NO. 47538-6-II

SUPREME COURT OF THE STATE OF WASHINGTON

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STATE OF WASHINGTON,
Respondent,
vs.
LEO ANDREW FANNON,
Petitioner.

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# PETITION FOR REVIEW

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Leo Andrew Fannon, Petitioner
DOC #906339 LCC EG-SSU
15314 N.E. DOLE VALLEY Rd
YacoLT, WA 98675

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# Table of Authorities

## Federal Cases



## State Cases

## I. IDENTITY OF PETITIONER.

LEO ANDREW FANNON ask this Court to accept review of the decision designated in part II of this motion.

## II. COURT OF APPEALS DECISION.

Petitioner seeks review of the entire decision of the Court of Appeals affirming petitioners conviction and sentence entered in the Superior Court of Washington for Cowlitz County. A copy of the Court of Appeals decision is attached to this Motion.

## III. ISSUES PRESENTED FOR REVIEW

Issue 1.

Was the chain of evidence broken?

Issue 2.

Was Mr. Fannon denied due process?

## IV Statement of Case

The COA inaccurately relied on the authorative narration of seasoned profesional government agents reliability as facts. Mr. Fannon disputes the Limited facts referance in COA decision. Not one thing was introduced in Court that would support or confirm any accusations or elements of the crime. Suspiously the State addresses the Trial Court, noting that none of his detectives could corraberate the other detectives statements. (RP 3, BOA 5 ¶2, SAG 8 ¶2)

The COA inaccurately relied on the authorative narration again as to Miranda rights. There is no supportive evidence of Miranda rights being given, no documentation of sign waiver, no written statements or recordings to confirm as fact. see issues addressed in (BOA 5 ¶1,2, SAG 8-9, Fannons Testimony RP 211, 212 and 326, 327, 329)

The COA inaccurately relied on authorative narration again as officer Hartley did admit to not trying the jacket on Mr. Fannon, but claims other information that would corroborate that, COA 3, BOA 5 ¶1,2, addresses no supportive information was ever introduced in the Trial.

Mr. Fannon has paraLegaL experience and recognizes failure of due process. Mr. Fannon's attorney, Mr. Suryan had no reaction to the violations, so Mr. Fannon addressed the Court personally to identify the extent of seriousness (RP 4, SAG 5,6,7)

Contrary to COA's failure to consider the TriaL Court record (RP 3,4). Mr. Fannon was in fear for his Life and was obvious his attorney was against him and in coLLusion with the State. The judge was addressed by the State over a 3.5 hearing and of secret information. This misconduct and abuse of discretion is evident. Then Mr. Fannon addressed the Court. COA did not give an answer to part 2 of SAG 5 through 9.

The discovery of Detectives with statements of admission was a surprise. Mr. Fannon is not an idiot. Mr. Fannon talked to no one except his attorney. Mr. Fannon feared for his Life and asked the Court, (~~RP 5,6,7~~ R.P. 4, SAG 5,6,7) "It's obvious he's a Liar, but saying that for God sakes he's an officer, I'd be cutting my own throat!" Mr. Fannon also asked, "Why was there not audio and video — if I made such a statement?" (R.P. 4, SAG 6)

Contrary to COA's understanding of facts, the reason Mr. Fannon disputes them is according to the Trial record which is Fact. Mr. Hartley comes in the Court room and sits in the witness seat. When a Leading question from the State directs him to identify this jacket, he points to the defendant fifty feet, half way accross a dim-Lit Court room and he mysteriously see's through the body of Mr. Fannon, he see's through the metal chair, and he see's through the jacket to the Label on the collar, and makes positive identification of a jacket he possessed four and a half months earlier. Contrary to the COA Mr. Fannon does not believe in Super Hero's.

The fact is shown by Trial records that the chain of evidence is broken and the original jacket was not preserved.

Contrary to the decison of COA 14 ¶ 3 of matter being outside the record. Mr. Fannon will clarify the issue with the Trial record as the only facts. Right to fair trial by due process was violated by failure to disclose discovery on the first day of jury trial, which is a violation of discovery, CrR 4.7 and CrR 3.5, 5th Amend., 6th Amend., 14th Amend. (RP 3, 4, SAG 5, 6, 7)

These happenings at first day of trial are evident by Trial record that Mr. Fannon was denied due process of Law. Mr. Fannon had no defense preperation and still no actual written statements to study on through trial. In Laymen terms this was a trial by ambush. It was real evident that the Tribunal was not going to be fair. Just reading the first Four pages of the Trial record without Mr. Fannon addressing the Court, you would think nothing was wrong.

The due process of Trial procedures set forth in the Court Rules guarantees a balance of fairness to protect the innocent. When these processes are broken, then miscarriage of justice is evident.

## V ARGUMENT WHY REVIEW SHOULD BE ACCEPTED

Issue 1. Was the chain of evidence broken?

