NO. 47538-6-II

COURT OF APPEALS OF THE STATE OF WASHINGTON,

DIVISION II

STATE OF WASHINGTON,

Respondent,

vs.

LEO FANNON,

Appellant.

BRIEF OF APPELLANT

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Assignment of Error

1. The prosecutor committed misconduct and thereby denied the defendant his due process right to a fair trial when he repeatedly mischaracterized a coat a police officer found as "Mr. Fannon's jacket."

2. Trial counsel's failure to object when the state repeatedly mischaracterized evidence and elicited inadmissible, prejudicial facts from its witnesses denied the defendant effective assistance of counsel under Washington Constitution, Article 1, § 22, and United States Constitution, Sixth Amendment.

Issues Pertaining to Assignment of Error

1. Does a prosecutor commit misconduct and thereby deny a defendant the process right to a fair trial if the prosecutor repeatedly mischaracterizes a critical piece of evidence, and there is a substantial likelihood that the mischaracterization affected the jury's verdict?

2. In a case in which the state charges a defendant with possession of drugs with intent to deliver, does a trial counsel's failure to object deny that defendant effective assistance of counsel when (1) the prosecutor repeatedly mischaracterizes a coat containing the drugs as "the defendant's jacket," (2) when the prosecutor calls upon a state's witness to render an opinion on guilt and comment on the defendant's credibility, and (3) when the prosecutor elicits evidence upon the defendant's exercise of his right to silence, if the trial court would have sustained timely made objections to the improper evidence and the failure to object undermines confidence in the outcome of the trial?

STATEMENT OF THE CASE

Factual History

On November 12, 2014, a number of officers associated with the Longview Police Department Street Crimes Unit executed a warrant at 2121 Sycamore Street in Longview. RP 122-123.[1] Upon entering the residence the officers found and handcuffed six or seven people present. RP 164-166, 229. One person in the home was the Defendant Leo Fannon, whom one officer found walking out of one of the bedrooms. RP 126-127. A search of that bedroom uncovered the following items: a small baggie of methamphetamine on a night stand, a small baggie of heroin on a night stand, personal use drug paraphernalia on the night stand and a black leather coat found somewhere in the room. RP 128-130. The coat had the following items in it: a large baggie of methamphetamine, small digital scales, eight oxycodone pills, ten methadone pills, two clonazepam pills and a black bag containing small plastic baggies. RP 132-149.

The officers also searched the defendant's person and seized his wallet. RP 145, 235. Inside the wallet they found $2,615.00 in cash, most of it in twenties, tens and fives. *Id.* According to the officers the defendant

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[1]The record on appeal includes three volumes of continuously numbered verbatim reports, which include the two day of trial and the subsequent sentencing hearing. They are referred to herein as "RP [page#]."

claimed that he had obtained the money buying, repairing and then selling used automobiles. RP 235-236. However, according to the same officers the defendant told them that "the drugs" in the bedroom belonged to him. *Id.*

Procedural History

By information filed November 17, 2014, and later amended, the Cowlitz County Prosecuting Attorney charged the defendant Leo Andrew Fannon with possession of methamphetamine with intent to deliver within 1,000 feet of a school zone, possession of heroin, possession of methadone, possession of oxycodone, and possession of clonazepam. CP 5-7, 33-35. The case later came on for trial with the state calling six witnesses, including Longview Officer Ray Hartley, who helped execute the warrant. RP 120-159. During his testimony Officer Hartley told the jury about finding a black leather coat in the bedroom that the defendant was leaving and about discovering its contents. RP 133. Although he stated that he found it in the bedroom, he did provide any facts to support the conclusion that it belonged to the defendant other than it appeared to the officer to be his size. *Id.* This testimony went as follows:

> MR. SURYAN: Sergeant Hartley, where was that scale found?
>
> WITNESS: Inside of a jacket in that bedroom.
>
> MR. SURYAN: In that same bedroom that you were in before?
>
> WITNESS: Yes.

