NO. 94273-1

COURT OF APPEALS, DIVISION II
STATE OF WASHINGTON

STATE OF WASHINGTON, RESPONDENT

v.

HOLLIS BLOCKMAN, PETITIONER

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

No. 14-1-04093-0

SUPPLEMENTAL BRIEF OF RESPONDENT

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A. ISSUES PERTAINING TO PETITION FOR REVIEW.

1. Does the protective sweep exception to the warrant requirement allow for officers lawfully in a residence to conduct a limited search of areas where a person may be hiding so long as they have a reasonable belief based on specific and articulable facts that the area to be swept poses a danger to investigating officers?

2. Did Division I of the Court of Appeals correctly apply the protective sweep exception when the officer was lawfully in a residence and has a reasonable belief based on specific and articulable facts that the area to be swept posed a danger to investigating officers?

3. Was the protective sweep preceded by valid voluntary consent as an alternative exception to the warrant requirement?

B. STATEMENT OF THE CASE.

1. Procedural History

Petitioner Hollis Blockman, hereinafter "defendant," was charged with a violation of RCW 69.50.401, possession of a controlled substance with intent to deliver, with a school bus stop sentence enhancement allegation. CP 35. Pre-trial the defendant moved to suppress the drug evidence which was obtained during a protective sweep of an apartment in

which the defendant was caught selling crack cocaine. 1RP 27[1], CP 13-23. The trial court denied defendant's motion on the basis of a valid protective sweep. CP 251-253, 2RP 17-21. He was subsequently convicted. 7RP 23, CP 97-112.

Division I of the Court of Appeals issued its opinion in an unpublished decision on January 23, 2017. Appendix A. It upheld the search as a valid protective sweep because the officers had a "'reasonable belief based on specific and articulable facts' that the area to be swept harbors an individual posing a danger to arresting officers." *Id.* The State subsequently moved for the opinion to be published. The Court granted the State's motion and published the opinion in full on March 2, 2017. Appendix A.

2. Statement of Facts

The facts relevant to defendant's petition are derived from the trial court's written findings and from the testimony at the pre-trial CrR 3.6 hearing and are included in the opinion of the court below. ***State v. Blockman***, 198 Wn. App. 34, 392 P.3d 1094 (2017). In short, Tacoma Police patrol officers responded to a reported strong arm robbery and were directed to a nearby apartment on Tacoma's eastside. CP 251-53. There they made contact with the renter who was aware of the incident. The

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

officers were invited inside the apartment and continued the investigation by starting to take an oral statement from the renter. *Id.* As the officers were doing so, the renter informed the officer that there were two other people in the back bedroom. *Id.* This prompted a request from the officers to conduct a protective sweep. The primary officer then testified as to the reasons for the protective sweep:

> In this specific example, this victim, witness, whatever we call her, Ms. Green, indicated there were other people in the apartment. And those other people could be a threat to our safety, and so that's what we're looking for. There was also two people in the alleged robbery.
>
> There was Patty that we spoke to, and then there was the other gentleman, Mr. Marlowe. As police officers on the east side of Tacoma, we're all very familiar with Mr. Marlowe. He's missing a leg. He stands out. And so he was involved in that robbery that this lady has described to us. So we're going to obviously check in case he's hiding or as a threat to us inside that place.
>
> * * * *
>
> We want some kind of element of surprise. At most police incidents where there's a shooting or something like that, police officers have to respond. Someone else pulled out a gun, and the police officer has to respond. We're not the one pulling out the firearm first. So any time we can give ourselves more of an opportunity to lengthen a gap, that's how you stay alive.
>
> 1 RP 47-48

After considering the evidence introduced at the CrR 3.6 hearing the trial court ruled that the protective sweep was lawful. CP 251-53. The parties also submitted authorities and argument concerning valid consent

but the trial court included only protective sweep in its written findings and conclusions. CP 251-53.

