No. 94273-1

IN THE SUPREME COURT OF THE
STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

vs.

HOLLIS BLOCKMAN,

Petitioner.

PETITION FOR REVIEW

Court of Appeals No. 76038-6-I
Appeal from the Superior Court of Pierce County
Superior Court Cause Number 14-1-04093-0
The Honorable Stanley Rumbaugh, Judge

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I. IDENTITY OF PETITIONER

The Petitioner is Hollis Blockman, Defendant and Appellant in the case below.

II. COURT OF APPEALS DECISION

Petitioner seeks review of the published opinion of the Court of Appeals, Division 1, case number 76038-6, which was filed on January 23, 2017 and published on March 2, 2017 (attached in Appendix). The Court of Appeals affirmed the conviction entered against Petitioner in the Pierce County Superior Court.

III. ISSUES PRESENTED FOR REVIEW

1. Where the protective sweep exception to the warrant requirement allows officers who enter a residence to lawfully arrest an occupant to first conduct a cursory search of areas adjoining the location of the arrest, but where the officers in this case did not enter the apartment in order to make an arrest, did the Court of Appeals err when it concluded that the search of the apartment was valid under the "protective sweep" exception to the warrant requirement?

2. The "protective sweep" exception to the warrant requirement was originally limited to circumstances where an officer was present at a home in order to arrest an occupant, which is an inherently confrontational situation, and required the officer to have a reasonable and articulable suspicion that there was a dangerous person present on the premises. Was Division 1 wrong to extend this exception to apply any time an officer is present at a residence and has reason to believe there are other people present, regardless of whether there is a reason to believe those other people may be armed or dangerous?

IV. STATEMENT OF THE CASE

A. PROCEDURAL HISTORY

The State charged Hollis Blockman with one count of unlawful possession of a controlled substance with intent to deliver (RCW 69.50.401), within 1,000 feet of a school bus stop (RCW 69.50.435). (CP 35) The trial court denied Blockman's CrR 3.6 motion to suppress, and ruled that his custodial statements were admissible under CrR 3.5. (CP 13-23; TRP2 17-21)[1]

A jury found Blockman guilty as charged. (TRP5 3-4; CP 72-73) The trial court sentenced Blockman to a 57-month term of confinement under the Special Drug Offender Sentencing Alternative. (TRP7 23; CP 104) The court imposed mandatory legal financial obligations and also ordered Blockman to pay $250.00 reimbursement for defense costs. (TRP7 23; CP 102) Blockman timely appealed. (CP 224) The Court of Appeals affirmed Blockman's conviction and sentence.

B. SUBSTANTIVE FACTS

1. Facts from CrR 3.6 Hearing

Officer Peter Hayward and his partner responded to a report

[1] The consecutively paginated pretrial and trial transcripts labeled volumes I thru VII will be referred to as "#RP." The remaining transcripts will be referred to by the date of the proceeding contained therein.

of a robbery at a Tacoma area apartment. (1RP 24, 36; CP 14) He spoke first to the victim, then went to the apartment where the victim claimed the crime occurred. (1RP 25, 36-37) Patricia Burton answered the door, and said something to the effect of, "I can't believe she called the cops." (1RP 25)

According to Officer Hayward, Burton immediately invited them into her apartment. (1RP 26) Once inside, Officer Hayward told Burton that he was investigating a report of a robbery and told her that he was going to walk through the apartment to see who else was present. (1RP 26, 42-43) Burton told Officer Hayward that there were two people in a bedroom and, according to Hayward, that she "had nothing to hide" and he could "search the whole apartment." (1RP 26, 41-43) Officer Hayward then conducted what he described as a "protective sweep" of the apartment, to make sure there were no other people who could pose a threat to officer safety. (1RP 26-27)

In one of the bedrooms, Officer Hayward saw a man and a woman sitting on a couch engaged in what he believed was a drug transaction. (1RP 27) The man, Hollis Blockman, was taken into custody. (1RP 30) Officer Hayward returned to the living room and asked Burton's permission to do a more thorough search of her

apartment. (1RP 29) Officer Hayward then explained to Burton that she did not have to consent to a search of her apartment and that she could also limit the scope of any permitted search. (1RP 29) Burton gave the officers permission to search the entire apartment. (1RP 29)

