

NO. 37722-5-II

COUNTY OF PIERCE
SUPERIOR COURT

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STATE OF WASHINGTON
BY *[Signature]*
DEPUTY

**COURT OF APPEALS, DIVISION II
STATE OF WASHINGTON**

STATE OF WASHINGTON, RESPONDENT

v.

COLTON HAUGSTED, APPELLANT

Appeal from the Superior Court of Pierce County
The Honorable Ronald Culpepper (Suppression Motion)
The Honorable Katherine Stolz (Trial)

No. 07-1-04245-0

Brief of Respondent

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

1. Whether the search of the defendant's motel room by the community correction officer was lawful where the officer had a reasonable basis to believe the defendant was in violation of his community custody conditions?
2. Whether the Deputy Prosecutor's statements in closing argument and rebuttal were appropriate where they did not lessen or remove the State's burden to prove each element of the crime beyond a reasonable doubt?
3. Whether defense counsel was effective even where she challenged the lawfulness of the search and objected to the State's statements in rebuttal, but there was in fact no error?

B. STATEMENT OF THE CASE.

1. Procedure

On August 15, 2007, the State filed charges against Colton Haugsted based on an incident that occurred the prior day. CP 1-3; 3-4. Haugsted was charged with two counts: Count I, unlawful manufacture of a controlled substance, methamphetamine; and Count II, unlawful possession of pseudoephedrine and/or ephedrine with intent to manufacture methamphetamine. CP 1-3. Each count also contained an allegation that the defendant was on community custody at the time of the offense. CP 1-3.

The defense filed a motion to suppress evidence challenging the officer's authority to search Haugsted's motel room. CP 10-39. The suppression motion was held before the Honorable Ronald Culpepper on April 15, 2008. RP 04-15-08, p. 9-76. The court issued its ruling and denied the motion to suppress on April 16, 2008. RP 04-16-08, p. 3-8.

On April 21, 2008, an Amended Information was filed adding to each count a school bus route stop enhancement. CP 72-73. The case was assigned to the Honorable Katherine Stolz for trial. CP 197. Prior to the commencement of trial, a CrR 3.5 hearing was held regarding the admissibility of the defendant's statements. *See* RP 04-21-08, p. 5-33; RP 04-22-08, p. 39-66. The trial proper commenced on April 23, 2008. *See* RP 04-23-08, p. 72ff.

The jury found the defendant not guilty of unlawful manufacture of a controlled substance in count I; and guilty of unlawful possession of pseudoephedrine with intent to manufacture methamphetamine. CP 138, 139. The jury also found that the defendant committed the crime within 1000 feet of a school bus route stop. CP 141.

On May 9, 2008, the court imposed a sentence on Count II of 108 months. CP 145-157. The notice of appeal was timely filed the same day. CP 177.

The details regarding closing argument will be incorporated into the argument section involving the issues related to the closing.

2. Facts

a. Facts at 3.6 Hearing

The court entered the following findings of fact after the 3.6 hearing. *See* CP 181-188.

THE UNDISPUTED FACTS

I.

On the evening of August 13, 2007, Fife Police Officer Allen Morales spoke on the telephone with Auburn Police Detective Crawford. Officer Morales had never spoken to Detective Crawford before. Detective Crawford relayed information about the defendant. Crawford stated the defendant had a DOC warrant for his arrest and one of the Detective's confidential informants reported the defendant was cooking methamphetamine in room #16 of the Fife Motel, located at 4601 Pacific Highway East, Fife, WA.

II.

A records check done on the defendant revealed that he had a felony DOC warrant for escape, and a bench warrant out of King County for failing to appear on a Fourth Degree Assault-DV case.

III.

Officer Morales relayed this information to Community Corrections Officer (CCO) Springer, who works in Fife, because the defendant was under DOC supervision and he had an active DOC warrant for his arrest.

IV.

CCO Springer researched the defendant's DOC status. She confirmed that he was on supervision for a drug conviction out of King County and that he had a warrant for failing to report to his DOC officer. CCO Springer also learned that the defendant's conditions of DOC supervision included that he report regularly to his DOC officer, obey all laws, not consume illegal drugs or alcohol, and obey the geographic restrictions on where he could travel while on supervision. CCO Springer was not the defendant's assigned probation officer, and she never had contact with his assigned DOC officer.

V.

CCO Springer printed a booking photo of the defendant, Colton Haugsted.

VI.

CCO Springer made the decision to respond to the Fife Motel to arrest the defendant on the DOC warrant.

VII.

CCO Springer requested that Fife officers assist her during the arrest for officer safety. There was a short briefing where information was shared with the other officers and the officers viewed the defendant's booking photo.

VIII.

CCO Springer frequently asks Fife patrol officers to assist her when she is going to arrest offenders on supervision. She prefers to have officers present for officer safety, but sometimes she is assisted by other corrections officers, and if no one is available she may go alone.

IX.

On this occasion, Officer Morales, Officer Vradenburg, and Sergeant Green went to the Fife Motel to assist CCO Springer for officer safety.

X.

Upon arrival at the Fife Motel, CCO Springer contacted the front desk and checked the room registration for room #16. That room was registered to a female named Donna Vasquez.

XI.