Mr. Fannon asserts that the Court records abundantly supports that the chain of evidence was broken. The facts support that contrary to the COA decision at COA 13 ¶1 and Facts posted at COA 2,3

Hartley did not preserve the original jacket from the time of arrest and broke the chain of evidence. Mr. Fannon contends it was exculpatory material evidence that would of changed the outcome of the trial. (SAG 1,2,3 ¶1)

Government misconduct in furtherance of justice need not be evil or dishonest; simple mismanagement is sufficient, State v. Kone 165 WnApp 420; also State v. Wilson 149 Wn 2d 1 (2003), State v. Barry 184 WnApp 790 (2014); CrR 8.3(b).

Law enforcement investigatory agencies have duty to preserve material evidence not only for the benefit of the State but for defendant also. State V. James 26 WnApp 522

Issue 2. Was Mr. Fannon denied due process?

Mr. Fannon asserts that the Court records abundantly supports that due process was in fact denied. ① No discovery; ② No pre-trial hearings held before trial; ③ No adaquate counsel for defense; ④ Abuse of discretion is evident; ⑤ Prosecutorial Misconduct by enabling Police's credibility; ⑥ Prosecutor Mischaracterized the Material Evidencesas pointed out in (BOA 9,19) and addressed in Full character in SAG.

Did the COA fail to properly address Mr. Fannon's issues in section 2. SAG pages 5→9? Was Mr. Fannon prejudiced by these actions? Did Mr. Fannon's Language in Layman terms present the wrong way of addressing these issues? To clarify please omit the issues outside the trial record of forcing a plea bargain in SAG 5. Was withholding discovery in fact denying due process? Was this not the duty of the Prosecutor? Was there failure of due process by abuse of discretion in allowing a CrR 3.5, 3.6 hearing on the second day of a jury trial? Issue raised in SAG 7¶2, 8.

Contrary to the COA decision, the COA did not address these questions. Mr. Fannon asks this Court to review them in the Light of fairness. Are they not violations of fundamental Rights and fairness that are put forth in the U.S. and State Constitutional Amendments? Does the Trial records not clearly provide the obvious? Mr. Fannon asserted his fear's for his Life when State first disclosed the officers statements to him. This at the opening day of his jury trial. Mr. Fannon was in fact surprised and the Trial record provides the accumulated events. (RP 3,4 SAG 6,7)

Mr. Fannon contends that he spoke to no one except his attorney, Mr. Suryan. The issue of selling cars was argued over by Mr. Fannon with Mr. Suryan. That only D.M.V. would have records of by Law, Then Lebbui's testimony of car sales was used by the State suggesting that Mr. Fannon was waiving his Miranda rights. Mr. Fannon knows that breach of confidentiality happened. This subject is expressed by testimony. (RP 210, 211, SAG #10 ¶2)

This is further shown by Trial record. When Mr. Fannon heard the State's witnesses testimony. He addressed the Court personally. Mr. Fannon

asked if he could call his own witnesses from the house he was arrested at, (RP 208, 209, SAG 10). This was a futal effort which was recorded at trial. No witnesses were called for the defense counselor.

Did COA fail to properly address Mr. Fannon's claim that he was prejudiced and bias by the Trial Court judge revoking his bail? Mr. Fannon's bail was revoked and was addressed as bias conduct of unfair Tribunal conduct as accumalated events raised in (SAG 12 ¶2). Contrary to COA's decision of not being reversable issue, (COA 14 ¶4)

The COA failed to consider Search Warrant issue. Due process is also fundamental for search warrants, 4th Amendment right. Mr. Fannon did not Live at 2121 Sycamore Lv, WA. No search warrant was produced in this trial, which is asserted as abuse of discretion. This issue was mentioned in Mr. Fannon's (SAG 9 ¶2, 13 ¶4) with attached Jury questionair from jury to the judge as an exhibit for his SAG. (State v. Miles 29 Wn2d 921 (1948); State v. Creelman 75 WnApp 490, 878 P2d 492 (1994)).

Mr Fannon did not Live at the house the alLeged search warrant was used at. Fact is, Det. Mortensen testified on (RP 170, SAG 12) No foundation produced
RP 170 Q: Okay. And did all of those people Live there?
A: I don't know if anybody Lived there.

The COA failed to consider or understand Mr. Fannon's SAG so to clarify the numbered issues from page "7" of this Motion.

① No disclosure

Mr. Fannon was surprised and addressed the Court in fear of his Life with issue of just learning about statements of admission of detectives. (RP 3,4, and SAG 5,6,9) State V. Barry 184 WnApp 790, 339 P3d 200 (2014) "It is weLL settLed that the purpose behind discovery disclosure is to protect against suprise that might prejudice the defense." U.S. V. Agurs 427 U.S. 97 (1976); U.S. V. Valenzuela-Bernal 458 U.S. 858 (1982) "Prosecutor fails to disclose or of testimony made unavaiLabLe to the defense by government actions." (CrR 4.5, 4.7)

② No pre-trial hearings were held outside the jury trial.

The COA failed to consider this as an issue.

