NO. 4[redacted]3
76038-6

COURT OF APPEALS, DIVISION II
STATE OF WASHINGTON

FILED
COURT OF APPEALS
DIVISION ONE

DEC 08 2016

STATE OF WASHINGTON, RESPONDENT

v.

HOLLIS BLOCKMAN, APPELLANT

Appeal from the Superior Court of Pierce County
The Honorable Stanley J. Rumbaugh

No. 14-1-04093-0

CORRECTED BRIEF OF RESPONDENT

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A. ISSUES PERTAINING TO APPELLANT'S ASSIGNMENTS OF ERROR.

1. Did the trial court properly admit evidence obtained during a protective sweep to be admitted into evidence when the sweep was done for the purpose of ensuring the safety of the officers present while they interviewed a robbery suspect? (Appellant's Assignment of Error 1 & 2)

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5. Should this Court make a determination that appellate costs are appropriate if the State prevails and seeks costs if the State prevails on appeal? (Appellant's Assignment of Error 5)

B. STATEMENT OF THE CASE.

1. Procedure

Hollis Blockman, hereinafter "defendant," was charged with a violation of RCW 69.50.401, possession of a controlled substance with the intent to deliver, and with a violation of RCW 69.50.435, intent to deliver a controlled substance within 1,000 feet of a school bus stop. CP 35. The defendant moved to suppress the drug evidence which was obtained during a protective sweep of an apartment in which the defendant was seen selling crack cocaine. 1RP 27[1], CP 13-23[2]. The trial court denied the defendant's motion. CP 251-253, 2RP 17-21.

The defendant was subsequently convicted by a jury and was sentenced to a term of confinement of 57 months with an additional 57 months in community custody under the Special Drug Offender Sentencing Alternative. 7RP 23, CP 97-112. The defendant filed a timely appeal. CP 224.

2. Facts

During the night of October 9, 2014 and into the morning of October 10, 2014, Officer Peter Hayward of the Tacoma Police

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[1] The Verbatim Reports of Proceedings are contained in seven consecutive volumes with new pagination for each volume.

[2] A trial court must enter written findings of fact and conclusions of law following a suppression hearing. CrR 3.6(b). The written Findings of Fact and Conclusions of Law were entered on June 16, 2016. They have been included as Clerk's Papers 251-253. Courts have allowed entry after a case is appealed as long as it does not prejudice the defendant. ***State v. Cruz*** 88 Wn. App. 905, 908, 946 P.2d 1229 (1997).

Department was on routine patrol. While on patrol he received a call related to a robbery at an apartment above East 38th Street and Portland Avenue in Tacoma. 1RP 24. Upon arriving at the apartment, Officer Hayward came into contact with the resident of the apartment, Patricia Burton. 1RP 25. After being granted permission by Burton to enter the apartment to discuss the robbery, Officer Hayward conducted a protective sweep for the safety purposes with Burton's permission. 1RP 26, 2RP 80. A protective sweep is where police officers check the location which they are at in order to ensure that there are no potential threats to their safety. 2 RP 80-81. Burton had previously informed Officer Hayward that there were other individuals in the apartment. 1 RP 26. This aligned with Officer Hayward being informed by the robbery victim that it was likely that there were other individuals besides Burton at the apartment. 1 RP 47.

During the protective sweep Officer Hayward saw the defendant holding what appeared to be crack cocaine, and a female handling a $20 dollar bill over to the defendant. 1RP 27, 2RP 81. Officer Hayward identified himself, at which point the defendant moved his hands out of the officer's view. 1RP 27-28, 2RP 82. Officer Hayward removed his firearm from its holster and ordered the defendant to show his hands. *Id.* The defendant complied and Officer Hayward saw crack cocaine in the defendant's hands. *Id.* Officer Hayward subsequently arrested the defendant. *Id.*

Following the protective sweep of the apartment and arrest of the defendant, Officer Hayward continued his interview with Burton. CP 74 (Exhibit 4). At the conclusion of the interview Officer Hayward arrested Burton for Robbery 2. *Id.* The arrest occurred within the apartment. *Id.* The defendant and Burton were subsequently transferred to the Pierce County Jail where they were both booked[3].

Forensic Scientist Maureena Dudschus of the Washington State Patrol Crime Lab tested the substance that the defendant was holding and determined that the substance was cocaine. 3RP 51. Officer Terry Krause, a member of the Special Investigations and drug unit for the Tacoma Police Department testified that crack cocaine for the amount that the defendant was selling has a street value of $20. 4RP 35. Testimony from Maude Kelleher, the lead bus router specialist for Tacoma Public Schools, showed that there was an active school bus stop at the intersection of East Columbia Avenue and East Portland Avenue in October 2014. 4RP 41. Further Officer Hayward measured the distance between the apartment where the defendant was selling the drugs and the school bus stop located at that intersection. 3RP 15-18. The distance between the apartment and the intersection is 666 feet. *Id.*

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[3] Although Burton was arrested, charges were never filed in connection to the strong-arm robbery.