C. ARGUMENT.

1. A PROTECTIVE SWEEP IS VALID WHEN AN OFFICER HAS A REASONABLE BELIEF BASED UPON SPECIFIC AND ARTICULABLE FACTS THAT AN AREA TO BE SWEPT POSES AN IMMINENT DANGER TO INVESTIGATING OFFICERS.

The community expects police to be "more than mere spectators." ***State v. Young***, 135 Wn.2d 498, 511-12, 957 P.2d 681 (1998). "Thus, it is well-established that '[e]ffective law enforcement techniques not only require passive police observation, but also necessitate their interaction with citizens on the streets.'" *Id.*, citing ***State v. Tucker,*** 136 N.J. 158, 642 A.2d 401, 406 (1994). It is in those necessary interactions that officers expose themselves to the greatest risk for the common good. They are deserving of the opportunity to assure their safety and the safety of bystanders as they investigate violent crime.

The Fourth Amendment of the United States Constitution and article I, section 7 of the Washington State Constitution both prohibit a warrantless search unless the state demonstrates that one of a few narrow exceptions to the warrant requirement applies. ***State v. Garvin***, 166 Wn.2d 242, 249, 207 P.3d 1266 (2009), ***State v. Smith***, 137 Wn. App. 262, 267-68, 153 P.3d 199 (2007). One such exception under both the

federal and state constitution is a protective sweep. ***State v. Smith***, 137 Wn.2d at 268.

Protective sweeps were recognized under the federal constitution in the 1990 ***Buie*** case. ***Maryland v. Buie***, 494 U.S. 325, 110 S. Ct. 1093, 108 L. Ed. 2d 276 (1990). ***Buie*** established that the Fourth Amendment permits a protective sweep in either of two situations: first, officers may look in spaces "immediately adjoining the place of arrest from which an attack could be immediately launched," that is in the lunge area adjoining the place of arrest. *Id.* at 334. Second they may also check other areas of the premises when there are "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.* A protective sweep does not permit a full search of the premises but rather is limited to a cursory inspection of spaces where a person may be expected to be found. *Id.* at 335. Plus the sweep may last no longer than is necessary to dispel the reasonable suspicion of danger. *Id.* at 335-336.

a. <u>The protective sweep exception is well grounded on the reasonableness of a search of limited intrusiveness balanced against the legitimate public interest in officer safety and police protection</u>.

The ***Buie*** protective sweep exception traces its origins to the Fourth Amendment's reasonableness requirement for warrantless searches

and officer safety.[2] ***Maryland v. Buie***, 494 U.S. 327-28, citing ***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). Prior to ***Buie***, in ***Terry***, the Supreme Court had held that an on-street frisk for weapons is reasonable when weighed against the need for police officers to protect themselves even where they lack probable cause for an arrest. ***Terry v. Ohio***, 392 U.S. at 21. The same rationale was applied to vehicle searches in ***Long***. There the Court again found a warrantless search of a vehicle reasonable so long as the search was limited to areas in which a weapon may be placed or hidden and the searching officer possesses ***Terry***-level information supporting a concern for officer safety. ***Michigan v. Long***, 463 U.S. at 1049-1050.

The potential for danger to officers in a vehicle stop related to a violent crime supplies obvious support for the reasonableness of a protective sweep of a vehicle:

> It would seem … the possibility of a violent encounter stems not from the ordinary reaction of a motorist stopped for a speeding violation, but from the fact … evidence of a more serious crime might be uncovered during the stop. And the motivation of a passenger to employ violence to prevent apprehension of such a crime is every bit as great as that of the driver.

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[2] The Court's reasonableness test for warrantless searches has been applied in other warrant exception cases such as exigent circumstances, emergency aid, and hot pursuit. *See* ***Kentucky v. King***, 563 U.S. 452, 460, 131 S. Ct. 1849, 179 L. Ed. 2d 865 (2011). Such exceptions are justifiable because, "As previously noted, warrantless searches are allowed when the circumstances make it reasonable, within the meaning of the Fourth Amendment, to dispense with the warrant requirement." *Id. See also* Amar, *Fourth Amendment First Principles*, 107 Harv. L. Rev. 757 (1994).