Mr. Fannon gave careful attention to address this on (SAG 8). The 3.5 hearing was not followed according to Rule CrR 3.5, 3.6, with the proper time and notification to prepare an adequate defense. The rule states that the hearing is to be on or before pre-trial outside the jury. Mr. Fannon was prejudiced by the trial Court in not complying with it own rules and regulations. The case law used in (SAG 9) is In re Lopez 128 WnApp 891, 110 P3d 764 (2005) "government agency has failed to comply with its own rules and regulations".

The State prejudiced Mr. Fannon by withholding discovery and not giving pre-trial hearings before jury trial. This is failure of due process of a fair trial. USCA 14, WCA 1§22, 1§3.

③ No adequate counsel for defense

Contrary to COA's decision of strategy and tactics as being suggested by the State's response. Mr. Fannon contends that evidence of collusion, by defense counsel not objecting to anything, or not making Motions of suppression, or even investigating basic knowlege of disputes i.e. D.M.V. records, or pointing out facts of due process, or trial procedure violations.

The trial record as a whole will proove ineffective, deficient, collusion, but severe ineffectiveness would best identify defense counsel's actions.

Contrary to COA's decision of Mr. Suryan being effective. Mr. Suryan did not preserve any issue of this trial. He made a good prosecutor, but not a defense attorney. Mr. Fannon retains his issues that were put forth in the BOA and SAG, that not doing anything for the defense is no strategy or tactics, Mr. Surgan failed to assist or represent the defendant, This is a U.S.C.A. 5th, 6th and 14th Amendment violations of fundamental rights. Strickland v. Washington 466 U.S. 668 (1984); State v. Easter 130 Wn.2d 228, 922 P2d 1285 (1996)

④ Abuse of discretion is evident.

The COA failed to consider the issue claimed by Mr. Fannon in his (SAG 5,6,7, RP 3,4). The abuse of discretion is by knowing the discovery was not disclosed to the defense, and by allowing a CrR 3.5, 3.6 pre-trial hearing to be held during jury trial.

In (Bracy V. Gramley 520 U.S. 899 (1997)) "Conducting a 3.5 hearing in the middle of a trial is abuse of discretion an violates rules set forth for due process. The government

agencies lack of record or corroborating evidence is arbitrary misconduct, or even simple mismanggement still shows Constitutional magnatude and manifest error. The due process clause requires a "Fair Trial in a fair Tribunal" before a judge with no actual bias against the defendants interest in the outcome of his or her particular case."

The other act of abuse of discretion and bias as characterized by Trickery in revoking Mr. Fannon's bail. This restricting him from aquiring exculpatory evidence for defense i.e., DMV records, records of daily assignments for Detectives used as State's witnesses, and witnesses for the defense. (RP 2089, COA 14$^{TH}$4, SAG 10)

(5) Prosecutorial misconduct by enabling police credibility.

The COA did not consider Mr. Fannon's issue of this misconduct. The State suspiciously requesting that the Detectives not to be questioned about the other Detectives statements. (RP 3, SAG 8)

Prosecutory misconduct also addressed in (BOA 9→13) on the mischaractorizing Material Evidence, i.e, Fannon's alleged jacket. No foundation was produced in the Trial to support it, or of Fannon's bedroom. Officer Mortensen

testified, he did not know if anybody Lived there. Officer Hartley testified, he did not try the jacket on Mr. Fannon, or provide anything To prove the jacket belonged to Mr. Fannon. The State relied on there opinions.

Contrary To COA's facts on page 2 ¶2 where alegedly Lebbui spoke to Mr. Fannon. Mr. Fannon disputes this claim. Mr. Fannon spoke to no one except his attorney, therefore Mr. Lebbui is a Liar. The State supports Mr. Lebbui, therefore Mr. Fannon is a Liar. The State has the burden of proof, not the defendant. No supportive evidence or witness to corroborate Mr. Lebbui. No signed documents, or Miranda rights given, or waivers signed, or recordings produced, therefore Mr Lebbui is a Liar. Lebbui's testimony of no confirmation, (RP 205, 6, 7)

The entry Level patrolman that conducted the search would have supportive evidence and witnesses to corroborate. Mr. Fannon contends Hartley, Lebbui, and Mortensen, were not present when Mr. Fannon was arrested. Even though this issue addressed was outside the record, was put forth in (SAG 14 ¶3, 4 with attached request during allocution RP 410, 11)

(Stansbury v. California 511 U.S. 318) "Detectives testimony of defendant's alleged admision should have been inadmissable, and a violation of the defendant's Constitutional Fifth and Sixth Amendment rights. Defendant contends that interogation never took place. There was nor is any interogation, or signed waiver from the defendant. Statements elicited in noncompliace with this rule may not be admitted for certain purposes in a criminal case Trial."

Detective Lebbui's statements did prejudice Mr. Fannon and is parallel to Stansbury's case. Therefore all issues in the BOA and SAG should be reviewed in the Light and an open eye. Mr. Lebbui's statements should be omitted.

## VI Conclusion

For the reasons set out in this Motion, the Court should accept review of this case and reverse Petitioners conviction. Petitioner request appointing Counsel to assist.

Dated the 23rd day of July 2016.

Leo Andrew Fannon
Petitioner

## APPENDIX

### WASHINGTON CONSTITUTION
### ARTICLE 1, § 3

No person shall be deprived of life, liberty, or property, without due process of law.