CCO Springer went to room #16 and knocked on the door. The defendant answered the door and he was the only person in the motel room.

XII.

The defendant told CCO Springer that his name was "Corey." CCO Springer showed the defendant his own booking photo and then he admitted that he was Colton Haugsted, the defendant.

XIII.

CCO Springer decided that the defendant would be arrested on the DOC warrant. Officer Vradenburg placed handcuffs on the defendant while he stood outside of his motel room, on the "porch."

XIV.

CCO Springer conducted a quick "sweep" of the motel room to determine if there was anyone else present. During the "sweep" of the room CCO Springer did not do a detailed search of the room for evidence of criminal activity. No other people were found in the motel room.

XV.

CCO Springer then returned to the defendant and began asking him questions. The defendant told CCO Springer that he had been staying in the motel room for the past few nights. The defendant admitted to CCO Springer that he had smoked marijuana and drank alcohol about a week earlier. The defendant also stated that he used methamphetamine approximately two days earlier.

XVI.

CCO Springer decided to search the motel room because the defendant was in violation of his DOC conditions of supervision. CCO Springer actively searched the motel room while Officer Morales stood by for safety.

XVII.

CCO Springer searched the room and located a shoe box near the dresser, which she opened and it contained the defendant's wallet, driver's license and a glass smoking pipe; there was also a box containing glass smoking devices with Angie's name on it. CCO Springer opened another shoe box underneath the first shoe box and found a weighing scale and an unopened box of Sudafed tablets. CCO Springer also opened a gray plastic container located beneath both boxes that contained a prescription bottle. Inside the prescription bottle, CCO Springer located a baggie with what appeared to be red phosphorous. There was also a pseudoephedrine bottle with what appeared to be crushed pseudoephedrine in it. CCO Springer then opened an ice cooler that was located in the closet area. The ice cooler contained rubber tubing, muriatic acid, drain cleaner, rock salt, a fertilizing spraying device, and a glass container. CCO Springer used a chair to view the top shelf of the closet, and discovered a can of acetone and a burner. CCO Springer also found two photographs of the defendant

located on the dresser on top of two pizza boxes. CCO Springer located coffee filters and a propane torch, as well as clothing items in a laundry basket. She was unable to recall whether they were female or male clothes.

XVIII.

Based on her training and experience, CCO Springer believed many of these materials were consistent with manufacturing methamphetamine.

XIX.

CCO Springer requested that the Fife Police Officers take over the search because it had evolved into a new criminal investigation. CCO Springer left all of the evidence with the Fife Police Department for investigation of a suspected methamphetamine lab.

THE DISPUTED FACTS

None.

FINDINGS AS TO DISPUTED FACTS

None.

b. Facts at Trial

On August 13, 2007, Department of Corrections (DOC) Community Corrections Officer Joanne Springer went to the Fife Motel to attempt to contact the defendant at room 16. RP 04-23-08, p. 74-77. Initially upon

contact, Haugsted gave a false first name, claiming to be “Corey”

Haugsted. RP 04-23-08, p. 78, ln. 3-17.

Haugsted admitted staying at the Motel the past few nights, that he had ingested methamphetamine two days before the officer’s arrival. RP 04-23-08, p. 78, ln. 17 to p. 79, ln. 4. Officers conducted a search of the motel room and found his wallet with ID card located in a shoe box near the dresser. RP 04-23-08, p. 79, ln. 8 to p. 80, ln. 17. A glass smoking pipe was found in the same shoe box. RP 04-23-08, p. 81, ln. 10-25.

Directly below the first shoe box was a second shoe box that contained a gram weigh scale [Ex 24] and an unopened box of pseudoephedrine [Sudafed mis-spelled as “Pseudofed”] tablets. RP 04-23-08, p. 82, ln. 10-21; p. 118, ln. 17-25; p. 122, ln. 2 to p. 123, ln. 23. The scale was of a type commonly used to weigh out narcotics, while the pseudoephedrine is an ingredient commonly used in the manufacture of methamphetamine. RP 04-23-08, p. 82, ln. 15-24.

Underneath the shoe boxes was a gray plastic container that contained a prescription bottle [Ex 25] without a label, inside which was a baggie of what appeared to be red phosphorous. RP 04-23-08, p. 83, ln. 2-10; p. 94, ln. 12-16; p. 124, ln. 2 to p. 126, ln. 15. The gray container also

held a pseudoephedrine bottle that was labeled as such and appeared to have a white powdery substance that appeared to be crushed pseudoephedrine. RP 04-23-08, p. 83, ln. 12-15.

In the closet was an ice cooler that contained rubber tubing, muriatic acid, drain cleaner, rock salt, a garden sprayer, and a glass container. RP 04-23-08, p. 83, ln. 18-24. On the top closet shelf was a can of acetone, a burner, and a box of garbage bags with two more glass pipes. RP 04-23-08, p. 84, ln. 5-15. In a laundry basket in the closet area were coffee filters and a propane torch. RP 04-23-08, p. 85, ln. 7-11. In a black duffel bag in the closet area was a can of Coleman fuel. RP 04-23-08, p. 85, ln. 13-17. Officer Springer recognized that all of the items found were ingredients or precursors to a methamphetamine lab. RP 04-23-08, p. 85, nl. 18-22.