MR. SURYAN: And do you know anything about the jacket itself? Do you know what kind of jacket it was?

WITNESS: I believe it was a black leather jacket.

MR. SURYAN: Do you know what size?

WITNESS: Mr. Fannon's size, actually; it looked to be about a medium.

MR. SURYAN: When you say Mr. Fannon's size, did you try it on him?

WITNESS: No.

MR. SURYAN: So that's just a guess?

WITNESS: No, I have other information that would corroborate that.

RP 133.

Although Officer Harley claimed to "have other information that would corroborate" his claim that the jacket was the defendant's, no such evidence was ever presented to the jury. RP 120-159. In spite of this fact, the prosecutor referred to the coat as "Mr. Fannon's jacket" on three subsequent occasions without objection from the defense. RP 140, 142, 144. The following provides these references:

Q. Now, besides these eight pills, did you locate anything else inside of Mr. Fannon's jacket?

. . .

Q. Okay. And were this – was that the only things you found in Mr. Fannon's jacket?

. . .

> Q. Okay. Thank you, Sergeant Hartley. Now, you indicated you found these items in Mr. Fannon's jacket, is that correct?

RP 140, 142, 144.

In addition, during trial the state called Longview Officer Seth Libbui, who also helped execute the search warrant at 2121 Sycamore Street. RP 222-260. According to Officer Libbui, he believed the person who possessed the drugs they recovered was dealing them to other persons. *Id.* His testimony was as follows on this point:

> Q. 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?
>
> A. 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.
>
> Q. Okay. Now, why were you asking him about the money that you had located and the drugs that you had located?
>
> A. 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 234-235.

The defense offered no objection to this evidence. *Id.* During his testimony, Officer Libbui also told the jury, again without objection, that he didn't believe what the defendant told him. RP 236. This exchange went as follows:

> Q. So why are you asking him these types of questions?
>
> A. 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 236.

Finally, Officer Libbui testified, again without defense objection, that the defendant refused to provide him with certain answers to his questions. RP 236-237. This exchange went as follows:

> Q. Was he – was he providing you with any information as to how he acquired this money at this point?
>
> A. 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.
>
> Q. Okay. So you – so you had been unable to verify any – any information he was providing to you?
>
> A. 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 236-237.

In this case the state also called two witnesses who provided evidence that the house at 2121 Sycamore was within 1,000 of the perimeter of Mark Morris High School. RP 173-180, 260-279. Finally, the state called a forensic scientist, who testified that the items in the baggies were methamphetamine and heroin, and that the pills were methadone, oxycodone, clonazepam. RP 279-306.

Following the close of the state's case the defendant took the stand on his own behalf. RP 308-336. He testified that he did not live at the house the police searched, that the jacket did not belong to him, and that he had just entered the bedroom to get items he had left in the closet when the officers arrived. RP 308-312, 317-320, 333. He denied that he had anything to do with the drugs recovered and he affirmed that he had earned the money the police took from his wallet by fixing and selling cars. *Id.*

After the defense closed its case the court instructed the jury without objection from the state or the defense. RP 337-338, 342-361. The parties then presented closing argument, after which the jury retired for deliberation. RP 361-393. The jury eventually returned verdicts of guilty on each count, along with a special verdict that the defendant committed Count I within 1,000 feet of a school. RP 396-403; CP 66-72. The court later sentenced the defendant within the standard range, after which the defendant filed timely notice of appeal. CP 74-86; RP 404-413.

ARGUMENT

I. THE PROSECUTOR COMMITTED MISCONDUCT AND THEREBY DENIED THE DEFENDANT HIS DUE PROCESS RIGHT TO A FAIR TRIAL WHEN HE REPEATEDLY MISCHARACTERIZED THE COAT AS "MR. FANNON'S JACKET."

