IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

STATE OF WASHINGTON, Respondent, v. COLTON LEROY HAUGSTED, Appellant.	No. 37722-5-II UNPUBLISHED OPINION

Quinn-Brintnall, J. — A jury entered verdicts finding Colton Haugsted guilty of unlawful possession of pseudoephedrine and/or ephedrine with intent to manufacture methamphetamine and not guilty of unlawful manufacturing of a controlled substance (methamphetamine). The same jury also returned a special verdict finding that Haugsted committed his offense within a thousand feet of a school bus stop. Haugsted appeals his conviction, asserting that (1) the trial court erred by failing to suppress evidence obtained from a search of his motel room and (2) the prosecutor committed misconduct in closing arguments by misstating the reasonable doubt standard to the jury. Because the evidence that Haugsted sought to have suppressed was obtained through a lawful search and because the prosecutor did not commit misconduct in her closing arguments, we affirm.

FACTS

On August 13, 2007, Department of Corrections (DOC) Officer Joanne Springer located Haugsted in a motel room registered to Donna Vasquez. Accompanied by Fife Police Department officers, Springer went to the Fife Motel in Fife, Washington, to arrest Haugsted for violating his community custody conditions. At the motel, Haugsted initially identified himself as "Corey," but he gave his true name after Springer confronted him with his photograph. Springer arrested Haugsted on a DOC warrant and searched the motel room. In the motel room, Springer found numerous items that she believed could be used to manufacture methamphetamine.

Springer turned the investigation over to the Fife Police Department. The Fife Police Department obtained a search warrant and seized evidence of the suspected methamphetamine lab. The State charged Haugsted with unlawful manufacturing of a controlled substance (methamphetamine), contrary to RCW 69.50.401(1), (2)(b), and unlawful possession of pseudoephedrine and/or ephedrine with intent to manufacture methamphetamine, contrary to RCW 69.50.440(1). The State also alleged that Haugsted committed the offenses within a thousand feet of a school bus stop and while he was on community custody.

On February 19, 2008, Haugsted filed a motion to suppress evidence obtained in the August 13, 2007 search of the motel room where he was arrested. After conducting a CrR 3.6 hearing, the trial court entered the following undisputed factual findings:

> 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 [Haugsted]. Crawford stated [Haugsted] had a DOC warrant for his arrest and one of the Detective's confidential informants reported [Haugsted] was cooking methamphetamine in room #16 of the Fife Motel, located at 4601 Pacific Highway East, Fife, WA.

II.

A records check done on [Haugsted] 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-[domestic violence] case.

III.

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

IV.

CCO Springer researched [Haugsted'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 [Haugsted'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 [Haugsted's] assigned probation officer, and she never had contact with his assigned officer.

V.

CCO Springer printed a booking photo of [Haugsted].

VI.

CCO Springer made the decision to respond to the Fife Motel to arrest [Haugsted] 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 [Haugsted'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. [Haugsted] answered the door and he was the only person in the motel room.

XII.

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

XIII.

CCO Springer decided that [Haugsted] would be arrested on the DOC warrant. Officer Vradenburg placed handcuffs on [Haugsted] 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 [Haugsted] and began asking him questions. [Haugsted] told CCO Springer that he had been staying in the motel room for the past few nights. [Haugsted] admitted to CCO Springer that he had smoked marijuana and drank alcohol about a week earlier. [Haugsted] also stated he used methamphetamine approximately two days earlier.

XVI.

CCO Springer decided to search the motel room because [Haugsted] 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 [Haugsted'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 [Haugsted] 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.

Clerk's Papers (CP) at 181-85.

The trial court denied Haugsted's motion to suppress evidence obtained in the search of his motel room, finding that Springer had reasonable cause to believe that Haugsted had violated his community custody conditions and, thus, had statutory authority to search his room under former RCW 9.94A.631 (1984).[1]

A jury trial began on April 21, 2008. In its closing argument, the State made the following statements regarding the reasonable doubt standard:

> Now, what is 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 [that] 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're satisfied beyond a reasonable doubt.

Report of Proceedings (RP) (Apr. 29, 2008) at 318-19.

Haugsted did not object to this portion of the State's closing argument. Then, in its

[1] Former RCW 9.94A.631 provided in part:

> 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.

rebuttal closing arguments, the State told the jury,

> 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 you have, you can use, and I encourage you to use.

RP (Apr. 29, 2008) at 337-38. Haugsted objected to this portion of the State's closing, which the trial court overruled, stating that one of the instructions used the phrase "'common sense, common experience.'" RP (Apr. 29, 2008) at 338.

The State continued its rebuttal closing argument:

> 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 [Haugsted] 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.

RP (Apr. 29, 2008) at 338.

The jury entered verdicts finding Haugsted guilty of unlawful possession of pseudoephedrine and/or ephedrine with intent to manufacture methamphetamine and not guilty of unlawful manufacturing of a controlled substance (methamphetamine). The jury also returned a special verdict finding that Haugsted committed his offense within a thousand feet of a school bus stop. The trial court imposed a standard range sentence. Haugsted timely appeals his conviction.