Officer Springer notified the Fife Police Department of what she had found and turned the meth lab investigation over to them. RP 04-23-08, p. 85, ln. 23 to p. 87, ln. 17. Sergeant Green of the Fife Police Department, who until recently had been a member of the lab team, called in Detective Nolta who was a member of the lab team who made a general assessment of the situation and then wrote a search warrant for the room. RP 04-23-08, p. 103, ln. 22 to p. 104, ln. 7.

Lab team members conducted a more thorough search and found the items listed above, as well as a number of additional items. Lab team members found the following items in the room. Two miniature Ziploc baggies of the type typically used to package drugs [Ex 3]. RP 04-23-08, p. 125, ln. 16 to p. 127, ln. 19. An unopened box of pseudoephedrine tablets found on the bed [Ex 4, 26]. RP 04-23-08, p. 127, ln. 20 to p. 129, ln. 23. A bottle marked advance nutrition pseudoephedrine containing a red powder and found on the bed [Ex 5, 27]. RP 04-23-08, p. 129, ln. 24 to p. 131, ln. 18. A two-pound plastic bottle of Reobic crystal drain opener found on the bed [Ex 6]. RP 04-23-08, p. 131, ln. 19 to p. 133, ln. 5. Three clear glass pipes commonly used to smoke methamphetamine, with a burnt white powder residue [Ex 7, 28]. RP 04-23-08, p. 133, ln. 4 to p. 136, ln. 7. A Toastmaster basic burner, electronic hot plate found on the bed in a box [Ex. 8, 29]. RP 04-23-08, p. 136, ln. 8 to p. 138, ln. 10. An open package of 250 disposable coffee filters [Ex 9, 30]. RP 04-23-08, p. 138, ln. 12 to p. 140, ln. 10. Two used damp coffee filters containing a chunk of reddish material and wrapped in a plastic bag and found on the bed [Ex 10, 31]. RP 04-23-08, p. 140, ln. 11 to p. 142, ln. 25. A one gallon RL brand Flo-Master garden sprayer with three pieces of plastic tubing found on the floor immediately adjacent to the bed [Ex 11]. RP 04-23-08, p. 143, ln. 2 to p. 144, ln. 15. A one-quart can of acetone [Ex 12].

RP 04-23-08, p. 144, ln. 16 to p. 145, ln. 14. A four-pound box of rock salt [Ex 15.] RP 04-23-08, p. 146, ln. 17.

A number of items were found in a large ice chest or cooler next to the bed. A one gallon plastic bottle of muriatic acid estimated to be three quarters full found in the cooler. [Ex 14]. RP 04-23-08, p. 146, 18 to p. 148, ln. 9. A container of Roto drain opener found within the cooler [Ex 15]. RP 04-23-08, p. 148, ln. 10 to p. 149, ln. 2. One pound plastic bottle of Glug brand drain opener found in the cooler [Ex 16]. RP 04-23-08, p. 149, ln. 3 to p. 150, ln. 7. A glass beaker with a reddish powder residue found in the cooler [Ex 17]. RP 04-23-08, p. 150, ln. 6 to p. 151, ln. 10. A clear two-cup coffee decanter found in the cooler [Ex 18]. RP 04-23-08, p. 151, ln. 11 to p. 152, ln. 24.

Two photos appearing to be of the defendant and connecting him to the scene were found on the dresser [Ex 19, 32, 33]. RP 04-23-08, p. 152, ln. 25 to p. 155, ln. 22. A gallon metal can of Coleman fuel approximately a quarter full was found on a table in the room [Ex 20]. RP 04-23-08, p. 157, ln. 16 to p. 158, ln. 14.

Detective Nolta also testified that he measured from the motel to a school bus route stop for the Fife school district and that the stop was 340 feet from the motel. RP 04-23-08, p. 165, ln. 2 to p. 167, ln. 7; RP 04-28-08, p. 226, ln. 2 to p. 229, ln. 22.

As Detective Nolta identified each of the items of evidence, he also explained how it related to the manufacture of methamphetamine. However, there was also a detailed description of the clandestine manufacture of methamphetamine by the forensic analyst, Jane Boysen. RP 04-23-08, p. 234, ln. 16 to p. 243, ln. 18.

Jane Boysen received several items of evidence from the police department, along with a request that she analyze five of them. RP 04-23-08, p. 244, ln. 21 to p. 245, ln. 16. The scale tested positive for methamphetamine and cocaine [Ex 24]. RP 04-23-08, p. 246, ln. 13 to p. 248, ln. 4; RP 04-23-08, p. 252, ln. 5-25. The plastic bag with red powder residue that was inside the pill container was identified as red phosphorous that also contained some methamphetamine and pseudoephedrine [Ex 25]. RP 04-23-08, p. 248, ln. 5 to p. 249, ln. 24; RP 04-23-08, p. 253, ln. 23 to p. 255, ln. 14. A plastic bottle containing 3.4 grams of chunky reddish-pink material contained pseudoephedrine [Ex 27]. RP 04-23-08, p. 249, ln. 25 to p. 250, ln. 11; RP 04-23-08, p. 255, ln. 15 to p. 256, ln. 13. The

three glass smoking pipes tested positive for methamphetamine [Ex 28]. RP 04-23-08, p. 250, ln. 12-17; RP 04-23-08, p. 253, ln. 1-22. The six nested yellow paper filters contained 3.9 grams of dark red solid material that tested positive for methamphetamine, red phosphorous and iodine [Ex 31]. RP 04-23-08, p. 250, ln. 18 to p. 251, ln. 13; RP 04-23-08, p. 256, ln. 14 to p. 257, ln. 20.