C. ARGUMENT.

1. THE PROTECTIVE SWEEP OF THE APARTMENT WAS VALID BECAUSE IT WAS CONDUCTED INCIDENT TO A LAWFUL ARREST AND WAS DONE TO PROTECT THE SAFETY OF THE OFFICERS PRESENT.

Maryland v. Buie, 494 U.S. 325, 110 S. Ct. 1093, 108 L. Ed.2d 276 (1990) established that the Fourth Amendment permits protective sweeps. ***Buie*** at 494 U.S. at 327. Protective sweeps are considered to be a quick and limited search of the premises, incident to an arrest, and *conducted to protect the safety of police officers or others. Id.* (emphasis added). A protective sweep does not permit a full search of the premises, but rather is limited to a cursory inspection of the spaces where a person may be found. ***Buie***, 494 U.S. at 335. Further, the sweep may last no longer than is necessary to dispel a reasonable suspicion of danger that exists for the officers present. ***Buie***, 494 U.S. at 335-336.

Washington courts have explicitly adopted and extended the logic of ***Buie***. *See* ***State v. Hopkins***, 113 Wn. App. 954, 959, 55 P.3d 691 (2002); ***State v. Sadler***, 147 Wn. App. 97, 125-126, 193 P.3d 1108 (2008). In ***Hopkins***, the court specifically noted that when a protective sweep immediately adjoins the place of arrest, the police do not need to justify

their actions by establishing a concern for their safety. ***Hopkins***, 113 Wn. App. at 959.

Here, the protective sweep was conducted incident to arrest. During redirect examination of Officer Hayward, the following testimony occurred:

> Q: What was the intention [of going to Burton's apartment]?
>
> A: Just to contact the suspect of the other half of this alleged robbery at that point.
>
> Q: And what does that involve typically? Is it just questioning?
>
> A: Sure. Trying to develop probable cause or determine if there's probable cause to make an arrest in a strong-arm robbery case.

1RP 46.

Hence, based upon Officer Hayward's testimony, one of the reasons that he was at the apartment was in order to make an arrest. Officer Hayward did in fact arrest Burton. CP 74 (Exhibit 4). While the actual arrest was not an issue in the suppression motion, a suppression hearing exhibit notes that Burton was arrested. *Id.* Further, Officer Hayward's report indicates that Burton was arrested in the apartment. The areas within the apartment immediately adjoining the place of arrest were subject to a valid sweep, even without any officer safety concerns. ***Hopkins***, 113 Wn. App. at 959. Hence, this was a valid protective sweep.

Admittedly, the evidence of Burton's arrest is sparse. The suppression motion focused on ***Ferrier***. CP 13-23. In any event, the protective sweep should be upheld with or without evidence of Burton's arrest.

Protective sweeps are derived from the warrant exceptions first established in ***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). In ***Terry*** the Supreme Court held that an on-street frisk for weapons is reasonable when weighed against the need for police officers to protect themselves and potentially other victims of violence in situations where they may lack probable cause for an arrest. ***Terry***, 392 U.S. at 21. This same rationale was applied to the concept of roadside stops in ***Long***, 463 U.S 1032. The Court found that the search of a passenger area of a vehicle could occur without a warrant so long as such was limited to areas in which a weapon may be placed or hidden and the searching officer possesses a reasonable belief based on specific and articulate facts which taken together reasonably warrant the officer in believing that a suspect is dangerous and may gain immediate control of weapons. ***Long***, 463 U.S. at 1049-1050.

In ***Buie*** the Court noted that a protective sweep should occur at the scene of arrest. However, the Court also made it clear that:

> the Fourth Amendment would permit the protective sweep undertaken here if the searching officer "possesse[d] a reasonable belief based on 'specific and articulable facts which, taken together with the rational inferences from those facts, reasonably warrant[ed]' the officer in believing," ***Michigan v. Long***, 463 U.S. 1032, 1049–1050, 103 S.Ct. 3469, 3480–3481, 77 L.Ed.2d 1201 (1983) (quoting ***Terry v. Ohio***, 392 U.S. 1, 21, 88 S.Ct. 1868, 1880, 20 L.Ed.2d 889 (1968)), that the area swept harbored an individual posing a danger to the officer or others.

Buie, 494 U.S. at 327.

This Court should hold that a protective sweep conducted while questioning a violent crime suspect is valid so long as it was done to protect the safety of police officers or other individuals present at the scene and based upon a reasonable belief of danger.

Protective sweep cases generally focus on the issue of officer safety. While previous cases in Washington, as well as the decision in ***Buie***, discuss protective sweeps occurring as part of a lawful arrest, when looking at the rationale behind the decisions, this should apply equally to situations in which a suspect is questioned about a violent crime. *See* ***State v. Sadler***, 147 Wn. App. 97, 125 ("Police may conduct a protective sweep of the premises for security purposes...") (citing ***Hopkins***, 113 Wn. App. at 959); ***Maryland v. Buie***, 494 U.S. at 335 ("...a protective sweep, aimed

at protecting the arresting officer..."). While Washington courts have discussed protective sweeps in the context of arrests, officer safety purpose will be served even if the officer does not develop probable cause or exercises his discretion not to arrest. The need for safety during the investigation of a violent crime should be paramount.