Maryland v. Wilson, 519 U.S. 408, 414, 117 S. Ct. 882, 137 L. Ed. 2d 41 (1997). The same potential underlies the protective sweep exception applied to a residence: "The risk of danger in the context of an arrest in the home is as great as, if not greater than, it is in an on-the-street or roadside investigatory encounter." ***Maryland v. Buie***, 494 U.S. at 333.

Buie's focus was on officer safety and that interest not to mention the safety of innocent civilians was weighed against the minimal degree of the intrusion. One need look no further than the all too familiar tragedy of officer involved, innocent bystander shootings to recognize that officer safety is a paramount concern to both the officer and the public. Thus the ***Buie*** court acknowledged the seriousness of the intrusion but determined that the reasonableness of the search was supported by the danger of a police encounter in an unfamiliar area:

> 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.

Maryland v. Buie, 494 U.S. 333. In the foregoing discussion the court acknowledged that the officer safety concern may arise contemporaneous with rather than after an arrest. Considering that acknowledgement,

arguably, the only reason that ***Buie*** held that a protective sweep must be preceded by an arrest is because the arrest happened to take place before the protective sweep rather than the other way around.

Division One's decision in this case that an arrest need not necessarily precede a protective sweep has strong federal support. Most of the federal circuit courts have applied ***Buie*** to non-arrest circumstances. The reason for the extension is invariably grounded in officer safety. ***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(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), abrogated in part on other grounds ("[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 (2004); ***United States v. Taylor***, 248 F.3d 506, 513 (6th Cir. 2001) ("[P]olice 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. Starnes***, 741 F.3d 804, 810 (7th Cir. 2013) ("What matters are the specific facts that would give a reasonable officer, who is lawfully inside a home, a 'reasonable belief

based on specific and articulable facts which, taken together with the rational inferences from those facts, reasonably warrant the officer in believing that the area swept harbored an individual posing a danger to the officer or others.' ") (citations omitted); ***United States v. Caraballo***, 595 F.3d 1214, 1225 (11th Cir. 2010) (Police officer lawfully conducted a protective sweep on a boat based upon the nervous behavior of the suspects); ***United States v. Patrick***, 959 F.2d 991, 996 (D.C. Cir. 1992), abrogated on other ground ("Once the police were lawfully on the premises, they were authorized to conduct a protective sweep").

Two federal circuits have seemingly declined to extend ***Buie*** to non-arrest circumstances. In ***United States v. Torres-Castro***, 470 F.3d 992 (10th Cir. 2006), the Tenth Circuit, while not endorsing the expansion of the protective sweep doctrine, did note that the majority of federal circuits have extended it to cases where officers possess a reasonable belief that their safety is endangered, even in the absence of an arrest. The panel that decided Torres-Castro suggested that it would have held the other way but was bound by an earlier decision. ***United States v. Torres-Castro***, 470 F.3d at 997.

The Eighth Circuit also declined to extend ***Buie***. ***United States v. Waldner***, 425 F.3d 514, 517 (8th Cir. 2005). However, the court also noted that the officers lacked ***Terry***-level information because there was "no evidence that the officers had any articulable facts that an unknown individual might be in the office, or anywhere else in the house, ready to

launch an attack." *Id.* In a concurrence, one of the panel members stated that ***Buie*** did not limit protective sweeps to arrest situations but agreed that the specific facts did not render the protective sweep reasonable. *Id.* at 518 (Murphy, J., concurring).

The Ninth Circuit has gone both ways. In ***United States v. Garcia***, 997 F.2d 1273, 1282 (9th Cir. 1993), a panel of the court found that a protective sweep is permissible without a preceding arrest when officers are lawfully in the residence and have a reasonable concern about their safety. *Id.* A different panel found otherwise in ***United States v. Reid***, 226 F.3d 1020 (9th Cir. 2000) without acknowledging ***Garcia***. ***Reid*** was primarily concerned with the question of valid consent. In response to a secondary argument, the court simply noted that ***Buie*** defines a protective sweep as occurring incident to arrest and also that there were no facts presented that "demonstrated that a reasonably prudent officer would have believed that the apartment 'harbor[ed] an individual posing a danger to those on the arrest scene.'" *Id.* at 1027.