C. ARGUMENT

1. THE COMMUNITY CORRECTION OFFICER'S SEARCH OF THE MOTEL ROOM WAS LAWFUL
 - a. The Defendant Was Properly Arrested As A Probationer Who Correction Officers Had A Reasonable Basis to Believe Violated His Conditions Of Probation

The defendant was subject to arrest without a warrant because he had violated his probation conditions:

If any offender violates any condition or requirement of a sentence, a community corrections officer may arrest or cause the arrest of the offender without a warrant, pending a determination by the court. If there is a reasonable cause to believe that an offender has violated a condition or requirement of the sentence, an offender may be required to submit to a search and seizure of the offender's person, residence, automobile, or other personal property. A community corrections officer may also arrest an offender for any crime committed in his or her presence. [...]

RCW 9.94A.631. *See also, State v. Massey*, 81 Wn. App. 198, 200, 913 P.2d 424 (1996).

The Washington State Legislature has codified the provisions authorizing the Department of Corrections to supervise offenders, arrest offenders and issue warrants for offenders who are in violation of community custody. RCW 9.94A.720 describes the Department's authority to supervise offenders.

[A]ll offenders sentenced to terms involving community supervision, community restitution, community placement, or community custody shall be under the supervision of the department and shall follow explicitly the instructions and conditions of the department. The department may require an offender to perform affirmative acts it deems appropriate to monitor compliance with the conditions of the sentence imposed. [...] (b) The instructions shall include, at a minimum, reporting as directed to a community corrections officer, remaining within prescribed geographical boundaries, notifying the community corrections officer of any change in the offender's address or employment, and paying the supervision fee assessment. [...]

RCW 9.94A.720.

RCW 9.94A.740 explicitly authorizes the Department of Corrections to issue secretary's warrants for the arrest of offenders who are in violation of their community custody conditions.

The secretary may issue warrants for the arrest of any offender who violates a condition of community placement or community custody. The arrest warrants shall authorize any law enforcement or peace officer or community corrections officer of this state or any other state where such offender may be located, to arrest the offender and place him or her in total confinement pending disposition of the alleged violation.

RCW 9.94A.740. The defendant's argument that a secretary's warrant is without authority of law is incorrect.

In this case, the defendant had failed to report to his CCO Sandra Othon as directed, and the CCO requested a secretary's warrant on November 11, 2006. *See* CP 69. The secretary authorized a warrant for the defendant's arrest. *See* CP 71. The defendant remained at large until this incident on August 14, 2007, when CCO Springer arrested the defendant on the DOC warrant at the Fife Motel. All of these actions were legally authorized by statute and in no way violated the defendant's rights.

As discussed above, the defendant had a valid DOC arrest warrant for failing to report to his community corrections officer. *See* CP 71. When CCO Springer learned of the defendant's location, she requested that members of the Fife Police Department accompany her to the Fife Motel for officer safety reasons. CP 182-183, finding VII. CCO Springer knocked on the door to motel room #16 and the defendant answered the door. CP 183, finding XI. The defendant answered the door and claimed his name was "Corey", but admitted his identity when presented with his booking photo. CP 183, finding XI, XII. The defendant was arrested and handcuffed outside his room. CP 183-84, finding XIII.

The defendant's conditions of community custody included that he regularly report to his CCO, obtain written permission from his CCO before traveling outside the county in which he resides, abstain from taking drugs other than those prescribed to him by a doctor, that he obey all municipal, county, state, tribal, and federal laws, and other standard conditions. *See* CP 63-67. The defendant even signed acknowledging these conditions of community custody. *See* CP 63-67. Based on the DOC warrant for failing to report the defendant's location in Fife, giving a false name, and his admissions of illegal drug use, CCO Springer had a well-founded suspicion that the defendant was in violation of all of the above conditions of community custody. Therefore, CCO Springer was legally justified in searching the defendant's person, room, and personal property.

CCO Springer conducted a quick search of the room to determine if anyone else was present, but during the sweep did not do a detailed search of the room for evidence of criminal activity. CP 184, finding XIV. The defendant told CCO Springer that he had been staying in the motel room for the past few nights. CP 184, finding XV. The address on his DOC statement of conditions listed his home address as an apartment in Auburn, King County, Washington. *See* CP 63-67. The defendant also

admitted that he had smoked marijuana and drank alcohol about a week ago. CP 184, finding XV. The defendant also stated that he used methamphetamine approximately two days earlier. CP 184, finding XV.