The majority of federal courts have extended the protective sweep doctrine to instances where officers have a reasonable belief that their safety is at risk. ***United States v. Torres-Castro***, 470 F.3d 992, 997 (10th Cir. 2006). This includes cases where a protective sweep occurs in the absence of an arrest. *Id.* Federal courts have found that the key rationale behind ***Buie*** was the safety of police officers. *See* ***United States v. Martins***, 413 F.3d 139, 150 (1st Cir. 2005) ("[T]he key is the reasonableness of the belief that the officers' safety or the safety of others may be at risk."), *cert denied* 546 U.S. 1011, 126 S. Ct. 644, 163 L.Ed.2d 520 (2005); ***United States v. Miller***, 430 F.3d 93, 100 (2d Cir. 2005) ("The restriction of the protective sweep doctrine only to circumstances involving arrests would jeopardize the safety of officers in contravention of the pragmatic concept of reasonableness embodied in the Fourth Amendment."); ***United States v. Gould***, 364 F.3d 578, 584 (5th Cir. 2004) (en banc) ("[W]e hold that arrest is not always, or *per se*, an indispensable element of an in-home protective sweep..."), *cert denied* 543 U.S. 955,

125 S. Ct. 437, 160 L. Ed. 2d 317 (2004); ***United States v. Taylor***, 248 F.3d 506, 513 (6th Cir. 2001) ("...police may conduct a limited protective sweep [of an area while waiting for a search warrant to prevent destruction of evidence] to ensure safety of those officers"); ***United States v. Patrick***, 959 F.2d 991, 996 (D.C. Cir. 1992) ("Once the police were lawfully on the premises, they were authorized to conduct a protective sweep"). This Court should follow the lead of the federal courts and find that a protective sweep during questioning of a violent crime suspect is valid provided the purpose is officer safety.

The Court of Appeals for the Ninth Circuit has previously split on this issue. In ***United States v. Garcia***, 997 F.2d 1273 (9th Cir. 1993) a panel of the court found that a protective sweep was permissible when officers had a reasonable concern about their safety and there was no arrest at that time. ***Garcia*** 997 F.2d at 1282. More recently, the Ninth Circuit, while quoting previous precedent allowing protective sweeps when no arrest occurred, declined to address the issue. ***Mendez v. County of Los Angeles***, 815 F.3d 1178, 1191 (9th Cir. 2016).

State courts within the Ninth Circuit have likewise explicitly found that ***Buie*** allows for a protective sweep to occur even when such is not incident to arrest. *See* ***State v. Guggenmos***, 253 P.3d 1042, 1047-1048, 350 Or. 243 (2011) (finding that a protective sweep is justified as an

officer might come under the immediate threat of serious physical injury, even when not conducting an arrest); ***State v. Revenaugh***, 992 P.2d 769, 772, 113 Idaho 774 (1999) (finding that a protective sweep is valid when an individual is not formally arrested).

The argument that defense counsel makes would render the concept of protective sweeps for purposes of officer safety void. Defense counsel argues that a protective sweep must occur after an arrest. App. Brf. at 9. This is contrary to the purpose of a protective sweep. Once a suspect is arrested, often after questioning, danger to the officer is diminished and the rationale for a protective sweep is lessened. The defense argument undermines ***Buie*** and creates a dangerous situation for officers while they are determining probable cause and informing arrestees of their constitutional right. This goes directly against the logic of ***Terry Long***, and ***Buie***.

In our case, Officer Hayward had a reasonable belief about his safety. Officer Hayward was investigating a strong-arm robbery. 1RP 24. Further, Burton informed Officer Hayward that there were a couple of other people in the back bedroom of the apartment. 1RP 26. This aligned with Officer Hayward being informed by the robbery victim that it was likely that there were individuals other than Burton at the apartment. 1RP 47. Officer Hayward made it clear that the reason for the protective sweep

was based upon the knowledge that there were other individuals in the apartment that might pose a threat to him and his partner. 1RP 26, 38, 42, 47. The officer also made it clear that safety is the top priority when at the scene. 1RP 49. Due to the information provided to Officer Hayward, this would be a situation where, based upon the reasonable belief of other individuals present at the scene, Officer Hayward was concerned for his safety. The trial court found that Officer Hayward was credible in his testimony and that he had a reasonable suspicion to believe that there might be other individuals in the apartment who could pose a threat to the safety of the officers present. CP 251-253. Additionally, the court determined that Officer Hayward did not exceed the scope of the protective search. *Id.* This court should affirm the trial court's conclusion that the protective sweep was valid.