While due process under Washington Constitution, Article 1, § 3 and United States Constitution, Fourteenth Amendment does not guarantee every person a perfect trial, it does guarantee all defendants a fair trial. *State v. Swenson*, 62 Wn.2d 259, 382 P.2d 614 (1963); *Bruton v. United States*, 391 U.S. 123, 20 L.Ed.2d 476, 88 S.Ct. 1620 (1968). This due process right to a fair trial is violated when the prosecutor commits misconduct. *State v. Charlton*, 90 Wn.2d 657, 585 P.2d 142 (1978). To prove prosecutorial misconduct, the defendant bears the burden of proving that the state's conduct was both improper and prejudicial. *State v. Brown*, 132 Wn.2d 529, 940 P.2d 546 (1997). In order to prove prejudice, the defendant has the burden of proving a substantial likelihood that the misconduct affected the jury's verdict. *State v. Evans*, 96 Wn.2d 1, 633 P.2d 83 (1981).

For example, in *State v. Barrow*, 60 Wn.App. 869, 809 P.2d 209 (1991), the state charged a defendant with possession of cocaine residue found in a pipe the defendant had on his person when arrested. During trial the defendant claimed unwitting possession. To rebut this claim the state called an undercover officer, who testified that a little earlier that same

evening the defendant had sold him a small amount of powder that the defendant claimed was cocaine. The defendant denied ever having contact with this officer.

During closing the state argued to the jury that the defendant's testimony denying the encounter with the officer constituted a claim that the officer was lying. The jury later convicted the defendant, who appealed, arguing in part that the prosecutor had committed misconduct when he argued to the jury that the defendant had called the testifying officer a liar because this argument mischaracterized the defendant's testimony. Although the Court of Appeals found the error harmless, it did hold that it constituted misconduct for the state to mischaracterize evidence. The court held:

> Other courts, moreover, consistently have found liar arguments similar to those at issue here to be improper. They reason that arguments about a defendant's opinion of the government's witnesses' credibility are irrelevant and interfere with the jury's duty to make credibility determinations. Based upon this authority and the related Washington cases of *Green* and *Brown*, we hold the arguments at issue here to be misconduct. It was a mischaracterization to say that the defendant was calling the officers liars. The officers simply could have been mistaken about the seller's identity. Furthermore, the jurors did not need to "completely disbelieve" the officers' testimony in order to acquit Barrow; all that they needed was to entertain a reasonable doubt that it was Barrow who made the sale to Officer O'Neal.

State v. Barrow, 60 Wn.App. at 875-76 (citations omitted).

In the case at bar the prosecutor committed misconduct then he referred to the coat Officer Hartley found in the bedroom of the residence as

"Mr. Fannon's jacket" on three subsequent occasions. RP 140, 142, 144. These references were as follows:

> Q. Now, besides these eight pills, did you locate anything else inside of Mr. Fannon's jacket?
>
> . . .
>
> Q. Okay. And were this – was that the only things you found in Mr. Fannon's jacket?
>
> . . .
>
> Q. Okay. Thank you, Sergeant Hartley. Now, you indicated you found these items in Mr. Fannon's jacket, is that correct?

RP 140, 142, 144.

The reason the state's repeated description of the jacket containing the drugs constituted misconduct is because the state did not present any evidence to support this claim. Although Officer Hartley had claimed that there was such evidence, the state did not present it to the jury. Officer Hartley's testimony on this point was as follows:

> MR. SURYAN: Sergeant Hartley, where was that scale found?
>
> WITNESS: Inside of a jacket in that bedroom.
>
> MR. SURYAN: In that same bedroom that you were in before?
>
> WITNESS: Yes.
>
> MR. SURYAN: And do you know anything about the jacket itself? Do you know what kind of jacket it was?
>
> WITNESS: I believe it was a black leather jacket.

MR. SURYAN: Do you know what size?

WITNESS: Mr. Fannon's size, actually; it looked to be about a medium.

MR. SURYAN: When you say Mr. Fannon's size, did you try it on him?

WITNESS: No.

MR. SURYAN: So that's just a guess?

WITNESS: No, I have other information that would corroborate that.

RP 133.

