

NO. 35207-9-II

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

STATE OF WASHINGTON,

Respondent,

v.

NATHANIEL MILES,

Appellant.

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

The Honorable Stephanie A. Arend, Judge

REPLY BRIEF OF APPELLANT

Rita J. Griffith
Attorney for Appellant

1304 N.E. 45th Street, #205
Seattle, WA 98105
(206) 547-1742

STATE OF WASHINGTON
BY WJ
JUL 17 2009

TABLE OF CONTENTS

	Page
A. RESTATEMENT OF FACTS	1
B. ARGUMENT IN REPLY	1
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	1
2. THE PROSECUTOR'S MISCONDUCT IN CLOSING ARGUMENT WAS FLAGRANT AND ILL-INTENTIONED AND DENIED MR. MILES A FAIR TRIAL	5
C. CONCLUSION	7

TABLE OF AUTHORITIES

Page

WASHINGTON CASES

Anderson v. Dobro,
63 Wn.2d 923, 389 P.2d 885 (1964) 4

State v. Argren,
28 Wn. App. 1, 622 P.2d 388 (1982) 5

State v. Babich,
68 Wn. App. 438, 842 P.2d 324 (12995),
review denied, 121 Wn.2d 1015 (1993) 4

State v. Barrow,
60 Wn. App. 869, 809 P.2d 209,
review denied, 118 Wn.2d 1007 (1991) 6

State v. Casteneda-Perez,
61 Wn. App. 354, 810 P.2d 74,
review denied, 118 Wn.2d 1007 (1991) 6

State v. Fleming,
83 Wn. App. 209, 921 P.2d 1076 (1996),
review denied, 131 Wn.2d 1018 (1997) 5

State v. Hubbard,
103 Wn.2d 570, 693 P.2d 718 (1985) 4

State v. Lopez,
95 Wn. App. 842, 980 P.2d 224 (1999) 4

State v. Wright,
76 Wn. App. 811, 888 P.2d 1214,
review denied, 127 Wn.2d 1010 (1995) 6

State v. Yoakum,
37 Wn.2d 137, 222 P.2d 181 (1950) 3, 4

FEDERAL CASES

United States v. Katsougrakis,
715 F.2d 769, 779 (2nd Cir. 1983),
cert. denied, 464 U.S. 1040 (1984) 2

TABLE OF AUTHORITIES -- cont'd

	Page
<u>United States v. Martel</u> , 792 F.2d 630, 636 (7th Cir. 1986)	2
 <u>OTHER JURISDICTIONS</u>	
<u>Thurmond v. State</u> , 57 Okla. Crim. 388, 48 P.2d 845 (1935)	*
 <u>RULES, STATUTES AND OTHERS</u>	
Sixth Amendment, U.S. Constitution	2

A. RESTATEMENT OF FACTS

The only evidence at trial that Mr. Miles delivered cocaine on May 27, 2004, was the testimony of confidential informant Ronald Wilmoth. RP 43. Even though a number of officers were watching and portions of the exchange were audiotaped and videotaped, none of the officers or the taping was able to identify Mr. Miles as the person in the car. RP 55-63, 70, 75-80. The police did not independently link Mr. Miles to the car and no buy money was recovered. RP 44-45, 69, 71, 80.

Wilmoth was a long-time drug addict who had been convicted of crimes of dishonesty and who worked as a confidential informant for money. RP 39-40. He remained a drug user at the time of the transaction. RP 49.

Mr. Miles denied having ever met Wilmoth before. RP 110-111.

B. ARGUMENT IN REPLY

- 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 Mr. Miles and Kawana Bell 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. RP 107-108, 118-119. The prosecutor did not introduce any evidence supporting his questions.

Mr. Miles's argument on appeal is that without evidentiary support, the prosecutor was improperly impeaching by innuendo and by contradiction and denied him his Sixth Amendment right to confrontation.

In response, the state cites a number of older federal cases which ultimately recognize the proposition advanced by Mr. Miles that "it is error for a party to raise a prejudicial innuendo in cross-examination without a basis in proof." United States v. Martel, 792 F.2d 630, 636 (7th Cir. 1986); United States v. Katsougrakis, 715 F.2d 769, 779 (2nd Cir. 1983), cert. denied, 464 U.S. 1040 (1984) (trial court properly excluded question on cross-

examination of witness if he said two other men had a reputation for being hit men). See Brief of Respondent (BOR) at 7-8.

Similarly, the state quotes from Professor Tegland who ultimately concludes, consistently with Mr. Miles's position, that it is improper for a cross-examiner, who is unable to bring out evidence he believes to be crucial, to remedy the situation "by imparting [his] own personal knowledge to the jury." Tegland, *Washington Practice*, vol. 5 § 103.22 (1999). This is precisely what occurred at trial in Mr. Miles's case.

As in State v. Yoakum, 37 Wn.2d 137, 141, 222 P.2d 181 (1950), the unfairness and prejudice to Mr. Miles was that the prosecutor's questions left the jurors with the clear impression that Mr. Miles had fought in the prize fights listed by the prosecutor "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.

Because the evidence introduced by the prosecutor through his cross-examination went to the heart of Mr. Miles' defense, it was not collateral and constituted a violation of the right to confrontation. State v. Lopez, 95 Wn. App. 842, 855, 980 P.2d 224 (1999); State v. Babich, 68 Wn. App. 438, 445-446, 842 P.2d 324 (12995), review denied, 121 Wn.2d 1015 (1993). There is simply no possibility that the prosecutor did not mean to convey and actually did convey to the jurors that he had specific knowledge about prior fights.

Further, the prosecutor's cross-examination was "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 not shown to 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).

The misconduct was serious in this case and constituted a denial of the constitutional due process right to a trial based on properly-admitted evidence and of the constitutional right to confrontation of witnesses.

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.

In this way, the prosecutor's argument was indistinguishable from the argument in State v. Fleming, 83 Wn. App. 209, 213, 921 P.2d 1076 (1996), review denied, 131 Wn.2d 1018 (1997), where the court held that 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)).

As held in Fleming, the jury need only have been unsure about the testimony of the confidential informant Wilmoth or unsure that he had not been mistaken. 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.

C. CONCLUSION

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

DATED this 7th day of March, 2007.

Respectfully submitted,



Rita J. Griffith, WSBA #14360
Attorney for Appellant

CERTIFICATE OF SERVICE

I certify that on the 7th day of March, 2007, I caused a true and correct copy of Reply Brief of Appellant to be served on the following via prepaid first class mail:

Counsel for the Respondent:

Kathleen Proctor
Office of Prosecuting Attorney
930 Tacoma Ave. S., Rm. 946
Tacoma, Washington 98402-2171

Nathaniel Miles
961489
Stafford Creek Corrections Center
191 Constantine Way
Aberdeen, WA 98520

Rita J. Griffith 3/7/07
Rita J. Griffith DATE at Seattle, WA

STAFFORD CREEK
BY *W* DEPUTY
CERTIFICATE OF SERVICE