2. EXIGENT CIRCUMSTANCES APPLIED TO THE PROTECTIVE SWEEP OF THE APARTMENT.

The protective sweep here was also valid under the exigent circumstance exception. In Washington there are eleven suggested factors to consider for exigent circumstances. ***City of Seattle v. Altschuler***, 53 Wn. App. 317, 320, 766 P.2d 518 (1989). In this case, application of the pertinent factors supports exigent circumstances.

First, the crime being investigated was a violent crime. It was an assault and a strong-arm robbery. CP 251-253. A strong-arm robbery is robbery in the second degree, a Class B felony, a violent crime and a strike offense. RCW 9.94A.030(33)(o). RCW 9A.56.210. Second, entry into the apartment was made peaceably with the resident's consent. 1RP 26, CP 251-253. Third, as previously discussed, Officer Hayward was concerned about his safety and the safety of his partner. 1RP 26, 42, 47, 49. Officer Hayward made it clear that he conducted the protective sweep in order to ensure that there was no danger to himself and to his partner as they conducted an interview of Burton regarding the robbery. *Id.* His top priority is safety and that the protective sweep was done to ensure such. 1RP 49. As such, because exigent circumstances existed, this court should affirm the trial court's ruling and find that the protective sweep was a valid exercise in police power.

3. ***FERRIER*** WARNINGS WERE NOT REQUIRED BECAUSE OFFICER HAYWARD ENTERED THE APARTMENT TO INTERVIEW A POTENTIAL SUSPECT AND LOOK FOR A PERSON PRESENT, TWO CLEAR EXCEPTIONS TO ***FERRIER***.

Ferrier warnings are only necessary when police officers conduct a knock and talk for the purpose of obtaining consent to search a residence. ***State v. Ferrier***, 136 Wn.2d 103, 118-119, 960 P.2d 927 (1998). The Supreme Court has limited the requirement of a warning to

situations where police seek to conduct a search for contraband or evidence of a crime without obtaining a search warrant. ***State v. Williams***, 142 Wn.2d 17, 28, 11 P.3d 714 (2000). When police officers are invited into a home for investigative purposes, ***Ferrier*** warnings are not necessary. ***Williams***, 142 Wn.2d at 27.

In the present case, ***Ferrier*** warnings were not necessary. Officer Hayward had no intention of conducting a search for contraband. 1RP 46. He was at the apartment investigating a specific crime that had occurred there. *Id.* He was interviewing the prime suspect. *Id.* The protective sweep occurred for the sole purpose of looking for additional individuals that were present in the apartment. 1RP 46-47.

An appeals court can affirm the judgement of the trial court on any ground supported by the evidence. ***State v. Morales***, 173 Wn.2d 560, 580, 269 P.3d 263 (2012) (quoting ***State v. Carroll***, 81 Wn.2d 95, 101, 500 P.2d 115 (1972)). While the trial court found that the ***Ferrier*** warnings were properly given, this Court can uphold the search if the warnings were unnecessary.

Here, Officer Hayward went to the apartment with the intention of interviewing a potential suspect about a robbery. 1RP 39. Officer Hayward did not intend to search for evidence of the robbery. *Id.* During the protective sweep Officer Hayward's sole intention was to see if there were any other individuals present in the apartment that could pose a threat to

Officer Hayward and his partner. 1RP 46-47. Officer Hayward testified that during the protective sweep he was not looking through any desks, drawers, or opening cabinets, but rather was looking for any persons that were present in the apartment. *Id.* Additionally, Officer Hayward testified that during the protective sweep he was not searching for any evidence of the robbery. 1RP 52-53. Because Officer Hayward's intention upon entering the apartment was not to conduct a search of the apartment for contraband or evidence of the robbery, it was not necessary to give ***Ferrier*** warnings prior to the protective sweep as such was not a search.

a. It was not necessary to give ***Ferrier*** warnings prior to the protective sweep as the officer was in the apartment for an interview and as such, the interview exception to ***Ferrier*** applies.

It is not necessary to give ***Ferrier*** warnings prior to entering a residence for a legitimate, non-search, investigatory purpose. An exception to ***Ferrier*** is for the purpose of interviewing a suspect. ***State v. Khounvichai***, 149 Wn.2d 557, 564-566, 69 P.3d 862 (2003). ***Khounvichai*** is a case that is very factually similar to the present case. Officers went to a residence with the intention of talking to a suspect about an incident. 149 Wn.2d at 559. The officers were voluntarily granted entrance to the residence. *Id.* One of the officers was shown down a hallway to a room where the individual the officer wished to interview was located. *Id.* at

560-561. Upon entering the room, the officer saw the defendant make a sudden dash across the room. *Id.* at 561. Concerned for her safety and that the defendant was going for a weapon, the officer demanded that the defendant show her his hands. *Id.* When the defendant refused to do so, the officer grabbed the defendant's hand and saw a bag of cocaine fall out. *Id.* The defendant was subsequently charged and convicted with possession of cocaine. *Id.* The Supreme Court found that because the consensual entry to the house was for the purpose of questioning a resident, ***Ferrier*** warnings were not required. *Id.* at 563-564.