In this case the state argued that the jacket belonged to the defendant but it presented no evidence to support this claim. Thus, in the same manner that the state mischaracterized the defendant's testimony in *Barrow*, so the state mischaracterized Officer Hartley's testimony in the case at bar. Consequently, in the same manner that the mischaracterization in *Barrow* constituted misconduct, so the mischaracterization in the case at bar constituted misconduct.

In this case the evidence presented at trial was fairly strong that the owner of the jacket possessed the methamphetamine found in the jacket with the intent to deliver it. Not only was there a large amount of drugs, but there were also baggies and digital scales in the jacket. However, the evidence that the jacket belonged to the defendant was very weak. Officer Hartley did not seize the jacket, have the defendant try it on, or directly ask the defendant if

the jacket belonged to him. Neither did Officer Hartley present any evidence that the defendant had been living in the bedroom or that any items found in the bedroom were directly associated with the defendant. Thus, in this case the prosecutor's mischaracterization of the coat as "the defendant's jacket" provided the bridge between the lack of evidence on the one side and the conclusion on the other side that the state had presented proof beyond a reasonable doubt that the defendant owned the jacket and drugs contained therein. The conclusion then follows that there is a substantial likelihood that the misconduct affected the jury's verdict. As a result, this court should reverse the defendant's conviction and remand for a new trial.

II. TRIAL COUNSEL'S FAILURE TO OBJECT WHEN THE STATE REPEATEDLY MISCHARACTERIZED EVIDENCE AND ELICITED INADMISSIBLE, PREJUDICIAL FACTS FROM ITS WITNESSES DENIED THE DEFENDANT EFFECTIVE ASSISTANCE OF COUNSEL.

Under both United States Constitution, Sixth Amendment, and Washington Constitution, Article 1, § 22, the defendant in any criminal prosecution is entitled to effective assistance of counsel. The standard for judging claims of ineffective assistance of counsel under the Sixth Amendment is "whether counsel's conduct so undermined the proper functioning of the adversary process that the trial cannot be relied on as having produced a just result." *Strickland v. Washington*, 466 U.S. 668, 686,

80 L.Ed.2d 674, 104 S.Ct. 2052 (1984). In determining whether counsel's assistance has met this standard, the Supreme Court has set a two part test.

First, a convicted defendant must show that trial counsel's performance fell below that required of a reasonably competent defense attorney. Second, the convicted defendant must then go on to show that counsel's conduct caused prejudice. *Strickland*, 466 U.S. at 687, 80 L.Ed.2d at 693, 104 S.Ct. at 2064-65. The test for prejudice is "whether there is a reasonable probability that, but for counsel's errors, the result in the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Church v. Kinchelse*, 767 F.2d 639, 643 (9th Cir. 1985) (citing *Strickland*, 466 U.S. at 694, 80 L.Ed.2d at 698, 104 S.Ct. at 2068). In essence, the standard under the Washington Constitution is identical. *State v. Cobb*, 22 Wn.App. 221, 589 P.2d 297 (1978) (counsel must have failed to act as a reasonably prudent attorney); *State v. Johnson*, 29 Wn.App. 807, 631 P.2d 413 (1981) (counsel's ineffective assistance must have caused prejudice to client).

In the case at bar, the defendant claims ineffective assistance based upon trial counsel's failure to object when the prosecutor (1) called upon a state's witness to render an opinion on guilt and comment on the defendant's credibility, and (2) when the prosecutor elicited evidence upon the

defendant's exercise of his right to silence. The following sets out these arguments.

(1) Trial Counsel's Failure to Object When the Prosecutor Called upon a State's Witness to Render an Opinion on Guilt and Comment on the Defendant's Credibility Denied the Defendant Effective Assistance of Counsel.