2. Facts from Trial

Officer Hayward testified that Blockman and an unidentified woman were sitting facing each other on an L-shaped couch. (2RP 81) Blockman was holding a baggie with one hand and reaching into it with the other hand. (2RP2 81, 82; 3RP 7) The woman was leaning towards Blockman and appeared to be placing a $20 bill onto the coffee table. (2RP 81; 3RP 7-8) Officer Hayward made his presence known, and Blockman immediately put his hand down and out of view. (2RP 82) Officer Hayward told Blockman to show his hands. (2RP 82) Blockman complied, and Officer Hayward saw that Blockman was still holding the baggie, which appeared to contain crack cocaine. (2RP 82)

The substance in the baggie was subsequently tested and identified as crack cocaine. (3RP 51; 4RP 32) Small rocks of crack sell for about $20.00 apiece. (4RP 34) Blockman was arrested and booked, and during a booking search the officers found

$244.00 in cash inside his sock. (3RP 9, 14) The State also presented testimony that a school bus stop is located at an intersection about 666 feet from Burton's apartment. (3RP 15, 18; 4RP 41)

V. ARGUMENT & AUTHORITIES

The issues raised by Hollis Blockman's petition should be addressed by this Court because the Court of Appeals' decision conflicts with settled case law of the Court of Appeals, this Court and of the Federal Courts. RAP 13.4(b)(1) and (2). Division 1 ignored its own prior decisions and decision of several Federal Circuit Courts, and improperly and without justification expanded the "protective sweep" search exception well beyond its intended scope and purpose.

The Fourth Amendment guarantees "[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures." Article 1, section 7 of the Washington Constitution states that "[n]o person shall be disturbed in his private affairs, or his home invaded, without authority of law." This right to privacy includes the right to be free from warrantless searches, which are "unreasonable per se." State v. Hendrickson, 129 Wn.2d 61, 70, 917 P.2d 563 (1996). And "the physical entry of

the home is the chief evil against which the wording of the Fourth Amendment is directed." Payton v. New York, 445 U.S. 573, 585, 100 S. Ct. 1371, 63 L. Ed. 2d 639 (1980) (internal quotation marks omitted)

Blockman moved to suppress the baggie of cocaine discovered by Officer Hayward during the "protective sweep" of Burton's apartment.[2] (CP 16-23; 2RP 9-13) Blockman argued that the search was not a valid protective sweep, and that Officer Hawyard was obligated to inform Burton of her right to refuse consent or limit the scope of a search (the so called Ferrier warnings) before he conducted any sweep or search. (2RP 9-12)

The trial court denied the motion. The court did not enter any written finding or conclusions, but made the following oral ruling:

> Ferrier prohibits police officers or law enforcement from searching a residence for evidence of a crime when a homeowner might feel a coercive force based on the presence of law enforcement or under circumstances where the resident who is inviting the search is unaware of their right to keep the police from searching, to curtail the scope of the search, to otherwise order that the search be stopped on request, and that is different than a protective sweep. And protective sweeps have always troubled this Court. However, I think that under the current

[2] The parties agreed that Blockman automatically had standing to challenge the search because he was charged with a possessory offense. (2RP 9)

status of Fourth Amendment law and Article I, Section 7 law, in Washington State protective sweeps of residences are an accepted exception to the warrant requirement.

The seminal case is Maryland vs. Buie, B-u-i-e, 494 United States 325. It's a 1990 case. The familiar ruling in Buie states that, "Law enforcement may – " and I'm quoting from the case – "without probable cause or reasonable suspicion look in closets and other spaces immediately adjoining the place of arrest from which an attack could be immediately launched."

In this case we have a small apartment, a short hallway, and an officer that has been notified there are other people present in a home where a victim alleged that the victim was robbed. So looking through the bedroom door into the bedroom is different than rifling through drawers or looking in locations that no person could hide in. That is, I think, a legitimate scope of a protective sweep.

The requirement is immediate adjacency and the area from which an attack could be immediately launched. Both of those requirements of Buie are met. So we have a cursory inspection here of short duration into an immediately adjacent room, and I think that Buie is satisfied for Fourth Amendment purposes.

…The fact that Ms. Burton told officers there were others present in the apartment certainly does raise a reasonable suspicion to believe that there might be persons present who pose a danger to the officers.

[T]he Washington Courts have adopted the essential reasoning of Buie in State vs. Sadler, which is 147 Wn. App. 97….

[W]hile Article I, Section 7 allows search of a dwelling only when done under the authority of law, that authority is not restricted only to a warrant. The authority of law present here is as described in the Buie warrant exception and as adopted by our courts in the cases adopting the Buie rationale or State vs. Sadler and State vs. Smith. So I don't believe there

> was a search.
>
> Therefore, Ferrier becomes somewhat irrelevant to the analysis. I believe that this was a valid protective sweep. Consequently, based on this record, Officer Hayward saw a drug transaction or what he believed in his experience to be a drug transaction taking place in plain view, and he was entitled thereafter to detain Mr. Blockman.