Here, Officer Hayward went to the apartment with the intention of interviewing a potential suspect in a robbery. 1RP 39. Upon arriving at the apartment he was given consensual entry into the residence. 1RP 26. Officer Hayward testified that upon entering the apartment he discussed the strong-arm robbery with Burton. *Id.* During this point in time, and prior to the protective sweep, Officer Hayward was talking to Burton and asking her questions related to the strong-arm robbery. 1RP 39-40. When Officer Hayward indicated that he wanted to conduct a protective sweep of the apartment he had already been discussing the robbery with Burton. 1RP 42. Further, when he informed Burton that he wanted to conduct a protective sweep for safety purposes, Burton gave Officer Hayward consent to conduct the protective sweep. 1RP 26, CP 251-253. Because

Officer Hayward felt that he was going to be engaged in a conversation about the robbery for more than a brief period of time, he felt that it was necessary to conduct a protective sweep in order to protect his safety. 1RP 43. During the protective sweep, Officer Hayward saw the defendant selling what was later identified to be crack cocaine. 1RP 27-28. Hence, because Officer Hayward was only in the apartment for the sole purpose of wanting to interview a potential suspect and not conduct a search, ***Ferrier*** warnings were not necessary as determined by ***Khounvichai.***

b. It was not necessary to give ***Ferrier*** warnings prior to the protective sweep as the officer was looking for any additional individuals present and as such the exception for looking for a person present applies.

Ferrier warnings are not required when the police seek consent to conduct a warrantless search for a person whom they have a reasonable suspicion to believe is on the premises. ***State v. Dancer***, 174 Wn. App. 666, 670, 300 P.3d 475 (2013). In ***Dancer*** the police were led to the defendant's residence by a K-9 unit that was tracking a domestic violence suspect. 174 Wn. App. at 668. The defendant answered the door and allowed the officers to search for the suspect. *Id.* at 669. During the search

for the suspect the officers found methamphetamine in plain sight that the defendant admitted belonged to her. *Id.* The suspect was not at the defendant's residence. *Id.* This Court held that because the defendant freely and voluntarily consented to the search of the apartment for a person that the police reasonably suspected to be inside, ***Ferrier*** warnings were not necessary. *Id.* at 674-675.

In this case, Officer Hayward had a reasonable suspicion to believe that there were other individuals present in the apartment. First, the victim of the strong-arm robbery testified that the defendant might be in the apartment. 1RP 37. Second, Officer Hayward testified he was informed by Burton that there were individuals in the back of the apartment. 1RP 26. Based upon the information provided to him, particularly from Burton, Officer Hayward conducted the protective search to specifically look for any individuals present. Because he had a reasonable suspicion based upon the information provided that there were other individuals present in the apartment, ***Ferrier*** warnings were not necessary for the limited purpose of looking for the other individuals that were present in the apartment.

4. THE DEFENDANT WAS GIVEN HIS CONSTITUTIONAL RIGHT TO EFFECTIVE ASSISTANCE OF COUNSEL AS DEFENSE COUNSEL ARGUED FOR THE DEFENDANT ON MERITORIOUS GROUNDS AND PROPERLY DID NOT OBJECT TO THE PROSECUTOR'S VALID STATEMENTS OF THE LAW.

The right to effective assistance of counsel is the right "to require the prosecution's case to survive the crucible of meaningful adversarial testing." ***United States v. Cronic***, 466 U.S. 648, 656, 104 S. Ct. 2045, 80 L.Ed.2d 657 (1984). When such an adversarial proceeding has been conducted, even if defense counsel made demonstrable errors in judgment or tactics, the testing envisioned by the Sixth Amendment has occurred. *Id.* "The essence of an ineffective-assistance claim is that counsel's unprofessional errors so upset the adversarial balance between defense and prosecution that the trial was rendered unfair and the verdict rendered suspect." ***Kimmelman v. Morrison***, 477 U.S. 365, 374, 106 S. Ct. 2574, 2582, 91 L.Ed.2d 305 (1986).

A defendant who raises a claim of ineffective assistance of counsel must show: (1) that his or her attorney's performance was deficient, and (2) that he or she was prejudiced by the deficiency. ***Strickland v. Washington***, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984); *See also* ***State v. Hendrickson***, 129 Wn.2d 61, 77-78, 917 P.2d 563 (1996). Under the first prong, deficient performance is not shown by matters that go to trial strategy or tactics. ***State v. Garrett***, 124 Wn.2d 504, 520, 881

P.2d 185 (1994). Under the second prong, the defendant must show that there is a reasonable probability that, but for counsel's errors, the result of the trial would have been different. ***State v. Thomas***, 109 Wn.2d 222, 226, 743 P.2d 816 (1987).

Judicial scrutiny of a defense attorney's performance must be "highly deferential in order to eliminate the distorting effects of hindsight." ***Strickland***, 466 U.S. at 689. This Court must judge the reasonableness of counsel's actions "on the facts of the particular case, viewed as of the time of counsel's conduct." *Id.* at 690; ***State v. Benn***, 120 Wn.2d 631, 633, 845 P.2d 289 (1993).