The United States Supreme Court has consistently stated that searches are "generally not reasonable without a warrant issued on probable cause" but that there are "other contexts, however, where the public interest is such that neither a warrant nor probable cause is required." ***Maryland v. Buie***, 494 U.S. at 331. Officer safety during the investigation of a violent crime is one such context. Since "the Fourth Amendment bars only unreasonable searches and seizures" it is not

surprising that it does not bar an officer from conducting a cursory search out of the very human concern for the officer's own personal safety and the safety of any other people or officers who may be present in the unfamiliar territory of a residence.

b. This Court and the Courts of Appeals have explicitly applied the protective sweep exception without necessarily requiring a preceding arrest.

This Court jealously guards the privacy of Washington citizens but also permits officer safety to be weighed in the balance. ***State v. Smith***, 165 Wn.2d 511, 199 P.3d 386 (2009). "The United States and Washington Constitutions prohibit most warrantless searches of homes. However, the police may search without a warrant under one of the "'few jealously and carefully drawn exceptions to the warrant requirement.'" *Id.* at 517, citing ***State v. Kinzy,*** 141 Wn.2d 373, 384, 5 P.3d 668 (2000) and quoting ***State v. Houser***, 95 Wn.2d 143, 149, 622 P.2d 1218 (1980).

In ***Smith*** this Court upheld a warrantless "sweep" of a residence after the occupants had removed themselves and were being detained outside. ***State v. Smith***, 165 Wn.2d at 515-16. The reasonableness of the officer's actions was balanced against the intrusiveness of the search and the potential for a chemical spill tragedy with the ultimate result that the warrantless sweep was held to be reasonable and lawful:

> Under the unusual facts presented here, most notably the combination of large quantities of a toxic chemical and the

> missing firearm, the officers' search falls under the "officer and public safety" prong of the "exigent circumstances" exception to the warrant requirement. The trial court was correct in refusing to suppress the evidence gained in connection with the search.

State v. Smith, 165 Wn.2d at 519.

Consistent with ***Smith,*** the Courts of Appeals have approved protective sweeps where they are conducted appropriately and where the focus is officer safety. ***State v. Boyer***, 124 Wn. App. 593, 601, 102 P.3d 833, 837 (2004) ("To justify a protective sweep beyond immediately adjoining areas [of an arrest], the officers must be able to articulate '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.'"), citing ***Maryland v. Buie***, 494 U.S. at 334, and ***State v. Hopkins***, 113 Wn. App. 954, 959, 55 P.3d 691 (2002); ***State v. Sadler***, 147 Wn. App. 97, 125, 193 P.3d 1108, 1123 (2008) ("Police may conduct a protective sweep of the premises for security purposes as part of the lawful arrest of a suspect."); and ***State v. Chambers***, 197 Wn. App. 96, 127, 387 P.3d 1108(2016), *review denied*, 188 Wn.2d 1010 (2017) ("To justify a protective sweep when a suspect is arrested outside his home, there must be articulable facts that warrant a police officer in believing 'the area to be swept harbors an individual posing a danger to those on the arrest scene.'"), quoting ***Maryland v. Buie***, 494 U.S. at 334.

The defendant and *amici* have pointed out that the ***Boyer*** case declined to extend the protective sweep exception to cases involving the execution of a search warrant. ***State v. Boyer***, 124 Wn. App. 593, 603, 102 P.3d 833 (2004). But this should not be startling. A search warrant carries with it authority to enter and search apart from any exception to the warrant requirement. The ***Boyer*** court pointed out, "A search warrant sufficiently describes the place to be searched with particularity if it enables the executing officer to find and identify the location without mistake." *Id.* Because the search warrant was confined to one of three apartments in the house that was searched, the officer's attempt to expand the scope of the warrant to cover a separate upstairs apartment was understandably met with skepticism: "We agree with the trial court that, even if a protective sweep was justified under these circumstances, there was no valid reason to extend the search to the upstairs apartment." *Id.* at 602.