(TRP2 17-20)[3]

The trial court's ruling is incorrect for several reasons.[4] First, the trial court misunderstood and misapplied the "protective sweep" exception to the warrant requirement. In Maryland v. Buie, the United States Supreme Court held that the Fourth Amendment permits protective sweeps. 494 U.S. 325, 327, 110 S. Ct. 1093, 108 L. Ed. 2d 276 (1990). The rationally being that the risk of danger with in-home arrests justifies steps by the officers "to assure themselves that the house in which a suspect is being, or has just been, arrested is not harboring other persons who are dangerous and who could unexpectedly launch an attack." Buie, 494 U.S. at

[3] A trial court must enter written findings and conclusions following a suppression hearing. CrR 3.6(b). Those findings and conclusions are generally considered necessary for appellate review. State v. Head, 136 Wn.2d 619, 622-23, 964 P.2d 1187 (1998). But the appeal court will nevertheless review the decision when the trial court clearly and comprehensively states the basis of its opinions in its oral ruling. State v. Cruz, 88 Wn. App. 905, 907-09, 946 P.2d 1229 (1997); State v. Smith, 68 Wn. App. 201, 208, 842 P.2d 494 (1992).

[4] The facts relevant to the motion to suppress were largely undisputed. The trial court's legal conclusions, as set forth in its oral ruling, are reviewed de novo. *See* State v. Mendez, 137 Wn.2d 208, 214, 970 P.2d 722 (1999) (citing State v. Johnson, 128 Wn.2d 431, 443, 909 P.2d 293 (1996)).

333. Thus, "**[w]hile making a lawful arrest**, officers may conduct a reasonable 'protective sweep' of the premises for security purposes." State v. Hopkins, 113 Wn. App. 954, 959, 55 P.3d 691 (2002) (emphasis added) (citing Buie, 494 U.S. at 334-35).

The scope of such a sweep is limited to a "cursory visual inspection of places where a person may be hiding." Hopkins, 113 Wn. App. at 959. "If the area immediately adjoins **the place of arrest**, the police need not justify their actions by establishing a concern for their safety." Id. (emphasis added). But when a sweep extends beyond the immediate area, "'there must be articulable facts which, taken together with the rational inferences from those facts, would warrant a reasonably prudent officer in believing that the area to be swept harbors an individual posing a danger to those **on the arrest scene**.'" Id. (emphasis added) (quoting Buie, 494 U.S. at 334). The protective sweep may last "no longer than is necessary to dispel the reasonable suspicion of danger." Buie, 494 U.S. at 335-36.

Here, Officer Hawyard did not arrest anyone, or even indicate an intent to arrest anyone, before the protective sweep. Thus, the threshold requirement of a protective sweep was not met under the circumstances of this case. Rather, Officer Hayward

conducted the sweep before the arrest, and it was the cocaine discovered during the sweep that led to Blockman's arrest.

Nevertheless, Division 1 upheld the search even though it was not conducted in conjunction with an arrest or execution of an arrest warrant, stating:

> Blockman does not cite persuasive authority for the proposition that a protective sweep can occur only after an arrest. In many cases, including Buie, the facts were that the protective sweep was conducted after or in the course of making an arrest, but nothing in the rationale of Buie or its progeny suggests that an arrest is an indispensable prerequisite.

(Opinion at 4)

But Division 1 ignored the plain language of Buie, and numerous decisions of the Eighth, Ninth and Tenth Circuit Courts of Appeal, that specifically declined to extend the protective sweep exception beyond the context of an arrest, and holding that an arrest or valid arrest warrant is a prerequisite to a protective sweep. *See* United States v. Davis, 290 F.3d 1239, 1242 n. 4 (10th Cir. 2002) (rejecting an argument that protective sweeps should sometimes be permitted absent an arrest); United States v. Smith, 131 F.3d 1392, 1396 (10th Cir. 1997) (noting that a protective sweep "is a brief search of premises during an arrest to ensure the safety of those on the scene"); United States v. Torres-Castro, 470

F.3d 992, 997 (10th Cir. 2006) (noting, in connection with application of the doctrine, that "protective sweeps must be performed incident to an arrest"); United States v. Waldner, 425 F.3d 514, 517 (8th Cir. 2005) (declining the invitation to "extend Buie further"); United States v. Reid, 226 F.3d 1020, 1027 (9th Cir. 2000) (refusing to permit a protective sweep where the defendant was not under arrest).