> What decision [defense counsel] may have made if he had more information at the time is exactly the sort of Monday-morning quarterbacking the contemporary assessment rule forbids. It is meaningless...for [defense counsel] now to claim that he would have done things differently if only he had more information. With more information, Benjamin Franklin might have invented television.

Hendricks v. Calderon, 70 F.3d 1032, 1040 (9th Cir. 1995).

The standard of review for effective assistance of counsel is whether, after examining the whole record, the court can conclude that defendant received effective representation and a fair trial. ***State v. Ciskie***, 110 Wn.2d 263, 751 P.2d 1165 (1988). A presumption of counsel's competence can be overcome by showing counsel failed to conduct appropriate investigations, adequately prepare for trial, or subpoena necessary witnesses. *Id.* An appellate court is unlikely to find ineffective

assistance on the basis of one alleged mistake. ***State v. Carpenter***, 52 Wn. App. 680, 684-685, 763 P.2d 455 (1988).

a. Trial counsel made reasonably arguments for suppression based upon well-established case law for warrantless searches.

Counsel's performance is only deficient when it falls below an objective standard of reasonableness based on consideration of all the circumstances. ***State v. McFarland***, 127 Wn.2d 322, 334-35, 899 P.2d 1251 (1995). There is a strong presumption that counsel's performance was not deficient. *Id.* "The burden is on the defendant alleging ineffective assistance of counsel to show deficient representation based on the record established in the proceedings below." *Id.*

"The defendant alleging ineffective assistance of counsel 'must show in the record the absence of legitimate strategic or tactical reasons supporting the challenged conduct by counsel.'" ***In re Personal Restraint of Elmore***, 162 Wn.2d 236, 252-53, 172 P.3d 335 (2007) (quoting ***McFarland***, 127 Wn.2d at 336). "Once counsel reasonably selects a defense ... 'it is not deficient performance to fail to pursue alternative defenses.'" ***In re Personal Restraint of Davis***, 152 Wn.2d 647, 721-22, 101 P.3d 1 (2004). "Counsel is not, at the risk of being charged with incompetence, obliged to raise every conceivable point ... or to argue

every point to the court ... which in retrospect may seem important to the defendant." ***State v. Piche***, 71 Wn.2d 583, 590, 430 P.2d 522 (1967).

In this case, the defendant's motion was focused on the warrantless search of the apartment by Officer Hayward. CP 13-23. Defense counsel argued that the ***Ferrier*** requirements made it so that the protective sweep was not valid as it was a violation of ***Ferrier***. CP 13-23, 2RP 10. In light of the facts supporting a valid protective sweep, the ***Ferrier*** argument reasonably appeared to be the best argument that could be advanced. Counsel supported his argument through well-reasoned and well-argued principles of law. CP 13-23, 2RP 10-13. Defense counsel also conducted a spirted and thorough cross and re-cross examination of Officer Hayward during the 3.6 hearing. 1RP 35-46, 50-53. The cross and re-cross examinations focused on the way that Officer Hayward gave the ***Ferrier*** warnings and the timeline for when he conducted the protective sweep and when he gave the warnings. When the full circumstances of the suppression motion are taken into account, the ***Ferrier*** arguments were more than reasonable. As such, trial counsel performed effectively and therefore, neither prong of ***Strickland*** is met.

b. Trial counsel properly did not object to statements made by the prosecutor in rebuttal closing as such was done in direct response to defense closing argument and were proper statements of the law.

Failure to object to the State's comments during closing arguments generally does not constitute deficient performance. This is because it is uncommon to object during closing arguments "absent egregious misstatements." ***In re Cross***, 180 Wn.2d 664, 721, 327 P.3d 660 (2014).

Even if defense counsel's performance was deficient, the defendant is unable to show he was prejudiced by such inaction as required under the second prong of ***Strickland***. The jury was repeatedly reminded to consider only the testimony and evidence that was presented during the trial and the law as instructed by the court and that they are the sole judges of the credibility of each witness. Additionally, the jury was provided the specific elements for RCW 69.50.401, including that the defendant must have had intent to deliver the cocaine in order for him to be convicted of violating the statute. CP 46-69.

Here, defense counsel asserts that the prosecutor made an improper statement of the law that could not have been cured by a curative instruction. During closing argument defense counsel constantly used the phrase "fish tale" to describe the State's case against the defendant. 4RP 73-77. In explaining the defense theory of the case, defense counsel stated:

> 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?

4RP 74-75. In response to the "fish tale" analogy and the defense question about the assumption that only men are drug dealers, in their rebuttal, the prosecutor stated:

> 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.

4RP 78.

The argument that the prosecutor made was a direct response to that defense argument. The prosecutor used the term "red herring" to show that the State was not arguing that the defendant was guilty because he was a male, but rather that he was guilty because he was actively selling drugs. The phrase "interrupted while conducting a drug transaction" meant that the defendant was interrupted while he was selling drugs.