Another circumstance where a protective sweep was disallowed is when a suspect was arrested outside a residence before the sweep is conducted. ***State v. Chambers***, 197 Wn. App. at 127. Nevertheless even an arrest outside a residence does not categorically invalidate a protective sweep: "To justify a protective sweep when a suspect is arrested outside his home, there must be articulable facts that warrant a police officer in believing 'the area to be swept harbors an individual posing a danger to those on the arrest scene.'" *Id.* quoting ***Maryland v. Buie***, 494 U.S. at

334. In ***Chambers*** Division One declined to uphold the protective sweep because "The record does not support the conclusion that there were 'articulable facts' that the kitchen harbored 'an individual posing a danger.'" *Id.*

The history of the application of the protective sweep exception by the courts of appeals is one of a number of reasons why this Court should affirm Division One in this case. Washington's application of the exception has been jealously sparing. Comparison of this case with ***Chambers*** is an example of just how sparing. Here the officer was invited into the residence by the renter whereas in ***Chambers*** the defendant stepped out of the house rather than invite the officers inside. Plus in this case the officer was investigating an assault and robbery. 1 RP 24-26. He knew that the renter who answered the door was not the suspect but also knew from his contact with the victim that there were two suspects and there were individuals other than the renter in the apartment. 1 RP 47. His sole concern was safety of himself and the civilians present. 1 RP 26, 38, 42, and 47. The information from the victim augmented by the consensual contact with the renter of the apartment, who said there were others in the bedroom, and the officer's own observations from the doorway more than satisfied the "articulable facts" and led the same court that decided ***Chambers*** to uphold the protective sweep here. Under the circumstances that Officer Hayward found himself and his partner in, it

was not a stretch for the court below to find this case distinguishable from ***Chambers***.

The primary argument of the defendant in this case is that protective sweeps should be confined to cases where there is a preceding arrest. This argument is undermined by ***Buie***'s express recognition that the sweep could be conducted contemporaneously with the arrest and need not be preceded by it. ***Maryland v. Buie***, 494 U.S. 333. It is further undercut by ***Smith*** because this Court's affirmance did not turn on whether the two individuals who exited the house were placed under arrest before or after the protective sweep. ***State v. Smith***, 165 Wn.2d 517-19. The key ingredient in ***Smith*** was the wholly justified officer and public safety motivation of the officers. *Id.*

Apart from the lack of case support, common sense also undermines the defense argument. In the first place once an arrest is made and a suspect is in handcuffs officer safety is necessarily less of a concern at least where the crime involves a single perpetrator. Where officer safety is the primary factor that makes a protective sweep reasonable under the Fourth Amendment, it would defy logic to permit a search only after safety has been increased by an arrest.

It would also defy logic to encourage officers to make a rush to judgment in order to assure their safety and the safety of innocent bystanders. But that is exactly the incentive that would be created if the only way for the officers to lawfully protect themselves and bystanders is

to make an arrest. If officers must wait until an arrest is made before they can protect themselves, arrests might well be made more quickly simply for the sake of safety. Even defendants should support a rule that enables a complete investigation to be made in safety before an arrest is made.