In fact, Division 1 itself even recognized in State v. Boyer, that "the weight of authority specifically limit[s] protective sweeps to arrests or to executions of arrest warrants[.]" 124 Wn. App. 593, 602, 102 P.3d 833 (2004). The Boyer court acknowledged that "[t]he concept of a protective sweep was adopted to justify the reasonable steps taken by arresting officers to ensure their safety while making an arrest." Boyer, 124 Wn. App. at 600 (citing Buie, 494 U.S. at 334).

This Court should follow this line of cases and reject an extension of Buie to non-arrest situations for several reasons. First, while both the Federal and Washington State constitutions prohibit unreasonable searches and seizures, Washington's article I, section 7 is qualitatively different from the Fourth Amendment and provides greater protections. *See e.g.* State v. Hinton, 179 Wn.2d

862, 868, 319 P.3d 9 (2014). Also any expansion of the protective sweep doctrine is unjustified because the doctrine is premised on the assumption that an arrest is confrontational by its very nature. Thus, expanding the doctrine will encourage law enforcement to gain legal entry through "knock and talk" type requests and then gather evidence without any requirement of suspicion or compliance with the Fourth Amendment or article I, section 7.

But even if Division 1's decision to extend Buie is upheld, its determination that the facts presented in this case justify a protective sweep should still be reversed because the court drastically reduces what is required to justify a protective sweep. Division 1 recognizes that "the standard to be applied is whether the officer had a 'reasonable belief based on specific and articulable facts' that the area to be swept harbors an individual posing a danger to investigating officers." (Opinion at 6 (quoting Buie, 494 U.S. at 337).

The State presented no testimony to support the conclusion that there was a "reasonable suspicion to believe that there might be persons present who pose a danger to the officers." (2RP 19) Officer Hayward responded to the report of what he described as a "strong-arm robbery." (1RP 24) Other than that vague description,

there was absolutely no testimony that the alleged victim saw or had reason to believe that there were weapons or dangerous people inside the apartment. There was no reason to believe the perpetrator was still on the premises. There was simply nothing in the record to show any valid concerns either for officer safety or the safety of others that might have authorized a protective sweep of the apartment.

Nevertheless, Division 1 found this to be sufficient to support the sweep, stating:

> When he arrived at the apartment, he was invited in by Burton, a resident, who told him there were two people "in the back." Based on these specific and articulable facts, Officer Hayward had a reasonable belief that the apartment harbored at least two people who might "jump out" and surprise him while he was questioning Burton.

(Opinion at 6) But "[a] general desire to make sure that there are no other individuals present is not sufficient to justify an extended protective sweep." State v. Sadler, 147 Wn. App. 97, 126, 193 P.3d 1108 (2008); see also Hopkins, 113 Wn. App. at 960-61.

Division 1 essentially upheld the protective sweep simply because Officer Hayward had reason to believe there were other people in the apartment. Under Division 1's holding, an officer no longer needs facts to indicate that someone on the premises might

be armed or might be dangerous. The officer only needs to suspect that there is someone else on the premises that might "jump out." An unseen person simply has to be present on the premises to justify a complete invasion of a person's home.

The protective sweep in this case was not conducted after a lawful arrest and there were no facts presented at the hearing to support a belief that dangerous individuals were present in Burton's apartment. Accordingly, the State failed to establish that Officer Hayward's search was justified under the "protective sweep" exception to the warrant requirement.

Consent is another narrowly drawn exception to the warrant requirement. State v. Ferrier, 136 Wn.2d 103, 111, 960 P.2d 927 (1998) (citing Hendrickson, 129 Wn.2d at 72). The State has the burden of proving that the defendant's consent to a search was valid by clear and convincing evidence. State v. Smith, 115 Wn.2d 775, 789, 801 P.2d 975 (1990); Ferrier, 136 Wn.2d at 111. To show that consent to a search is valid, the prosecution must prove that the consent was freely and voluntarily given. See State v. O'Neill, 148 Wn.2d 564, 588, 62 P.3d 489 (2003) (citing Bumper v. North Carolina, 391 U.S. 543, 548, 88 S. Ct. 1788, 20 L.Ed.2d 797 (1968); State v. Walker, 136 Wn.2d 678, 682, 965 P.2d 1079

(1998)).