Here, Officer Springer had a valid secretary's warrant. Moreover, where the supervisee has violated conditions, RCW 9.94A.631 allows the arrest of a probationer without a warrant. Officer Springer had lawful authority to arrest the defendant notwithstanding the warrant. Accordingly, for both these reasons the defendant's attack on the sufficiency of the secretary's warrant is without merit.

b. The Community Corrections Officer Had Lawful Authority to Search the Motel Room

Washington courts have recognized an exception to the search warrant requirement to search parolees or probationers and their home or effects. *State v. Campbell*, 103 Wn.2d 1, 22, 691 P.2d 929 (1984), *cert. denied*, 471 U.S. 1094, 105 S. Ct. 2169, 85 L.Ed.2d 526 (1985). This exception to the warrant requirement allows a community corrections officer to search a probationer's person and property if the officer has a well-founded suspicion the probationer is in violation of his conditions of probation. *State v. Lucas*, 56 Wn. App. 236, 783 P.2d 121 (1989); *State v. Lozano*, 76 Wn. App. 116, 882 p.2d 1191 (1994). The well-founded suspicion that justifies a warrantless search of a probationer's person or

effects need not rise to the level of probable cause. *Lucas*, 58 Wn. App. at 243-44.

The courts have also approved of joint ventures by parole officers and law enforcement. In *State v. Patterson*, the defendant's parole officer searched his car because he was a suspect in a robbery. *State v. Patterson*, 51 Wn. App. 202, 752 P.2d 945 (1988). In upholding the warrantless search, the court explained: "Mr. Patterson's parole officer testified he made the decision to search the car although he was encouraged to do so by a police contact. Further, the parole officer was still acting in a supervisory capacity (although assisting the police in their investigatory capacity) because there was a parole hold on Mr. Patterson and the parole officer needed information, such as possession of a gun, to support his parole suspension. The societal interest in suspending the parole of a felon who has violated the conditions of parole is sufficient to outweigh the privacy interest of the parolee." *Patterson*, 51 Wn. App. at 208. Similarly, parole officers may be accompanied by law enforcement escorts. *State v. Simms*, 10 Wn. App. 75, 85, 516 P.2d 1088 (1974).

The right to search parolees and probationers is allowed by statute, which provides in part:

If there is a reasonable cause to believe that an offender has violated a condition or requirement of the sentence, an offender may be required to submit to a search and seizure of the offender's person, residence, automobile, or other personal property.

RCW 9.94A.631. *See also, Massey*, 81 Wn. App. at 200.

The rationale for this diminished level of privacy is that a person sentenced to confinement, but released on parole, remains in custody while serving the remainder of the sentence. *Lucas*, 56 Wn. App. at 240. Additionally, these individuals have a diminished right of privacy because "the State has a continuing interest in the defendant and its supervision of him as a probationer." *Lucas*, 56 Wn. App. at 240 (quoting *State v. Lapman*, 45 Wn. App. 228, 233, n. 3, 724 P.2d 1092 (1986)).

Lucas is illustrative. In *Lucas*, community correction officers went to the defendant's home to conduct a transfer interview, but the defendant was not home. While standing in the driveway, the officers looked through a sliding glass door and observed a plastic container that appeared to contain marijuana and rolling papers. Several days later, the officers returned to the defendant's residence, and upon meeting the defendant at the front door, informed him that they were there to conduct

the transfer interview. The defendant became nervous and asked the officers if they had a warrant. *Lucas*, 56 Wn. App. at 238.

Because the officers had not mentioned the possibility of searching the defendant's home, the officers found the defendant's behavior suspicious. The officers informed the defendant that pursuant to his probation, they did not need a warrant. The defendant allowed the officers into his home, but continued to act nervously. When the officers discovered narcotics in the defendant's living room, the defendant was arrested and his home searched. *Lucas*, 56 Wn. App. 238-39.

The court in *Lucas* determined that the search of the defendant's residence was lawful under several doctrines. Among them are two that are particularly relevant here. First, the court found the search did not violate Article 1, Section 7 of the Washington Constitution because the defendant's status as a convicted criminal gave him a diminished expectation of privacy. *Lucas*, 56 Wn. App. at 239-41. Lucas's sentence had been stayed due to a pending appeal, so that Lucas was only subject to conditions of release imposed by the court pending appeal. Nonetheless, the court held that the exception to warrantless searches that applies to parolees and probationers also applied to Lucas. *Lucas*, 56 Wn. App. at 241-42. Second, the court determined that the search of the defendant's residence was lawful because the community correction officers had a

well-founded suspicion that the defendant was in violation of his probation. *Lucas*, 56 Wn. App. at 245.

In *State v. Simms* the court held that a probationary search cannot be conducted based on the tip of an anonymous informant. *Simms*, 10 Wn. App. 75, 516 P.2d 1088 (1973). However, the *Simms* ruling is limited to situations in which the sole basis of the search was the anonymous tip of a completely unknown informant. *Simms*, 10 Wn. App. at 88. Here, the report came from Auburn Detective Crawford, who received the information from one of his confidential informants. CP 181, Finding of Fact I. Thus, here the informant was neither anonymous nor unknown.

The *Simms* court set forth three important criteria for evaluating when an informant's tip justifies a probationary search. First, the court distinguished between varying degrees of privacy intrusion ranging from police investigatory contact to a full-fledged search. *Simms*, 10 Wn. App. at 81-82. Second, the court established the now long-standing rule that probationary searches may be conducted on less than probable cause. *Simms*, 10 Wn. App. at 87. Third, the court explained that while a purely anonymous tip contains no indicia of reliability, a tip from a known reliable informant is sufficient to warrant an intrusion. *Simms*, 10 Wn. App. at 87-88.