The defendant and *amici* also argue that Division One's holding leads inevitably to "the routine invasion of Washingtonian's privacy. . . ." Amici Memorandum, p, 5. The argument is absurd; the evidentiary foundation that applies to a protective sweep has been with us since 1968. ***Terry v. Ohio***, 392 U.S. 1, 21, 88 S. Ct. 1868, 20 L. Ed. 2d 889 (1968), ***Maryland v. Buie***, 494 U.S. at 327-28. It is mandatory that an officer conducting a protective sweep first have ***Terry***-level information that "reasonably warrant[s] that intrusion." *Id.*

While previous cases in Washington, as well as the decision in ***Buie***, discuss protective sweeps as occurring as part of a lawful arrest, the arrest is generally not the determinative factor. ***State v. Sadler***, 147 Wn. App. 97, 125, 193 P.3d 1108 (2008). Extension of the protective sweep exception to situations where an arrest has not been made, but where officers have officer safety concerns, serves the complimentary interests of both the Fourth Amendment and article I, section 7. Division One's opinion is not inconsistent with previous decisions of this Court or the Courts of Appeals. Its decision should be affirmed as to the protective sweep.

2. VALID CONSENT IS AN ALTERNATIVE BASIS FOR AFFIRMING THE DENIAL OF THE SUPPRESSION MOTION AND FOR AFFIRMING THE DEFENDANT'S CONVICTION.

Free and voluntary consent is another jealously guarded and well-recognized exception to the warrant requirement. ***State v. Budd***, 185 Wn.2d 566, 573, 374 P.3d 137 (2016). Where consent is obtained as the result of a knock and talk investigation, *Ferrier* warnings are necessary because "The failure to provide these warnings, prior to entering the home, vitiates any consent given thereafter." *Id.* at 573, quoting ***State v. Ferrier***, 136 Wn.2d 103, 118–19, 960 P.2d 927 (1998). However other types of police contacts where the purpose was not to conduct a search but to investigate a crime do not require the warnings. ***State v. Khounvichai***, 149 Wn.2d 557, 563, 69 P.3d 862, 865 (2003) ("We have since clarified that the *Ferrier* requirement is limited to situations where police request entry into a home for the purpose of obtaining consent to conduct a warrantless search and have declined to broaden the rule to apply outside the context of a request to search.") citing ***State v. Williams***, 142 Wn.2d 17, 28, 11 P.3d 714 (2000) and ***State v. Bustamante–Davila***, 138 Wn.2d 964, 981, 983 P.2d 590 (1999).

In this case, although consent was not addressed by the court below, the renter of the apartment gave express, valid consent. 1 RP 40. This was not a knock and talk. Officer Hayward went to the apartment for

the purpose of contacting a suspect in a robbery not with the purpose of searching the apartment for contraband. 1 RP 39. The protective sweep was likewise not conducted for the purpose of discovering evidence of a drug crime but for the purpose of making sure the robbery investigation could be completed safely. *Id.*

The facts belie any argument that consent was invalid. Upon arriving at the apartment Officer Hayward was invited in. 1RP 26. He testified that he discussed the strong-arm robbery with the renter. *Id.* Prior to the protective sweep, he asked the renter 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 the renter. 1RP 42. Further, when he informed the renter that he wanted to conduct a protective sweep for safety purposes, she gave him consent to conduct the protective sweep. 1RP 26, 40. 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. It was during the protective sweep that Officer Hayward saw the defendant selling what was later identified to be crack cocaine. 1RP 27-28.

Although not necessary, the decisions of the court below and of the trial court can be affirmed on the basis of voluntary consent obtained before the protective sweep. Because Officer Hayward was in the

apartment for the sole purpose of wanting to interview a potential robbery suspect and not to conduct a search, *Ferrier* warnings were not necessary. ***State v. Khounvichai***, 149 Wn.2d at 563. The defendant's conviction should be affirmed on this alternative basis as well as on the basis of a valid protective sweep.

D. CONCLUSION.

For the foregoing reasons the decisions of both the trial court and the court below which upheld the denial of the suppression motion should be affirmed.

DATED: July 28, 2017

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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.

7/28/17
Date Signature

APPENDIX "A"

Opinion

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, Respondent, v. HOLLIS BLOCKMAN, Appellant.	)	No. 76038-6-I DIVISION ONE UNPUBLISHED 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.

PIERCE COUNTY PROSECUTING ATTORNEY

July 28, 2017 - 2:59 PM

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