In Ferrier, the Washington Supreme Court acknowledged that to some degree it is inherently coercive whenever a police officer requests consent to enter or search a home without a warrant. 136 Wn.2d at 115. The Court noted that the only way to protect the right against warrantless searches of a home is to require police to inform citizens of their right to refuse consent. 136 Wn.2d at 116. "If we were to reach any other conclusion, we would not be satisfied that a home dweller who consents to a warrantless search possessed the knowledge necessary to make an informed decision. That being the case, the State would be unable to meet its burden of proving that a knowing and voluntary waiver occurred." 136 Wn.2d at 116-17. Accordingly, the Ferrier Court held that "article I, section 7 is violated whenever the authorities fail to inform home dwellers of their right to refuse consent to a warrantless search." 136 Wn.2d at 118.[5]

Ferrier warnings are not required when an officer simply

[5] When police officers request permission to enter a citizen's home to conduct a warrantless search they must, prior to entering the home, inform the person from whom consent is sought that he or she: (1) may lawfully refuse consent to the search; (2) may revoke, at any time, the consent that they give; and (3) may limit the scope of the consent to certain areas of the home. Ferrier, 136 Wn.2d at 118-19. The failure to provide these warnings prior to entering the home vitiates any consent given thereafter. Ferrier, 136 Wn.2d at 118-19.

seeks to enter a home merely to question or gain information from an occupant. State v. Khounvichai, 149 Wn.2d 557, 566, 69 P.3d 862 (2003). But Officer Hayward testified that they "always do a protective sweep of a location." (TRP1 26, 46) Thus, Officer Hayward **knew** before he asked permission to enter that he would conduct a sweep of Burton's apartment. His intention was not simply to enter and question Burton; his intention was to enter and question **and** search. Thus, Ferrier warnings were required.

Even if Officer Hayward's only intention in entering the apartment was to question Burton, his subsequent sweep was still an improper search because Burton's consent was not truly voluntary. The State has the burden of demonstrating the voluntariness of the consent. State v. Bustamante-Davila, 138 Wn.2d 964, 981, 983 P.2d 590 (1999). Whether consent was voluntarily given is generally determined by evaluating "the totality of the circumstances which includes '(1) whether Miranda warnings had been given prior to obtaining consent; (2) the degree of education and intelligence of the consenting person; and (3) whether the consenting person had been advised of his right to consent.'" Bustamante-Davila, 138 Wn.2d at 981-92 (quoting State v. Shoemaker, 85 Wn.2d 207, 211-12, 533 P.2d 123 (1975)).

According to Officer Hayward, Burton repeatedly said she had nothing to hide and that he could search her entire apartment. (TRP1 28, 39-40) However, Officer Hawyard had "**told** her, '**I'm going to take a look** to make sure there's no one else here.'" (TRP1 26; emphasis added) Officer Hayward did not request permission to search, instead he presented the search as something that was absolutely going to happen. Burton therefore would have no reason to believe that she could refuse to allow the search. Burton's "consent" was obtained only after she was informed of Officer Hayward's intentions and misinformed of his authority. Her "consent" was obtained under circumstances that even the most informed citizen would find coercive. Her response to Officer Hayward's statement that he intended to search—that she had nothing to hide and they could search the entire apartment—simply cannot be seen as voluntary and informed consent.

Under the trial court's and Officer Hayward's interpretation of the State and Federal constitutions, any resident who gives a police officer permission to enter their home in order talk is also unwittingly and unknowingly granting the officer permission to conduct a walk-through search of their home. Neither the Fourth

Amendment nor article I, section 7 grant police officers such broad authority. There simply must be an exception to the warrant requirement, or consent given after being fully informed of the right to refuse such consent, before a police officer may invade the private spaces of a person's home. Neither a valid exception nor a valid consent were present in this case, and the sweep search was improper.

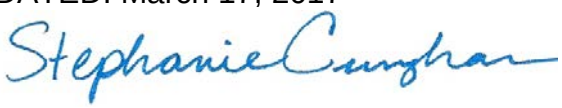
When an unconstitutional search occurs, all subsequently uncovered evidence becomes fruit of the poisonous tree and must be suppressed. State v. Ladson, 138 Wn.2d 343, 359, 979 P.2d 833 (1999) (citing State v. Kennedy, 107 Wn.2d 1, 4, 726 P.2d 445 (1986)). The State failed to show that a valid exception to the warrant requirement applied and the search was therefore unconstitutional. Accordingly, the baggie of cocaine should have been suppressed, and Blockman's conviction must be reversed.

VI. CONCLUSION

Officer Hayward testified that he "always do[es] a protective sweep of a location … to make sure that there's no one hiding or anything like that." (1TRP 26-27; 49) Officer Hayward clearly did not believe that a specific and articulable concern for his safety was required. And now Division 1 no longer requires such a concern

either. Division 1 has improperly and without justification expanded the protective sweep exception far beyond its original limitations and purpose. This Court should accept review, reverse the trial court's denial of Blockman's motion to suppress, and reverse Blockman's convictions.