Finally, in *Patterson*, the court held that the search of a parolee's vehicle was based upon reasonable suspicion where an anonymous tip led to additional information. *Patterson*, 51 Wn. App. at 205.

Here the defendant argues that CCO Springer conducted two searches, that the first one, a sweep of the room for other persons, was unlawful, and that the defendant's statements and the evidence obtained in the second search were the result of that initial illegal entry. The defendant's argument is fatally flawed because CCO Springer had lawful authority to conduct the first search.

As indicated above, RCW 9.94A.631 permits DOC officers to conduct searches of supervisee's premises when the officers have a reasonable basis to believe that the supervisee is in violation of their conditions. Here, Officer Springer knew that the defendant was in violation of his conditions because he was required to report to his community corrections officer and had failed to do so. It was that violation that was the basis of the warrant being issued in the first place.

Officer Springer also had a reasonable basis to believe that the defendant had violated his conditions where the informant for Auburn Detective Crawford had reported that Haugsted was manufacturing methamphetamine in the motel room. Accordingly, the initial sweep was lawful. Moreover, those very same violations provided a legal basis for

the second search of the room independent of anything the defendant told the officers after he was arrested. Finally, he also made a false statement to Officer Springer when he lied about his name when she first contacted him. That was a separate crime that was also a violation of his conditions, which also independently supported both the first and second searches.

See RCW 9A.76.175.

- c. It makes no difference that the defendant was arrested outside of his room.

Additionally, the defendant argues that because he was arrested after stepping right outside of his motel room, CCO Springer was prohibited from searching inside of his motel room. Br. App. 28. The defendant relies on cases pertaining to searches incident to arrest. Br. App. 28. This was not a search incident to arrest, this was a corrections officer searching an offender on community custody, as authorized under RCW 9.94A.631. The statute states,

If there is reasonable cause to believe that an offender has violated a condition or requirement of the sentence, an offender may be required to submit to a search and seizure of the offender's person, residence, automobile, or other personal property. [RCW 9.94A.631.]

There is nothing within that statute, nor did the defendant cite any authority pertaining to community custody searches, requiring a certain proximity to a room in order for a search to be legitimate.

Because the defendant's arrest and the search of the room were lawful, the lower court properly denied the defendant's motions to suppress the evidence and admit the defendant's statements to the officers. Reversal is not warranted.

2. THE STATE'S ARGUMENT IN CLOSING AND REBUTTAL WAS PROPER AND WAS NOT MISCONDUCT

Absent a proper objection, a defendant cannot raise the issue of prosecutorial misconduct on appeal unless the misconduct was so "flagrant and ill intentioned" that no curative instruction would have obviated the prejudice it engendered. *State v. Hoffman*, 116 Wn.2d 51, 93, 804 P.2d 577 (1991); *State v. Ziegler*, 114 Wn.2d 533, 540, 789 P.2d 79 (1990), *State v. Belgarde*, 110 Wn.2d 504, 507, 755 P.2d 174 (1988).

The defendant bears the burden of establishing both the impropriety of the prosecutor's remarks and their prejudicial effect. *State v. Finch*, 137 Wn.2d 792, 839, 975 P.2d 967 (1999). To prove that a prosecutor's actions constitute misconduct, the defendant must show that the prosecutor did not act in good faith and the prosecutor's actions were improper. *State v. Manthie*, 39 Wn. App. 815, 820, 696 P.2d 33 (1985) (citing *State v. Weekly*, 41 Wn.2d 727, 252 P.2d 246 (1952)). Before an appellate court should review a claim based on prosecutorial misconduct, it should require "that [the] burden of showing essential unfairness be

sustained by him who claims such injustice.” *Beck v. Washington*, 369 U.S. 541, 557, 82 S. Ct. 955, 8 L. Ed. 2d 834 (1962).

Allegedly improper comments are reviewed in the context of the entire argument, the issues in the case, the evidence addressed in the argument and the instructions given. *State v. Bryant*, 89 Wn. App. 857, 873, 950 P.2d 1004 (1998) “remarks must be read in context.” *State v. Pastrana*, 94 Wn. App. 463, 479, 972 P.2d 557 (1999).

Improper remarks do not constitute prejudicial error unless the appellate court determines there is a substantial likelihood that the misconduct affected the jury’s verdict. *Finch*, 137 Wn.2d 792 at 839. The trial court is best suited to evaluate the prejudice of the statement. *State v. Weber*, 99 Wn.2d 158, 166, 659 P.2d 1102 (1983).

“It is not misconduct... for a prosecutor to argue that the evidence does not support the defense theory. Moreover, the prosecutor, as an advocate, is entitled to make a fair response to the arguments of defense counsel.” *State v. Russell*, 125 Wn.2d 24, 87, 882 P.2d 747 (1994).

