the other because one set of witnesses "is not being candid with you." RP 152, 154. This was misconduct.

As the court held in State v. Fleming, 83 Wn. App. 209, 213, 921 P.2d 1076 (1996), review denied, 131 Wn.2d 1018 (1997), it is well-established misconduct for the prosecutor to argue "that in order to acquit a defendant, the jurors must find that the State's witnesses are either lying or mistaken." (citing State v. Casteneda-Perez, 61 Wn. App. 354, 362-363, 810 P.2d 74, review denied, 118 Wn.2d 1007 (1991), State v. Wright, 76 Wn. App. 811, 826, 888 P.2d 1214, review denied, 127 Wn.2d 1010 (1995), State v. Barrow, 60 Wn. App. 869, 874-875, 809 P.2d 209, review denied, 118 Wn.2d 1007 (1991)).

The prosecutor's argument misstated the law and misrepresented both the role of the jury and the burden of proof. The jury would not have had to find that D.S.

was mistaken or lying in order to acquit: instead, it was *required* to acquit *unless* it had an abiding conviction in the truth of her testimony. Thus, if the jury were unsure whether D.S. was telling the truth, or unsure of her ability to accurately recall and recount what happened...it was required to acquit.

Fleming, 83 Wn. App. at 213.

Because such misconduct is so well-established, engaging in it is flagrant and ill-intentioned and can be considered on appeal even if not objected to at trial. Fleming, at 214.

The error is not that the prosecutor told the jury that it should consider the relative credibility of the state and defense witnesses. The error was in telling the jury that their job was to choose which set of witnesses to believe. This shifted the burden of proof. The job of the jury was to presume Mr. Miles innocent, and acquit him, unless the state's evidence overcame every reasonable doubt.

Here, the officer witnesses did not place Mr. Miles in the car or even associate the car with him. No independent physical evidence linked him to the drug transaction. The jurors might well have had a reasonable doubt about Wilmoth's memory, the accuracy of his identification of Mr. Miles or his

motives. They might have had these doubts even if they were not convinced that the defense witnesses were totally candid.

The prosecutor committed misconduct in closing argument; and, because it should be deemed flagrant and ill-intentioned and created unfair prejudice, Mr. Miles' conviction should be reversed.

**E. CONCLUSION**

Mr. Miles respectfully submits that his conviction should be reversed and his case remanded for retrial.

DATED this 26<sup>th</sup> day of December, 2006

Respectfully submitted,

  
Rita J. Griffith, WSBA #14360  
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CERTIFICATE OF SERVICE

I certify that on the 26<sup>th</sup> day of December, 2006, I caused a true and correct copy of Reply Brief of Appellant to be served on the following via prepaid first class mail:

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