DATED: March 17, 2017



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CERTIFICATE OF MAILING

I certify that on 3/17/17, I caused to be placed in the mails of the United States, first class postage pre-paid, a copy of this document addressed to: Hollis Blockman DOC# 964310, Monroe Correctional Complex-WSR D301, P.O. Box 777, Monroe, WA 98272-0777.

STEPHANIE C. CUNNINGHAM, WSBA #26436

APPENDIX

Court of Appeals Opinion in State v. Hollis Blockman, No. 76038-6-I

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

STATE OF WASHINGTON, Respondent, v. HOLLIS BLOCKMAN, Appellant.	No. 76038-6-I ORDER GRANTING MOTION TO PUBLISH OPINION

Respondent, State of Washington, has filed a motion to publish in part the opinion filed on January 23, 2017. Appellant, Hollis Blockman, has filed a response to respondent's motion. The court has determined that respondent's motion to publish the opinion is granted and that the opinion shall be published in full rather than in part. Now, therefore, it is hereby

ORDERED that the written opinion filed on January 23, 2017, shall be published in full and printed in the Washington Appellate Reports.

DATED this 2nd day of March, 2017.

FOR THE COURT:

Becker, J.
Judge

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, Respondent, v. HOLLIS BLOCKMAN, Appellant.	)	No. 76038-6-I DIVISION ONE PUBLISHED OPINION FILED: January 23, 2017

BECKER, J. – Appellant Hollis Blockman appeals from his conviction for unlawful possession of cocaine with intent to deliver. The principal issue is whether the trial court erred in denying Blockman's motion to suppress evidence. The evidence was that an officer, while conducting a protective sweep of an apartment, saw Blockman in a back room engaged in a drug transaction.

The relevant facts are set forth in findings of fact and conclusions of law entered by the trial court on June 16, 2016, after Blockman filed this appeal. A court rule provides that written findings and conclusions are to be entered after a suppression hearing. CrR 3.6(b). In some cases we have accepted findings that are entered after a case is appealed as long as there is no prejudice to the defendant. State v. Cruz, 88 Wn. App. 905, 907 n.1, 946 P.2d 1229 (1997). That is true here. There were no disputed facts at the suppression hearing, and

Blockman has not contested the facts as set forth in the belatedly entered findings and conclusions.

According to the findings of fact, Tacoma police officer Peter Hayward responded to a report of an assault and robbery and made contact with the victim, a Ms. Green. He went to an apartment in Tacoma and contacted the resident, Patricia Burton, who immediately said, "'I can't believe she called the cops.'" Burton acknowledged that she paid rent at the apartment and that she was the resident. Burton invited the officers inside, and the officers stood approximately two or three steps inside the front door and in the living room as they spoke with her. Burton offered that there were "'two people in the back.'" Officer Hayward had concerns for his safety due to the report of at least two unknown individuals somewhere in the residence.

Officer Hayward was invited by Burton to conduct a protective sweep, and he did. He conducted the sweep "to make sure no one would jump out and surprise them while he was questioning Ms. Burton." His gun was still in its holster when he conducted the protective sweep. He did not announce his presence due to officer safety concerns. He did not open cabinets or drawers to search for evidence.

Officer Hayward walked through the living room and turned into a short hallway. He immediately saw, in a bedroom, in plain view with the door open, a woman placing a $20 bill on a coffee table, and he observed Blockman holding a clear plastic bag containing several small, white rock-like objects that later tested positive for cocaine. Blockman was placed under arrest.

The State charged Blockman with unlawful possession of cocaine with intent to deliver within 1,000 feet of a school bus route stop. Blockman moved to suppress the evidence. At the CrR 3.6 hearing, counsel for Blockman argued that the evidence acquired from the protective sweep should be suppressed because of Officer Hayward's failure to give appropriate warnings under State v. Ferrier, 136 Wn.2d 103, 960 P.2d 927 (1998). The State argued that the protective sweep was valid based on officer safety concerns. The superior court denied the motion to suppress, concluding as follows:

> Officer Hayward had reasonable suspicion to believe there might be other persons present in the residence who could pose a danger to the officers.
>
> . . . Officer Hayward did not exceed the scope of his protective sweep of the small apartment with a short hallway when he looked in the back bedroom, with its door open, that immediately adjoined the place where he was questioning a suspect regarding an assault and robbery.

The jury found Blockman guilty as charged. Blockman appeals.