Under both Washington Constitution, Article 1, § 3, and United States Constitution, Fourteenth Amendment a prosecutor should never assert his or her personal opinion as to the "credibility of a witness" or the "guilt or innocence of an accused." *State v. Reed*, 102 Wn.2d 140, 684 P.2d 699 (1984). Any such expression on the credibility of a witness or expressing a "personal belief in the defendant's guilt" is "not only unethical but extremely prejudicial." *State v. Case*, 49 Wn.2d 66, 68, 298 P.2d 500 (1956). Thus, a prosecutor should never introduce "'evidence of any matter immaterial or irrelevant to the single issue to be determined.'" *State v. Devlin*, 145 Wn. 44, 49, 258 P. 826 (1927). The courts "will not allow such testimony, in the guise of argument, whether or not defense counsel objected or sought a curative instruction." *State v. Belgarde*, 110 Wn.2d 504, 508, 755 P.2d 174 (1988).

Similarly, under both Washington Constitution, Article 1, § 22 and United States Constitution, Sixth Amendment, a defendant is entitled to have his or her case decided upon the evidence adduced at trial, not upon the

opinions of attorneys, the courts or the witnesses concerning the credibility of witnesses, the evidence, or the guilt of the defendant. *State v. Casteneda-Perez*, 61 Wn.App. 354, 360, 810 P.2d 74 (1991). Thus, it is improper for the prosecutor to elicit evidence of any person's personal opinion about the credibility of himself, herself, or another witness. *State v. Reed*, 102 Wn.2d 140, 145, 684 P.2d 699 (1984). As part of this right, it is also improper for the state to attempt to get the defendant to comment on the credibility of the state's witnesses. *State v. Suarez-Bravo*, 72 Wn.App. 359, 366, 864 P.2d 426 (1994).

For example, in *State v. Jerrels,* 83 Wn.App. 503, 925 P.2d 209 (1996), the defendant was convicted of Rape of a Child and Child Molestation after a trial in which the trial court permitted the state to ask the defendant's wife whether or not she believed that her children were telling the truth. The defendant appealed his convictions arguing that this line of questioning denied him his right to a fair trial. In addressing this argument, the Court of Appeals first noted that it was error for the court to allow a witness to comment on the credibility of another witness. The court stated:

> A prosecutor commits misconduct when his or her cross examination seeks to compel a witness' opinion as to whether another witness is telling the truth. Such questioning invades the jury's province and is unfair and misleading. The questions asked of Mrs. Jerrels were clearly improper because the prosecutor inquired whether she believed the children were telling the truth; thus, misconduct occurred. In another sexual abuse case, we held recently that

> reversible error occurred when a pediatrician was allowed to testify that, based on the child's statements, she believed the child had been abused.

State v. Jerrels, 83 Wn.App. at 507-508 (citations omitted).

As the court states: "A prosecutor commits misconduct when his or her cross examination seeks to compel a witness' opinion as to whether another witness is telling the truth." Thus, it was error in *Jerrels* for the prosecutor to ask the defendant's wife whether or not she believed her children.

In the case at bar the prosecutor committed misconduct when he first called upon Officer Libbui to render an opinion on guilt. This error occurred during the following exchange on direct:

> Q. 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?
>
> A. 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.
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> Q. Okay. Now, why were you asking him about the money that you had located and the drugs that you had located?
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> A. 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 234-235.

The defense offered no objection to this evidence. *Id.* The state then called upon Officer Libbui to render an opinion on the defendant's credibility, again without defense objection. RP 236. This exchange went as follows:

> Q. So why are you asking him these types of questions?
>
> A. 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 236.

In this case there was no possible tactical reason for the defendant's attorney to refrain from objecting to these questions and answers, given its purpose and effect of telling the jury that in the officer's opinion the defendant was guilty and that in the officer's opinion the defendant was a liar. Thus, trial court's failure to object fell below the standard of a reasonably prudent attorney. In addition, given the paucity of evidence proving that the defendant possessed the jacket, the result in the proceeding would have been different given a timely, proper objection to this evidence. Consequently, trial counsel's failure to object denied the defendant effective assistance of counsel under Washington Constitution, Article 1, § 22, and United States

Constitution, Sixth Amendment. As a result, this court should reverse and remand for a new trial.