A defendant claiming prosecutorial misconduct bears the burden of demonstrating that the remarks were improper and that they prejudiced the defense. *State v. Mak*, 105 Wn.2d 692, 726, 718 P.2d 407, *cert. denied*, 479 U.S. 995, 107 S. Ct. 599, 93 L. Ed. 2d 599 (1986); *State v. Binkin*, 79 Wn. App. 284, 902 P.2d 673 (1995), *review denied*, 128 Wn.2d 1015 (1996). If a curative instruction could have cured the error, and the

defense failed to request one, then reversal is not required. *Binkin*, at 293-294.

To prove that a prosecutor's actions constitute misconduct, the defendant must show that the prosecutor did not act in good faith and the prosecutor's actions were improper. *State v. Manthie*, 39 Wn. App. 815, 820, 696 P.2d 33 (1985) (citing *State v. Weekly*, 41 Wn.2d 727, 252 P.2d 246 (1952)).

Here, the defense has challenged two statements made by the State in closing and rebuttal. Br. App. 9-10. *See* RP 04-29-2008, p. 307-322; p. 332-338. The first statement challenged comes from the closing and involves the State's discussion of "reasonable doubt." After going through the evidence that supported a finding of guilt as to Count II, the Deputy Prosecuting Attorney made the following argument:

All of the elements of Count II have been proven beyond a reasonable doubt. Now, what is a reasonable doubt? It kind of sounds like a term of art; but again, it is something that we use every day to make reasonable decisions and choices. The key word is reasonable. Nothing is one hundred percent certain and you're not being asked to find anything one hundred percent certain. The standard is not beyond a shadow of a doubt. It's beyond a reasonable doubt, a doubt for which there is a reason; and you only have to have a reasonable doubt as to the elements of the crime. We're not talking about having a doubt as to the minor detail – well, how long was the defendant staying in the motel room? Or where did these items come from? Or any of those details are not in your jury instructions. You would have to have a reasonable doubt as to the elements of the crime as listed in your instructions, and it seems that those have been pretty much proven beyond a

reasonable doubt. If you have – if, after such consideration, you have an abiding belief in the truth of the charge, then you are satisfied beyond a reasonable doubt.

RP 04-29-08, p. 318, ln. 13 to p. 319, ln. 11.

This argument is an accurate statement of the law as represented by the reasonable doubt jury instruction, WPIC 4.01, which was given in this case as jury instruction number 2. CP 108. The language of that instruction has been upheld by the courts as lawful. *See, State v. Pirtle*, 127 Wn.2d 628, 656-58, 904 P.2d 245 (1995) (approving WPIC 4.01); *State v. Woods*, 143 Wn.2d 561, 594, 23 P.3d 1046 (2001) (interpreting former WPIC 4.01A).

The defendant seems to take issue with two particular phrases within that passage from the prosecutor’s closing, as those two sections are italicized in the brief of the appellant. *See* Br. App. 9. For convenience, it is easier to address the second phrase first. The second phrase italicized is “a doubt for which there is a reason.” Br. App. 9.

Jury instruction 2 and WPIC 4.01 define a reasonable doubt in pertinent part as, “...one for which a reason exists...” That language was specifically discussed and approved in *Pirtle*. *See, Pirtle*, 127 Wn.2d at 657. When the prosecutor argued that a reasonable doubt is, “a doubt for which there is a reason,” she was merely paraphrasing the language of the jury instruction, and there was nothing erroneous or improper about that statement.

The first phrase from the passage that the defendant takes issue with is, “it is something that we use every day to make reasonable decisions and choices.” The jury instruction specifies that a reasonable doubt, “is such a doubt as would exist in the mind of a reasonable person after fully, fairly, and carefully considering all of the evidence or lack of evidence.” Thus, a reasonable doubt is such as would exist in the mind of a “reasonable person.” The reasonable person standard is what the prosecutor was addressing when she made the statement. Nothing in the statement lessens the State’s burden nor encourages the jury to approach its job in a trivial manner. Moreover, that phrase occurs in the context of a much longer statement in which the prosecutor carefully lays out the State’s burden in a manner that is legally accurate. So nothing about the State’s argument reduced the State’s burden or relieved the State of its burden.

The defendant also took issue with a statement made by the prosecutor in rebuttal.

I’d briefly like to remind you about a jury instruction you don’t have. There is no jury instruction in your packet that says check your common sense outside the courtroom. Common sense is one of those tools that you have, you can use, and I encourage you to use.

RP 04-29-08, p. 337, ln. 23 to p. 338, ln. 3.

Defense counsel objected to this argument, claiming that it went against the instructions. RP 04-29-08, p. 4-6. The court denied the

objection on the ground that it didn't go against the instructions because the prosecutor was discussing an instruction that didn't exist, and because there was an instruction that discussed and referred to "common experience." RP 04-29-08, p. 338, ln. 7-12.

The prosecutor continued:

Thank you. So I would encourage you to use your common sense when you are evaluating the evidence and evaluating this case; and I would ask that after you evaluated all the evidence in this case, if you do have an abiding belief in the truth of the charges, I would ask that you find the defendant guilty of unlawful manufacture of a controlled substance, methamphetamine, and unlawful possession of ephedrine and/or pseudoephedrine with intent to manufacture methamphetamine and that both of these crimes occurred within a thousand feet of a school bus route stop. Thank you.