PROTECTIVE SWEEP

Officer Hayward's testimony describing the drug transaction he witnessed when he looked into the back bedroom was critical evidence supporting the conviction. Blockman assigns error to the denial of the motion to suppress. He contends the trial court erred by concluding that the sweep search was valid under the protective sweep exception to the warrant requirement.

The Fourth Amendment to the United States Constitution and article I, section 7 of the Washington Constitution prohibit a warrantless search and seizure unless the State demonstrates that one of the narrow exceptions to the warrant requirement applies. State v. Garvin, 166 Wn.2d 242, 249, 207 P.3d

1266 (2009). One recognized exception to the warrant requirement is a "protective sweep" inside a home to inspect "those spaces where a person may be found." Maryland v. Buie, 494 U.S. 325, 334-35, 110 S. Ct. 1093, 108 L. Ed. 2d 276 (1990).

Blockman argues that a protective sweep is valid without a warrant only if it occurs after a lawful arrest. Blockman did not make this argument below and instead argued for suppression based on Ferrier. For the first time on appeal, Blockman contends that the threshold requirement for a protective sweep was not met because Officer Hayward did not arrest anyone before the protective sweep. We will consider this argument, though Blockman did not raise it below, because the record is fully developed and the argument is constitutional in nature. See RAP 2.5(a).

Blockman does not cite persuasive authority for the proposition that a protective sweep can occur only after an arrest. In many cases, including Buie, the facts were that the protective sweep was conducted after or in the course of making an arrest, but nothing in the rationale of Buie or its progeny suggests that an arrest is an indispensable prerequisite. Buie was decided on the principles the Court had previously set forth in the context of a protective frisk for weapons, including Terry v. Ohio, 392 U.S. 1, 88 S. Ct. 1868, 20 L. Ed. 2d 889 (1968), and Michigan v. Long, 463 U.S. 1032, 103 S. Ct. 3469, 77 L. Ed. 2d 1201 (1983). The rationale is officer safety. "In Terry and Long we were concerned with the immediate interest of the police officers in taking steps to assure themselves that the persons with whom they were dealing were not armed with, or able to gain

immediate control of, a weapon that could unexpectedly and fatally be used against them. In the instant case, there is an analogous interest of the officers in taking steps to assure themselves that the house in which a suspect is being, or has just been, arrested is not harboring other persons who are dangerous and who could unexpectedly launch an attack." Buie, 494 U.S. at 333.

While the sweep in Buie took place in a house during the course of an arrest, federal appellate cases following Buie apply the same rationale to uphold sweeps before an arrest. United States v. Taylor, 248 F.3d 506, 510, 514 (6th Cir.) (officers justified in making a protective sweep to ensure their safety while a warrant was being obtained), cert. denied, 534 U.S. 981 (2001); United States v. Patrick, 959 F.2d 991, 994, 996-97 (D.C. Cir. 1992) (Once police were lawfully on premises with lessee's consent, they were authorized to conduct a protective sweep based on their reasonable belief that one of its inhabitants was trafficking in narcotics); United States v. Gould, 364 F.3d 578, 581 (5th Cir.) (There is no "across-the-board, hard and fast *per se* rule that a protective sweep can be valid only if conducted incident to an arrest"), cert. denied, 543 U.S. 955 (2004). The Gould court recognized that Buie authorized the protective sweep for officer safety and reasoned that "in the in-home context it appears clear that even without an arrest other circumstances can give rise to equally reasonable suspicion of equally serious risk of danger of officers being ambushed by a hidden person as would be the case were there an arrest." Gould, 364 F.3d at 584.

Blockman emphasizes that the protective sweeps in Buie and State v. Hopkins, 113 Wn. App. 954, 55 P.3d 691 (2002), were in fact incident to arrest. There was no dispute in these cases that the sweeps were incident to arrest, so the courts had no occasion to address whether the sweep would have been permissible absent arrest. See Gould, 364 F.3d at 581 ("There was no dispute in Buie that the sweep was incidental to arrest, and nothing in Buie states that if the officers were otherwise lawfully in the defendant's home and faced with a similar danger, such a sweep would have been illegal.")

We conclude the standard to be applied is whether the officer had a "reasonable belief based on specific and articulable facts" that the area to be swept harbors an individual posing a danger to investigating officers. See Buie, 494 U.S. at 337.

Officer Hayward was investigating a report of an assault and robbery in an apartment. When he arrived at the apartment, he was invited in by Burton, a resident, who told him there were two people "'in the back.'" Based on these specific and articulable facts, Officer Hayward had a reasonable belief that the apartment harbored at least two people who might "jump out" and surprise him while he was questioning Burton. As the trial court concluded, the officer did not exceed the scope of a protective sweep when he looked into an immediately adjoining back bedroom with its door open. The trial court did not err in denying the motion to suppress.