### WASHINGTON CONSTITUTION
### ARTICLE 1, § 9

No person shall be compelled in any criminal, case to give evidence against himself, or be twice put in jeopardy for the same offense.

### WASHINGTON CONSTITUTION
### ARTICLE 1, § 22

In criminal prosecutions the accused shall have the right to appear and defend in person, or by counsel, to demand the nature and cause of the accusation against him, to have a copy thereof, to testify in his own behalf, to meet the the witnesses against him face to face, to have compulsory process to compel the attendance of witnesses in his own behalf, to have a speedy public trial by an impartial jury of the county in which the offense is charged to have been committed and the right to appeal in all cases: Provided, The route traversed by any railway coach, train or public conveyance, and the water traversed by any boat shall be criminal districts; and the jurisdiction of all public offenses committed on any such railway car, coach, train, boat or other public conveyance, or at any station of depot upon such route, shall be in any county through which the said car, coach, train, boat or other public conveyance may pass during the trip or voyage, or in which the trip or voyage may begin or terminate. In no instance shall any accused person before final judgment be compelled to advance money or fees to secure the rights herein guaranteed.

## UNITED STATES CONSTITUTION, FIFTH AMENDMENT

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment of indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

## UNITED STATES CONSTITUTION, SIXTH AMENDMENT

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense.

## UNITED STATES CONSTITUTION, FOURTEENTH AMENDMENT

All persons born or naturalized in the United State, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the law.

Filed
Washington State
Court of Appeals
Division Two

June 28, 2016

# IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

## DIVISION II

| | |
|---|---|
| STATE OF WASHINGTON,<br><br>Respondent,<br><br>v.<br><br>LEO FANNON,<br><br>Appellant. | No. 47528-6-II<br><br>UNPUBLISHED OPINION |

BJORGEN, C.J. — A jury returned verdicts finding Leo Fannon guilty of unlawful possession of a controlled substance with intent to deliver, with a school zone enhancement, and four counts of unlawful possession of a controlled substance. Fannon appeals his convictions, asserting that (1) the prosecutor committed misconduct by mischaracterizing evidence presented at trial and (2) his defense counsel was ineffective for failing to object to (i) the prosecutor's mischaracterization of evidence, (ii) the prosecutor's elicitation of testimony commenting on Fannon's credibility, (iii) the prosecutor's elicitation of testimony that rendered an opinion of his guilt, and (iv) the prosecutor's elicitation of testimony commenting on his right to silence. Fannon also raises numerous issues in his statement of additional grounds (SAG) for review, all

of which either lack merit or require examination of matters outside the appellate record. We affirm.

## FACTS

On November 12, 2014, Longview police officers executed a search warrant at a Longview residence. After entering the residence, Sergeant Raymond Hartley saw Fannon exit a bedroom. Hartley searched the bedroom and saw bags containing methamphetamine and heroin on a nightstand. Hartley also saw a black leather jacket in the bedroom, which contained a set of scales with residue on them, packaging material, a bag containing methamphetamine, eight oxycodone pills, ten methadone pills, and two clonazepam pills. Additionally, officers found $2,615 in cash after searching Fannon incident to his arrest.

According to Detective Seth Libbui, Fannon agreed to speak with him after being advised of his *Miranda*[1] rights. Libbui stated that Fannon admitted that the bedroom and the drugs contained therein were his but denied that he sold drugs. Libbui also stated that Fannon had told him that he obtained his cash by fixing cars and selling them.

The State charged Fannon by amended information with one count of unlawful possession of a controlled substance with intent to deliver and four counts of unlawful possession of a controlled substance. The State also alleged a school zone sentencing enhancement with regard to his unlawful possession with intent to deliver charge.

During Hartley's trial testimony, defense counsel asked to voir dire Hartley, and the

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

following exchange took place:

> [Defense counsel]: Sergeant Hartley, where was that scale found?
> [Hartley]: Inside of a jacket in that bedroom.
> [Defense counsel]: In that same bedroom that you were in before?
> [Hartley]: Yes.
> [Defense counsel]: And do you know anything about the jacket itself? Do you know what kind of jacket it was?
> [Hartley]: I believe it was a black leather jacket.
> [Defense counsel]: Do you know what size?
> [Hartley]: Mr. Fannon's size actually; it looked to be about a medium.
> [Defense counsel]: When you say Mr. Fannon's size, did you try it on him?
> [Hartley]: No.
> [Defense counsel]: So that's just a guess?
> [Hartley]: No, I have other information that would corroborate that.

Report of Proceedings (RP) at 133. The State subsequently referred to the jacket at issue as "Mr. Fannon's jacket" on multiple occasions during Hartley's testimony, asking the following:

> [State]: Now, besides these eight pills, did you locate anything else inside of Mr. Fannon's jacket?
> . . . .
> [State]: Okay. And were this—was that the only things you found in Mr. Fannon's jacket?
> . . . .
> [State]: Now, you indicated you found these items in Mr. Fannon's jacket, is that correct?
> . . . .
> [State]: Would you recognize Mr. Fannon's jacket if you saw it again?