(2) Trial Counsel's Failure to Object When the Prosecutor Elicited Evidence on the Defendant's Exercise of His Right to Silence Denied the Defendant Effective Assistance of Counsel.

The Fifth Amendment to the United States Constitution states that no person "shall ... be compelled in any criminal case to be a witness against himself." Washington Constitution, Article 1, § 9 contains an equivalent protection. *State v. Earls*, 116 Wn.2d 364, 805 P.2d 211 (1991). The courts liberally construe this right. *Hoffman v. United States*, 341 U.S. 479, 486, 71 S.Ct. 814, 818, 95 L.Ed. 1118 (1951). At trial, this right prohibits the State from forcing the defendant to testify. *State v. Foster*, 91 Wn.2d 466, 589 P.2d 789 (1979). It further precludes the state from eliciting comments from witnesses or making closing arguments inviting the jury to infer guilt from the defendant's silence. *State v. Fricks*, 91 Wn.2d 391, 588 P.2d 1328 (1979). Finally, as part of the Fifth Amendment right to silence, a defendant has the right to consult with an attorney prior to and during questioning. *State v. Earls*, *supra*. Any comment on the invocation to this Fifth Amendment right to counsel also improperly impinges upon the Fifth Amendment right to silence. *Id.*

For example, in *State v. Easter*, 130 Wn.2d 228, 922 P.2d 1285 (1996), the state charged the defendant with multiple counts of vehicular

homicide. At trial the chief investigating officer testified that he found the defendant in a gas station bathroom shortly after the accident and the defendant "totally ignored" him when he asked what happened. The police officer also testified that upon further questioning the defendant looked down, "once again ignoring me, ignoring my questions." Following conviction the defendant appealed, arguing that this testimony violated his Fifth Amendment right to silence.

In addressing this issue the Washington Supreme Court first reviewed the rights protected under both Washington Constitution, Article 1, § 9, and United States Constitution, Fifth Amendment, stating as follows:

> The right against self-incrimination is liberally construed. It is intended to prohibit the inquisitorial method of investigation in which the accused is forced to disclose the contents of his mind, or speak his guilt. To enforce this principle, upon arrest, an accused must be advised he or she can remain silent.
>
> At trial, the right against self incrimination prohibits the State from forcing the defendant to testify. Moreover, the State may not elicit comments from witnesses or make closing arguments relating to a defendant's silence to infer guilt from such silence. As the United States Supreme Court said in *Miranda*, "[t]he prosecution may not ... use at trial the fact [the defendant] stood mute or claimed his privilege in the face of accusation." The purpose of this rule is plain. An accused's Fifth Amendment right to silence can be circumvented by the State "just as effectively by questioning the arresting officer or commenting in closing argument as by questioning defendant himself."

State v. Easter, 130 Wn.2d at 235-236 (citations omitted).

In *Easter*, the prosecution tried to take the statements admitted at trial out of Fifth Amendment analysis by arguing that they were "pre-arrest," and thus not constitutionally protected. The court noted: "[t]he State argues pre-arrest silence may be used to support the State's case in chief because the Fifth Amendment is designed to deal only with 'compelled' testimony, and Easter was under no compulsion to speak at the accident scene prior to his arrest." *Easter*, 130 Wn.2d at 237-38. The Court rejected this argument, holding as follows:

> We decline to read the Fifth Amendment so narrowly as the State urges. An accused's right to silence derives, not from *Miranda*, but from the Fifth Amendment itself. The Fifth Amendment applies before the defendant is in custody or is the subject of suspicion or investigation. The right can be asserted in any investigatory or adjudicatory proceeding. Indeed, the *Miranda* warning states the accused is entitled by the Fifth Amendment to remain silent; *Miranda* indicates the right to silence exists prior to the time the government must advise the person of such right when taking the person into custody for interrogation. When the State may later comment an accused did not speak up prior to an arrest, the accused effectively has lost the right to silence. A "bell once rung cannot be unrung." The State's theory would encourage delay in reading *Miranda* warnings so officers could preserve the opportunity to use the defendant's pre-arrest silence as evidence of guilt.
>
> The State's belief that the Fifth Amendment applies only to "compelled testimony" also implies that an accused acquires the right to silence only when advised of such right at the time of arrest. This is not so. No special set of words is necessary to invoke the right. In fact, an accused's silence in the face of police questioning is quite expressive as to the person's intent to invoke the right regardless of whether it is pre-arrest or post-arrest. If silence after arrest is "insolubly ambiguous" according to the *Doyle* Court, it is equally so before an arrest.