INEFFECTIVE ASSISTANCE OF COUNSEL

Blockman makes two ineffective assistance of counsel arguments. Ineffective assistance of counsel is established if counsel's performance was deficient and the deficient performance prejudiced the defendant. Strickland v. Washington, 466 U.S. 668, 687, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984); State v. Thomas, 109 Wn.2d 222, 225-26, 743 P.2d 816 (1987).

Blockman argues that he was denied his right to effective assistance of counsel when his attorney made an argument against the protective sweep based on a misunderstanding of Ferrier. He contends counsel instead should have argued that a protective sweep is permissible under Buie only after an arrest.

As discussed above, the protective sweep exception is not limited in the way that Blockman argues for the first time on appeal. Counsel may have inaccurately presented Ferrier to the trial court, but Blockman does not argue that an accurate rendition of Ferrier would have compelled granting of the motion to suppress. With respect to the motion to suppress, counsel's performance was neither deficient nor prejudicial.

Blockman contends counsel was ineffective in failing to object to a remark made by the prosecutor in rebuttal closing argument. The challenged remark was a response to Blockman's argument that the State had not proven that he was selling rather than buying the cocaine. Blockman suggested the State assumed he was the seller, and the woman involved in the transaction was the buyer, simply because of gender:

> Do we make the assumption that only men sell crack? Is it possible for a woman to deal crack and sell drugs, or are we just going to assume it's the man in the room? Are we just going to assume that the guy holding the bag is the person doing the dealing, or is he somebody that is holding the bag to select his product?

The prosecutor directly responded to Blockman's rhetorical questions about gender assumptions:

> There are some red herrings that came up here, and the State is not saying that just because you're a male and only drug dealers are males. I'm sure there are very successful female drug dealers out there too. That's not the issue. *The issue is the Defendant was interrupted while conducting a drug transaction.*

(Emphasis added.) Blockman contends counsel should have objected that the prosecutor was misstating the law by implying it was irrelevant whether Blockman was the purchaser or the seller.

Defense counsel's failure to object during a prosecutor's closing argument will generally not constitute deficient performance because lawyers do not commonly object during closing argument absent egregious misstatements. In re Pers. Restraint of Cross, 180 Wn.2d 664, 721, 327 P.3d 660 (2014).

The prosecutor was directly rebutting Blockman's closing argument that the State was asking the jury to assume that Blockman must have been the seller simply because he was a man. In closing, the prosecutor went through each element of the crime, including the intent to deliver element, and told the jury that "essentially the crux of this case" was "did the Defendant have the intent to deliver cocaine?" The jury was instructed on the elements of the crime, including intent to deliver. Taken in context, the prosecutor's comment did not

amount to a misstatement of the law. Thus, counsel was not ineffective for failing to object to it.

APPELLATE COSTS

Blockman asks us not to impose appellate costs in the event that the State prevails on appeal and seeks costs. Under RCW 10.73.160(1), this court has discretion to decline to impose appellate costs on appeal. State v. Sinclair, 192 Wn. App. 380, 385, 388, 367 P.3d 612, review denied, 185 Wn.2d 1034 (2016). The State asks us to decline to exercise our discretion, and instead to impose the costs if requested by the State and leave Blockman to seek a remission hearing in the future to show his inability to pay at such time as the State may try to collect the costs. The State has provided no basis for a determination that Blockman's financial circumstances have improved since the trial court found that he is indigent. We exercise our discretion not to impose appellate costs.

STATEMENT OF ADDITIONAL GROUNDS

Blockman alleges that the prosecutor failed to disclose expert witness Terry Krause. The State's supplemental witness list filed on June 22, 2015, listed Terry Krause.

Blockman alleges that there was a violation of the chain of custody based on arresting officer Hayward's testimony that the booking officer found $244 on Blockman that he did not see. Blockman does not explain how this is a chain of custody violation.

Blockman alleges that pages were missing from his discovery and that he had ineffective assistance of counsel. The record reveals that the trial court

already addressed both of these issues at length. Blockman gives us no reason to revisit the trial court's resolution of these issues.

Blockman alleges that Officer Hayward's testimony at trial contradicted his testimony at the suppression hearing. This allegation is inadequate to inform the court of the nature of the alleged error. See RAP 10.10(c).

Affirmed.

Becker, J.

WE CONCUR:

Spearman, J.

Dwyer, J.