When taken in the context of the whole argument by the prosecutor, the prosecutor did not misstate the law. In the closing lines of rebuttal argument that prosecutor stated that the issue that the jury needed to decide was whether the defendant possessed cocaine with the intent to

deliver. 4RP 80. During the initial closing argument when discussing the elements of the charge, the prosecutor made it clear that "the crux of the case" was whether or not the defendant intended to deliver the cocaine. 4RP 70. Finally, when going over the jury instructions during closing argument, the prosecutor again made it clear that one of the instructions presented to the jury was that the defendant needed to have intent to deliver in order for the jury to convict. 4RP 72. Taken as a whole, the prosecutor properly applied the law by stating to the jury that the jury needed to find that the defendant had the intent to deliver for a conviction to occur.

If one were to assume that the prosecutor's argument was error, it did not affect the outcome of the trial. The overwhelming evidence showed that the defendant was in the process of selling drugs when he was seen by Officer Hayward. The evidence showed that during the protective sweep Officer Hayward saw the defendant holding what was positively identified as crack cocaine and a female handing over a $20 bill to the defendant. 2RP 81. Upon identifying himself, Officer Hayward saw the defendant move his hands out of the officer's view in an apparent attempt to hide the incriminating evidence. 2RP 82. The fact that the testimony showed that defendant was seen to be given the $20 is overwhelming evidence that the defendant was selling, and not buying, the crack cocaine.

All of this reflects that even if the failure to object was defense error, defendant cannot show how he was prejudiced by it. The defendant is unable to satisfy either the first or second prong of the ***Strickland*** test.

5. APPELLATE COSTS MAY BE APPROPRIATE IN THIS CASE IF THE COURT AFFIRMS THE JUDGEMENT OF THE TRIAL COURT AND SHOULD BE ADDRESSED IF THE STATE WERE TO PREVAIL AND WERE TO SEEK ENFORCEMENT OF COSTS.

RCW 10.73.160(2) states "the court of appeals...may require an adult offender convicted of an offense to pay appellate costs." It has been affirmed many times that an appellate court may provide for the recoupment of costs from a defendant that does not prevail on appeal. *See* ***State v. Blank***, 131 Wn.2d 230, 234, 930 P.2d 1213 (1997); ***State v. Mahone***, 98 Wn. App. 342, 989 P. 2d 583 (1999). As the Court of Appeals for Division I stated in ***State v. Sinclair***, 192 Wn. App. 380, 383-384, 367 P.2d 612 (2016), the award of appellate costs to a prevailing party is within the discretion of the appellate court. *See, also* RAP 14.2; ***State v. Nolan***, 141 Wn.2d 620, 8 P.3d 300 (2000). Thus, the issue is not whether the Court can order appellate costs, but when, and how the Court may order such costs.

The idea that those convicted should be required to pay for the costs of their appeal, including the cost of their appellate attorney, is historical in nature. In 1976[4], the Legislature enacted RCW 10.01.160,

[4] Actually introduced in Laws of 1975, 2d Ex. Sess. Ch. 96

which permitted trial courts to order the payment of various costs, including that of prosecuting the defendant and his incarceration. *Id.*, .160(2). In ***State v. Barklind***, 87 Wn.2d 814, 557 P.2d 314 (1977), the Supreme Court held that requiring a defendant to contribute towards paying for appointed counsel under this statute did not violate, or even "chill" the right to counsel. *Id.*, at 818.

Nolan, 141 Wn.2d 620, noted that in ***State v. Keeney***, 112 Wn.2d 140, 769 P.2d 295 (1989), the Supreme Court found the imposition of statutory costs on appeal in favor of the State against a criminal defendant to be mandatory under RAP 14.2 and constitutional, but that "costs" did not include statutory attorney fees. ***Keeney***, at 142.

Nolan examined RCW 10.73.160 in detail. The Court pointed out that, under the language of the statute, the appellate court had discretion to award costs. 141 Wn.2d at 626, 628. Additionally, the Court noted that RCW 10.73.160 was specifically enacted by the legislature in order to allow the courts to require one whose conviction and sentence is affirmed on appeal to pay appellate costs for the expenses specifically incurred by the state in prosecuting or defending an appeal from a criminal conviction. ***Nolan*** at 623. In ***Blank***, *supra*, at 239, the Supreme Court held this statute constitutional, affirming this Court's holding in ***State v. Blank***, 80 Wn. App. 638, 641-642, 910 P.2d 545 (1996).

In ***Nolan***, as in the majority of other cases discussing the award of appellate costs, the defendant began review of the issue by filing an

objection to the State's cost bill. *Id.*, at 622. As suggested by the Supreme Court in ***Blank***, 131 Wn.2d at 244, this is an appropriate manner in which to raise the issue. The procedure invented by Division I in ***State v. Sinclair***, 192 Wn. App. 380, 367 P.2d 612 (2016), prematurely raises an issue that is not before the Court. The defendant can argue regarding the Court's exercise of discretion in an objection to the cost bill, if the defendant does not prevail, and if the State files a cost bill. However, in this matter the State has yet to file a cost bill in regards to appellate costs. Until the State does so, the issue is premature and not ripe for this Court to determine whether the defendant is excused from paying appellate costs that do not yet exist.