RP at 140, 142, 144. In response to this final question, Hartley testified that the jacket hanging on the back of Fannon's chair in the courtroom was the same jacket he had found in the bedroom.

Libbui testified that he asked Fannon what cars he had sold to obtain his cash, to whom he had sold the cars, and whether he had any documentation of such sales. The State then asked

Libbui why he had asked Fannon these types of questions, to which Libbui responded, "Because—well, I didn't believe him. The way he said it to me and the evidence, I—I initially didn't feel that that matched up to what I saw." RP at 236. Defense counsel did not object to the State's question or to Libbui's response. The following exchange also took place during Libbui's trial testimony:

> [State]: Was he—was he providing you with any information as to how he acquired this money at this point?
> [Libbui]: He wouldn't. He—he was unable to provide me anything, any—anything factual of who he sold it to. All the questions I just mentioned, there was no evidence provided to me that could verify that.
> [State]: Okay. So you—so you had been unable to verify any—any information he was providing to you?
> [Libbui]: I had no start. There was absolutely nothing that would point me in even a direction where I could even call someone, or look up something in a DMV record, or there's no—I mean, there's nothing. He—I was given nothing to work with, so—.

RP at 236-37. Again, defense counsel did not object.

Fannon testified in his defense. Fannon denied that he lived at the residence searched by police and denied that the jacket or controlled substances found by police belonged to him. Fannon stated that he obtained his cash from car sales.

The jury returned verdicts finding Fannon guilty of all the charges against him. The jury also returned a special verdict finding that Fannon committed unlawful possession of a controlled substance with intent to deliver within 1,000 feet of the perimeter of a school ground. Fannon appeals his convictions.

## ANALYSIS

### I. PROSECUTORIAL MISCONDUCT

Fannon first contends that the prosecutor committed misconduct during Hartley's testimony by repeatedly referring to the jacket alleged to have contained controlled substances as "Mr. Fannon's jacket." Br. of Appellant at 9. We disagree.

A defendant claiming prosecutorial misconduct must show both improper conduct and resulting prejudice. *State v. Fisher*, 165 Wn.2d 727, 747, 202 P.3d 937 (2009). Prejudice exists when there is a substantial likelihood that the misconduct affected the verdict. *State v. McKenzie*, 157 Wn.2d 44, 52, 134 P.3d 221 (2006). Where, as here, a defendant does not object to alleged misconduct at trial, the defendant fails to preserve the issue on appeal unless he or she establishes that the misconduct was so flagrant and ill-intentioned that it caused an enduring prejudice incurable by a jury instruction. *State v. Thorgerson*, 172 Wn.2d 438, 443, 258 P.3d 43 (2011).

Fannon asserts that the prosecutor's characterization of the jacket allegedly containing controlled substances as "Mr. Fannon's jacket" during Hartley's testimony was misconduct because the State did not present any evidence to support the inference that the jacket belonged to him. This, however, mischaracterizes the record. Although the State had not yet presented evidence linking the jacket to Fannon when the prosecutor referred to the jacket as "Mr. Fannon's," the State subsequently presented evidence that (1) Fannon had admitted to police that the bedroom where the jacket was found was his, (2) Fannon had admitted to police that the drugs found in that same bedroom were his, and (3) the jacket Fannon brought with him to court

was the same jacket Hartley found in the bedroom. One may reasonably infer from this evidence that the jacket was Fannon's. Therefore, his argument fails.

## II. INEFFECTIVE ASSISTANCE OF COUNSEL

Next, Fannon contends that his defense counsel was ineffective for failing to object to (1) the prosecutor's mischaracterization of evidence, (2) the prosecutor's question eliciting evidence commenting on his credibility, (3) the prosecutor's questions eliciting an opinion of his guilt, and (4) the prosecutor's questions eliciting evidence commenting on his right to silence. On all points, we disagree.

We review claims of ineffective assistance of counsel de novo. *State v. Sutherby*, 165 Wn.2d 870, 883, 204 P.3d 916 (2009). To prevail on his ineffective assistance of counsel claims, Fannon must show both that (1) defense counsel's representation was deficient and (2) the deficient representation prejudiced him. *State v. Grier*, 171 Wn.2d 17, 32-33, 246 P.3d 1260 (2011), *cert. denied*, 135 S. Ct. 153 (2014). Representation is deficient "if it falls 'below an objective standard of reasonableness.'" *Grier*, 171 Wn.2d at 33 (quoting *Strickland v. Washington*, 466 U.S. 668, 688, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984)). Prejudice ensues if there is a reasonable probability that absent counsel's deficient performance, the result of the proceeding would have differed. *Grier*, 171 Wn.2d at 34. If Fannon fails to establish either prong, we need not inquire further. *State v. Hendrickson*, 129 Wn.2d 61, 78, 917 P.2d 563 (1996).