The trial court was in fact correct that one of the instructions talks about "common experience." It occurred in jury instruction 3, which is WPIC 5.01. It provides:

Evidence may be either direct or circumstantial. Direct evidence is that given by a witness who testifies concerning facts that he or she has directly observed or perceived through the senses. Circumstantial evidence is evidence of facts or circumstances from which the existence or nonexistence of other facts may be reasonably inferred from common experience. The law makes no distinction between the weight to be given to either direct or circumstantial evidence. One is not necessarily more or less valuable than the other.

WPIC 5.01. [Emphasis added.]

The prosecutor's argument in rebuttal was not error. She merely informed the jury that "common sense is one of those tools that you have, you can use, and I encourage you to use." Thus, she described it as one of several tools available to the jury in their evaluation of the case. She did not describe it as the only tool, or even as a mandatory tool.

Moreover, nothing she said told the jury to disregard the legal burden to find proof beyond a reasonable doubt. Indeed, after the objection she continued that she encouraged the jury to use common sense in evaluating the evidence and the case, and that if after evaluating all the evidence, if they had an abiding belief in the truth of the charges, the jury should find the defendant guilty. RP 04-29-08, p. 338, ln. 13-19. Thus, she distinguished her argument about the use of common sense from the State's burden and properly argued that the evidence met that burden.

None of the statements either individually, or taken together, lessened the State's burden. None of the statements suggested the jury should adopt a common sense standard instead of a reasonable doubt standard. Instead, the statements told the jury that they were permitted to use their common sense in evaluating the evidence, but that the State had to prove each element beyond a reasonable doubt.

Even if the arguments were error, the defendant has failed to show that the Deputy Prosecutor did not act in good faith. Moreover, the defendant cannot show that a curative instruction would have cured any error where the jury instructions were already correct.

The defendant's claim should be denied as without merit.

3. TRIAL COUNSEL WAS NOT INEFFECTIVE

To demonstrate ineffective assistance of counsel, an appellant must make two showings: (1) defense counsel's representation was deficient, i.e., it fell below an objective standard of reasonableness based on consideration of all the circumstances; and (2) defense counsel's deficient representation prejudiced the appellant, i.e., there is a reasonable probability that, except for counsel's unprofessional errors, the result of the proceeding would have been different. *State v. McFarland*, 127 Wn.2d 322, 899 P.2d 1251 (1995).

However, where an appellant claims ineffective assistance of counsel for trial counsel's failure to object to the admission of evidence, the burden on the appellant is even higher. To prove that the failure of trial counsel to object to the admission of evidence rendered the trial counsel ineffective, the appellant must show that: not objecting fell below prevailing professional norms; that the proposed objection would likely have been sustained; and that the result of the trial would have been

different if the evidence had not been admitted. *In re Pers. Restraint of Davis*, 152 Wn.2d 647, 714, 101 P.3d 1 (2004). To prevail on this issue, the appellant must also rebut the presumption that the trial counsel's failure to object "can be characterized as legitimate trial strategy or tactics." *In re Pers. Restraint of Davis*, 152 Wn.2d at 714 (quoting *State v. McNeal*, 145 Wn.2d 352, 362, 37 P.3d 280 (2002) (emphasis added in original)). Deliberate tactical choices may only constitute ineffective assistance if they fall outside the wide range of professionally competent assistance, so that "exceptional deference must be given when evaluating counsel's strategic decisions." *In re Pers. Restraint of Davis*, 152 Wn.2d at 714 (quoting *State v. McNeal*, 145 Wn.2d at 362).

Courts engage in a strong presumption that counsel's representation was effective. Where, as here, the claim is brought on direct appeal, the reviewing court will not consider matters outside the trial record. The burden is on an appellant alleging ineffective assistance of counsel to show deficient representation based on the record established in the proceedings below. *McFarland*, 127 Wn.2d at 334.

Here, trial counsel did bring a motion challenging the search. Additionally, trial counsel objected to the prosecutor's remarks in rebuttal. Having made those objections, trial counsel was not ineffective. Moreover, as argued in sections 1 and 2 above, the errors that the defendant claims were not objected to were not errors at all. Even if they were error, the defendant has failed to make the requisite showing of

prejudice. The defendant's claims of ineffective assistance of counsel are not well considered and should be denied without merit.

D. CONCLUSION

All the searches of the motel room by Officer Springer were lawful where she had a reasonable basis to believe that Haugsted had failed to report to his probation officer as required, and where he committed a violation in Officer Springer's presence by lying to her about his name.

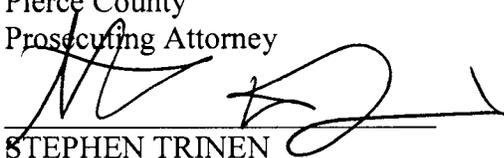
The prosecutor's statements in closing and rebuttal were not error or the least bit improper where they did not lessen or remove the State's burden.

Where there was no error in the underlying claims, trial counsel was not ineffective even if she could be construed not to have adequately raised the issues.

Because the defendant's claims are without merit, they should be denied and his conviction should be affirmed.

DATED: July 13, 2009.

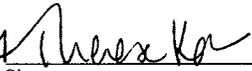
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Certificate of Service:

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.

7-13-09 
Date Signature

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