Under RCW 10.73.160, the time to challenge the imposition of legal financial obligations is when the State seeks to collect the costs. *See* ***Blank***, 131 Wn.2d at 242; ***State v. Smits***, 152 Wn. App. 514, 524, 216 P.3d 1097 (2009) (citing ***State v. Baldwin***, 63 Wn. App. 303, 310-311, 818 P.2d 1116 (1991)). The time to examine a defendant's ability to pay costs is when the government seeks to collect the obligation because the determination of whether the defendant either has or will have the ability to pay is clearly somewhat speculative. ***Baldwin***, at 311; *see also* ***State v. Crook***, 146 Wn. App. 24, 27, 189 P.3d 811 (2008). A defendant's indigent status at the time of sentencing does not bar an award of costs. *Id.* Likewise, the proper time for determining if a defendant is indigent "is the point of collection and when sanctions are sought for nonpayment."

Blank, 131 Wn.2d at 241–242. *See also* ***State v. Wright***, 97 Wn. App. 382, 965 P.2d 411 (1999). Further, ***Blank*** at 253 noted that "there is no reason [at the time of the decision] to deny the State's cost request based upon speculation about future circumstances." While ***State v. Blazina***, 182 Wn.2d 827, 344 P.3d 680 (2015) rejected the argument that "the proper time to challenge the imposition of an LFO arises when the State seeks to collect," it also noted that one of the requirements for judicial determination was if there were no further factual developments that were required and that a challenge to the trial court's entry of such met the requirements. ***Blazina*** 182 Wn.2d at 832, n.1. Because a trial court should determine whether defendant is still indigent at the time that a cost bill is submitted, as required under ***Blank***, there is still further factual information that needs to be developed. Additionally, unlike in ***Blazina***, there are currently no LFOs that are being challenged by defendant. Rather, he is looking to challenge potential future costs which by nature, are purely speculative.

In ***Blazina***, the Supreme Court interpreted the meaning of RCW 10.01.160(3). The Court wrote that:

> The legislature did not intend LFO orders to be uniform among cases of similar crimes. Rather, it intended each judge to conduct a case-by-case analysis and arrive at an LFO order appropriate to the individual defendant's circumstances.

182 Wn.2d at 834. The Court expressed concern with the economic and financial burden of LFOs on criminal defendants. *Id.*, at 835-837. The Court went on to suggest, but did not require, lower courts to consider the factors outlined in GR 34. *Id.*, at 838-839.

By enacting RCW 10.01.160 and RCW 10.73.160, the Legislature has expressed its intent that criminal defendants, including indigent ones, should contribute to the costs of their cases. RCW 10.01.160 was enacted in 1976 and 10.73.160 in 1995. This legislative delamination is deserving of deference.

Most criminal defendants are represented at public expense at trial and on appeal. RCW 10.73.160(3) specifically includes "recoupment of fees for court-appointed counsel." Those defendants with a court-appointed counsel have already been found to be indigent by the court. The statute would be redundant if it was not enacted specifically for the purpose of noting that indigent defendants may be responsible for paying for their court-appointed counsel.

As ***Blazina*** requires, trial courts should carefully consider a defendant's financial circumstances, as required by RCW 10.01.160(3), before imposing discretionary LFOs. However, as ***Sinclair*** points out at 385, the Legislature did not include such a provision in RCW 10.73.160. Instead, it provided that a defendant could petition for the remission of costs on the grounds of "manifest hardship." *See* RCW 10.73.160(4).

D. CONCLUSION.

For the foregoing reasons the State urges the Court to affirm the defendant's conviction and reject the challenge to the protective sweep.

DATED: Tuesday, December ~~06~~ 08, 2016

MARK LINDQUIST
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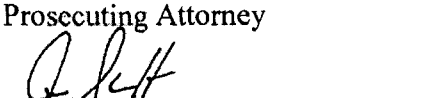

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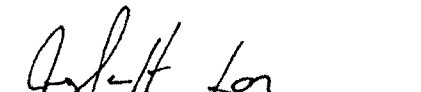
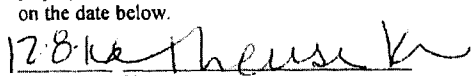


NATHANIEL BLOCK
Rule 9 Legal Intern

Certificate of Service:
The undersigned certifies that on this day she delivered by ~~U.S. mail~~ or ABC-LMI delivery to the attorney of record for the appellant and appellant c/o his attorney true and correct copies of the document to which this certificate is attached. This statement is certified to be true and correct under penalty of perjury of the laws of the State of Washington. Signed at Tacoma, Washington, on the date below.



Date Signature