We strongly presume that counsel's representation was effective. *Grier*, 171 Wn.2d at 33. To overcome this presumption, Fannon must show the absence of any legitimate strategic or tactical reason explaining defense counsel's challenged conduct. *State v. Emery*, 174 Wn.2d

741, 755, 278 P.3d 653 (2012). Legitimate trial strategy or tactics cannot serve as the basis for an ineffective assistance of counsel claim. *State v. Kyllo*, 166 Wn.2d 856, 863, 215 P.3d 177 (2009).

A. Mischaracterization of Evidence

Fannon first asserts that his counsel was ineffective for failing to object to the prosecutor's characterization of the jacket at issue as "Mr. Fannon's jacket" absent evidence in support. Br. of Appellant at 9. However, to the extent the that the prosecutor misrepresented the evidence by referring to the jacket as belonging to Fannon, there was no resulting prejudice because the State later presented evidence that the jacket belonged to Fannon. Accordingly, Fannon cannot demonstrate any prejudice resulting from defense counsel's failure to object to the prosecutor's characterization and, thus, he fails to show ineffective assistance of counsel on this ground.

B. Comment on Credibility

Next, Fannon asserts that his defense counsel was ineffective for failing to object to the prosecutor's question eliciting testimony commenting on his credibility. Again, we disagree.

Generally, witnesses are not permitted to testify about their opinions of the defendant's credibility. *State v. Demery*, 144 Wn.2d 753, 759, 30 P.3d 1278 (2001). Impermissible opinion testimony about the defendant's credibility "unfairly prejudices the defendant because it invades the exclusive province of the jury to make an independent determination of the relevant facts." *State v. Rafay*, 168 Wn. App. 734, 805, 285 P.3d 83 (2012) (citing *State v. Kirkman*, 159 Wn.2d 918, 927, 155 P.3d 125 (2007)). "Testimony from a law enforcement officer regarding the veracity of another witness may be especially prejudicial because an officer's testimony often

carries a special aura of reliability." *Kirkman*, 159 Wn.2d at 928. However, testimony based on "'direct knowledge of facts at issue'" rather than on "'one's belief or idea'" does not constitute opinion testimony. *Demery*, 144 Wn.2d at 760 (quoting BLACK'S LAW DICTIONARY 1486 (7TH ed. 1999)). It is improper for a prosecutor to ask a witness about his or her personal opinion of another witness's credibility. *State v. Jerrels*, 83 Wn. App. 503, 507-508, 925 P.2d 209 (1996).

Here Libbui testified that, in response to Fannon's claim that he obtained his cash from selling cars, he asked Fannon some simple follow-up questions such as, "what cars, who did you sell them to, do you have any documentation?" RP at 236. The prosecutor then asked Libbui, "So why are you asking him these types of questions?" to which Lubbui responded, "Because—well, I didn't believe him. The way he said it to me and the evidence, I—I initially didn't feel that that matched up to what I saw." RP at 236. Fannon argues that his defense counsel was ineffective for failing to object to the prosecutor's question and Libbui's response thereto.

Fannon does not explain how, and we cannot conclude that, the prosecutor's question, "So why are you asking him these types of questions?" was designed to elicit Libbui's personal opinion about Fannon's credibility. The prosecutor did not ask Libbui to state any opinion as to Fannon's credibility. The prosecutor merely asked Libbui why he was asking Fannon certain questions about his claim of obtaining cash through automobile sales, a legitimate point of inquiry and one not requiring an opinion on credibility in answer. Accordingly, we hold that defense counsel did not perform deficiently by failing to object to the question. *Grier*, 171 Wn.2d at 33.

Fannon also argues that his counsel was ineffective in failing to object to Libbui's response to the prosecutor's question. The officer's testimony that he did not believe Fannon

constituted a personal opinion of Fannon's credibility. Fannon, however, cannot succeed in demonstrating that his counsel was ineffective in failing to object to this opinion, because there is a legitimate tactical reason for that failure.

It has long been established that "[t]he decision of when or whether to object is a classic example of trial tactics [and o]nly in egregious circumstances, on testimony central to the State's case, will the failure to object constitute incompetence of counsel justifying reversal." *State v. Madison*, 53 Wn. App. 754, 763, 770 P.2d 662 (1989) (citing *Strickland*, 466 U.S. 668); *State v. Ermert*, 94 Wn.2d 839, 621 P.2d 121 (1980). Libbui's opinion testimony does not constitute such an egregious circumstance. Lubbui's opinion as to Fannon's credibility referred only to Fannon's statements regarding how he obtained his cash and did not extend to his opinion as to whether Fannon was guilty of his charged crimes. Defense counsel had a legitimate tactical reason not to object to the opinion testimony so as to not emphasize it to the jury. *See State v. McLean*, 178 Wn. App. 236, 247, 313 P.3d 1181 (2013) ("[I]t can be a legitimate trial tactic to withhold an objection to avoid emphasizing inadmissible evidence."), *review denied*, 179 Wn.2d 1026 (2014); *see also State v. Kloepper*, 179 Wn. App. 343, 354, 317 P.3d 1088 ("The decision to object, or to refrain from objecting even if testimony is not admissible, is a tactical decision not to highlight the evidence to the jury. It is not a basis for finding counsel ineffective."), *review denied*, 180 Wn.2d 1017 (2014). Because defense counsel had a legitimate tactical reason for not objecting to the opinion testimony, Fannon cannot demonstrate ineffective assistance on this ground.