State v. Easter, 130 Wn.2d 238-239 (citations omitted).

Given this analysis, the Supreme Court reversed, finding an error of constitutional magnitude, and insufficient proof by the state that the error was harmless beyond a reasonable doubt.

The decision in *Easter* is on point with the facts in the case at bar. In *Easter* a police officer testified before the jury that he confronted the defendant, who refused to respond. In the case at bar the officer testified before this jury that he also confronted the defendant who refused to respond. This exchange went as follows:

> Q. Was he – was he providing you with any information as to how he acquired this money at this point?
>
> A. 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.
>
> Q. Okay. So you – so you had been unable to verify any – any information he was providing to you?
>
> A. 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 236-237.

Once again, there was no possible tactical reason for the defendant's attorney to refrain from objecting to these questions and answers, given its purpose and effect of telling the jury that in the officer's opinion the

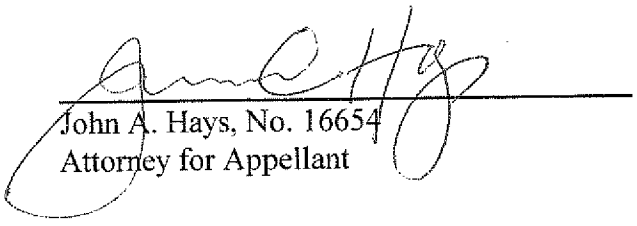
defendant was guilty because he refused to answer questions. Thus, trial court's failure to object fell below the standard of a reasonably prudent attorney. Once again, given the paucity of evidence proving that the defendant possessed the jacket, the result in the proceeding would have been different given a timely, proper objection to this evidence. Consequently, trial counsel's failure to object to the officer's comment upon the defendant exercise of his right to silence also denied the defendant effective assistance of counsel under Washington Constitution, Article 1, § 22, and United States Constitution, Sixth Amendment.

CONCLUSION

Trial counsel's failure to object when the prosecutor (1) repeatedly mischaracterized a coat found as "Mr. Fannon's jacket," (2) called upon a state's witness to render an opinion on guilt and comment on the defendant's credibility, and (3) elicited evidence upon the defendant's exercise of his right to silence, constituted misconduct and denied the defendant his rights to due process and his right to effective assistance of counsel. As a result, this court should reverse the defendant's convictions and remand for a new trial.

DATED this 12th day of October, 2015.

Respectfully submitted,



John A. Hays, No. 16654
Attorney for Appellant

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.

. . .

COURT OF APPEALS OF WASHINGTON, DIVISION II

STATE OF WASHINGTON, **Respondent,** **vs.** **LEO FANNON,** **Appellant.**	**NO. 47538-6-II** **AFFIRMATION OF SERVICE**

The under signed states the following under penalty of perjury under the laws of Washington State. On the date below, I personally e-filed and/or placed in the United States Mail the Brief of Appellant with this Affirmation of Service Attached with postage paid to the indicated parties:

1. Mr. Ryan Jurvakainen
   Cowlitz County Prosecuting Attorney
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   Kelso, WA 98626
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2. Leo Fannon, No.906339
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Dated this October 12, 2015, at Longview, WA.

Diane C. Hays

HAYS LAW OFFICE

October 12, 2015 - 3:08 PM

Transmittal Letter

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Case Name: State v. Leo Fannon
Court of Appeals Case Number: 47528-6

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Statement of Additional Authorities

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Affidavit

Letter

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Personal Restraint Petition (PRP)

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