C. Opinion of Guilt

Next, Fannon contends that his counsel was ineffective for failing to object to the prosecutor's question eliciting Libbui's opinion of his guilt. We disagree.

Generally, no witness may offer testimony regarding his or her opinion of the defendant's guilt. *Demery*, 144 Wn.2d at 759. A witness expresses opinion testimony when the witness testifies to beliefs or ideas rather than the facts at issue. *Demery*, 144 Wn.2d at 760. However, "testimony that . . . is based on inferences from the evidence is not improper opinion testimony." *City of Seattle v. Heatley*, 70 Wn. App. 573, 578, 854 P.2d 658 (1993).

Fannon argues that his defense counsel was ineffective for failing to object to the following exchange on the basis that it elicited improper opinion testimony as to his guilt:

> [State]: Okay. Did you ask him any questions about whether he was actively selling controlled substances or anything about the money that was found on his person?
>
> [Libbui]: I did question him. When I—when I had observed the stuff, I had had—it looked consistent with dealing and so—and that—then that's kind of the angle I started talking to him about, and I said, you know, it's—then I explained to him that's what I saw and—and he said it wasn't. He said that was—he wasn't dealing drugs, that—that they were from automotive sales, that he fixes up cars to sell them.
>
> [State]: Okay. Now, why were you asking him about the money that you had located and the drugs that you had located?
>
> [Libbui]: Because the amount of money and—and the way the—the smaller denominations were built up, it was—and—and the whole image of the—of the room, with the scale stuff and—and the—and even the setup of the house, how many people were there, that's all consistent with people selling or trafficking narcotics to the people waiting to buy, and the money—and the money, the same thing. It just adds to that whole—that whole case.

RP at 234-35.

In this exchange the prosecutor asked Libbui whether he had asked Fannon certain questions during his investigation and why Libbui had asked those questions. The prosecutor did

not ask Libbui to state any opinion, let alone an opinion of Fannon's guilt. Further, as shown below, Libbui's responses were not improper opinion testimony. Accordingly, we hold that Fannon's defense counsel did not perform deficiently by declining to object to the prosecutor's questions and, thus, his ineffective assistance of counsel claim cannot succeed on this ground.

To the extent that Fannon is also claiming ineffective assistance based on defense counsel's failure to object to Libbui's responses, that claim also cannot succeed. Libbui's testimony—that the evidence he had observed at the house and on Fannon's person was consistent with dealing narcotics—was based on Libbui's direct observations and the inferences drawn from those observations. The testimony contained no opinion on Fannon's guilt. Although Libbui's testimony that the evidence he had observed was consistent with dealing drugs supported a jury finding that Fannon was guilty of possession of controlled substances with intent to deliver, "[t]he fact that an opinion encompassing ultimate factual issues *supports* the conclusion that the defendant is guilty does not make the testimony an improper opinion on guilt." *Heatley*, 70 Wn. App. at 579. Because Libbui did not express an improper opinion of Fannon's guilt, Fannon cannot demonstrate either deficient performance or resulting prejudice from his defense counsel's failure to object to the testimony. Accordingly, his ineffective assistance of counsel claim cannot succeed on this ground.

D. Comment on Right to Silence

Finally, Fannon asserts that his defense counsel was ineffective for failing to object to the prosecutor's question eliciting testimony commenting on his right to silence. Again, we disagree.

The Fifth Amendment of the United States Constitution and article I, section 9 of the Washington Constitution "guarantee a criminal defendant the right to be free from self-incrimination, including the right to silence." *State v. Knapp*, 148 Wn. App. 414, 420, 199 P.3d 505 (2009). A police witness "may not comment on the silence of the defendant so as to infer guilt from a refusal to answer questions." *State v. Lewis*, 130 Wn.2d 700, 705, 927 P.2d 235 (1996). However, when a defendant waives his or her right to remain silent following adequate *Miranda* warnings and chooses to speak with police, a police witness may comment on what the defendant did and did not say. *State v. Young*, 89 Wn.2d 613, 620-21, 574 P.2d 1171 (1978); *State v. Clark*, 143 Wn.2d 731, 765, 24 P.3d 1006 (2001).

Fannon argues that his defense counsel was ineffective for failing to object to the following questions and answers thereto:

> [State]: Was he—was he providing you with any information as to how he acquired this money at this point?
> [Libbui]: He wouldn't. He—he was unable to provide me anything, any—anything factual of who he sold it to. All the questions I just mentioned, there was no evidence provided to me that could verify that.
> [State]: Okay. So you—so you had been unable to verify any—any information he was providing to you?
> [Libbui]: I had no start. There was absolutely nothing that would point me in even a direction where I could even call someone, or look up something in a DMV record, or there's no—I mean, there's nothing. He—I was given nothing to work with, so—.

RP at 236-37.

Fannon's argument fails. Fannon did not exercise his right to post-arrest silence following advisement of his *Miranda* warnings and instead chose to speak with police, stating that he obtained his cash through the sale of cars. Libbui's challenged testimony concerned Fannon's inability to provide police with details verifying his claim to have obtained cash

through car sales. Because Fannon waived his right to post-arrest silence and stated to police that he obtained his cash through car sales, the State could properly inquire, and Libbui could properly testify, about Fannon's failure to provide details verifying his statement to police. Accordingly, Fannon shows neither deficient performance nor resulting prejudice based on his defense counsel's failure to object to the challenged testimony and, thus, his ineffective assistance of counsel claim fails.

III. SAG

In his SAG, Fannon first contends that the State either withheld from the defense or failed to preserve exculpatory evidence, specifically the jacket allegedly containing controlled substances. There is no support in the appellate record to support this contention as Hartley testified that Fannon brought the jacket with him to the courtroom on the first day of trial. To the extent that Fannon relies on matters outside the appellate record to support this claim, he must raise the claim in a personal restraint petition. *State v. McFarland*, 127 Wn.2d 322, 335, 899 P.2d 1251 (1995).

Second, Fannon contends in his SAG that the prosecutor committed misconduct by asking whether Hartley saw the jacket at issue in the courtroom because the prosecutor knew that the State had withheld or failed to preserve the actual jacket found by police. Again, the record does not support Fannon's claim that the State withheld or failed to preserve the jacket. Accordingly, on this record, Fannon cannot show that the prosecutor's question regarding the location of the jacket was misconduct.[2]

[2] For this same reason, Fannon cannot show on this record that his defense counsel was ineffective for failing to object to the prosecutor's question regarding the location of the jacket.

Third, Fannon contends in his SAG that his defense counsel was ineffective for failing to object to Hartley's testimony that he found Fannon's wallet and cash in the bedroom. Fannon argues that Hartley's testimony was misleading because Libbui later testified that he had placed the wallet and cash in the bedroom after seizing them from Fannon following a search incident to Fannon's arrest. Accepting for the sake of argument that Hartley's testimony was misleading, Fannon cannot demonstrate resulting prejudice in light of Libbui's later testimony clarifying where he had found the wallet and cash. Accordingly, Fannon cannot demonstrate that his defense counsel was ineffective for failing to object to Hartley's testimony.

Fourth, Fannon appears to argue that his counsel was ineffective for failing to call certain witnesses at trial, failing to present a video recording taken from a police cruiser, and failing to investigate motor vehicle records that would support his claim that he had obtained his cash through car sales. Because review of these claims require examination of matters outside the appellate record, they must be raised in a personal restraint petition, and we do not further address them here. *McFarland*, 127 Wn.2d at 335.

Fifth, Fannon argues that his right to a fair trial was violated because he was shown a false statement before trial to coerce him to plead guilty. Again, this issue concerns a matter outside the appellate record that would be more appropriately raised in a personal restraint petition.

Finally, Fannon complains that the trial court judge improperly revoked his bail for appearing late on the second day of trial because he had timely appeared in court on that day. Even assuming for the sake of argument that Fannon is correct, he does not explain how the

improper revocation of his bail requires reversal of his convictions. Accordingly, we do not further address this issue.

## IV. APPELLATE COSTS

Fannon is 59 years old, was determined to be indigent, and is serving an 84-month sentence. For these reasons, we exercise our discretion to waive appellate costs. *See State v. Sinclair*, 192 Wn. App. 380, 367 P.3d 612 (2016).

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 in accordance with RCW 2.06.040, it is so ordered.

Bjorgen, C.J.

BJORGEN, J.

We concur:

Worswick, J.

WORSWICK, J.

Maxa, J.

MAXA, J.

FILED
COURT OF APPEALS
DIVISION II

2016 AUG -1 AM 9:31

STATE OF WASHINGTON

BY _____
DEPUTY

IN THE Supreme COURT FOR WASHINGTON
IN AND FOR Pierce COUNTY

STATE OF WASHINGTON,
~~Plaintiff~~ Respondent

v.

LEO ANDREW FANNON
~~Defendant~~ Petitioner

No. 47538-6-II

DECLARATION OF SERVICE BY MAILING

I Leo Andrew Fannon, the Defendant, in the above entited cause, do hereby declare that I have served the following documents; Petition for Review, For Supreme Court of Washington STATE

PARTIES SERVED:

CLERK OF THE COURT
Mr David C. Ponzoha, Clerk
Court of Appeals, Division II
950 Broadway, Suite 300
Tacoma, WA. 98402

PLAINTIFF / PROSECUTOR
Ryan Jurvakainen
Cowlitz County Prosecuting Attorney
312 S.W. First Ave
Kelso, WA 98626

That I deposited in with the Unit Officer's Station, by processing as Legal Mail, with First Class Postage at: L.C.C., 15314 NE. Dole Valley Rd, Yacolt, WA 98675

Dated this 25 day of July, 2016

I certify under the penalty of perjury under the laws of Washington that the aforementioned is true and correct.

Leo Andrew Fannon
(Signature)