ANALYSIS

CrR 3.6 Motion to Suppress Evidence

Haugsted contends that the trial court erred by denying his motion to suppress evidence obtained in the search of the motel room where DOC Officer Springer had located him. Haugsted appears to concede that his admission to previously using illegal drugs and alcohol, a violation of his community custody conditions, justified Springer's second search of the motel room under former RCW 9.94A.631, but he argues that his admission came as a result of Springer's initial "sweep" of the room, which Haugsted contends was illegal. We hold that the trial court properly denied Haugsted's motion to suppress because Springer's initial warrantless sweep of his motel room for evidence of noncompliance with the terms and conditions of his probation and to determine whether there were other occupants, drugs, or drug paraphernalia in plain view was proper under former RCW 9.94A.631 and did not violate his diminished constitutional right to privacy.

We review the trial court's denial of a motion to suppress to determine whether substantial evidence supports the factual findings and, if so, whether the findings support the conclusions of law. *State v. Dempsey*, 88 Wn. App. 918, 921, 947 P.2d 265 (1997). Because Haugsted does not assign error to the trial court's factual findings, they are verities on appeal. *State v. Acrey*, 148 Wn.2d 738, 745, 64 P.3d 594 (2003). We review the trial court's conclusions of law de novo. *State v. Mendez*, 137 Wn.2d 208, 214, 970 P.2d 722 (1999).

Absent an exception to the warrant requirement, we presume that a warrantless search is unconstitutional under the Fourth Amendment to the United States Constitution and article 1, section 7 of the Washington Constitution. *State v. Gaines*, 154 Wn.2d 711, 716, 116 P.3d 993

(2005). But probationers and parolees have a diminished right to privacy under the Fourth Amendment of the United States Constitution and article 1, section 7 of the Washington Constitution. *State v. Lucas*, 56 Wn. App. 236, 239-40, 783 P.2d 121 (1989), *review denied*, 114 Wn.2d 1009 (1990); *State v. Lampman*, 45 Wn. App. 228, 233, 724 P.2d 1092 (1986). And a warrant exception exists for a CCO to search a probationer's person, residence, or effects if the officer has "reasonable cause to believe that an offender has violated a condition or requirement of the sentence." Former RCW 9.94A.631; *see State v. Campbell*, 103 Wn.2d 1, 22, 691 P.2d 929 (1984) ("Washington recognizes a warrantless search exception, when reasonable, to search a parolee or probationer and his home or effects."), *cert. denied*, 471 U.S. 1094 (1985). DOC officers may conduct searches under former RCW 9.94A.631 upon less than probable cause, so long as the officer has some valid reason to believe that a parole violation has occurred. *State v. Simms*, 10 Wn. App. 75, 87, 516 P.2d 1088 (1973), *review denied*, 83 Wn.2d 1007 (1974).[2] Where a DOC officer is justified in making a search, she may enlist the aid of police officers in performing her duty. *Simms*, 10 Wn. App. at 86.

Under the exclusionary rule, a criminal defendant may move to suppress evidence seized during an illegal search. CrR 3.6; *Gaines*, 154 Wn.2d at 716-17. Additionally, a criminal defendant may move to suppress evidence derived from an illegal search under the fruit of the poisonous tree doctrine. *State v. O'Bremski*, 70 Wn.2d 425, 428, 423 P.2d 530 (1967) (citing *In re McNear v. Rhay*, 65 Wn.2d 530, 398 P.2d 732 (1965)).

[2] Our Supreme Court has recently held that a CCO must have probable cause to believe that the probationer resides at a particular residence before searching that residence. *State v. Winterstein*, 167 Wn.2d 620, 220 P.3d 1226 (2009). Haugsted does not contend that Springer lacked probable cause to believe he resided at the motel room that she searched.

Here, the trial court properly determined that DOC Officer Springer had a well-founded suspicion that Haugsted had violated a condition of his sentence and that Springer was authorized to search his motel room under former RCW 9.94A.631. First, Springer had a well-founded suspicion that Haugsted had violated a condition of his sentence based on his felony DOC warrant for escape and bench warrant for failing to appear on his fourth degree assault charge. Additionally, Haugsted's conduct in giving a false name to Springer also provided her with a well-founded suspicion that he had violated a condition of his sentence. Haugsted's conditions state that he must "**[o]bey all municipal, county, state, tribal, and federal laws**" (CP at 37), and that he must "report and be available for contact with the assigned [CCO] as directed until instructed to no longer report, or a court order is issued closing the case." CP at 38.[3]

Haugsted contends that Officer Springer's suspicion that he had violated a condition of his sentence could not justify her initial search of his motel room because Springer arrested him outside of the room, citing *Vale v. Louisiana*, 399 U.S. 30, 34, 90 S. Ct. 1969, 26 L. Ed. 2d 409 (1970), and *Chimel v. California*, 395 U.S. 752, 763, 89 S. Ct. 2034, 23 L. Ed. 2d 685 (1969). In both *Vale* and *Chimel*, the United States Supreme Court held that the search incident to arrest warrant exception does not permit law enforcement officers to search a residence outside the immediate vicinity of the arrestee, absent a warrant or another exception to the warrant requirement. 399 U.S. at 34; 395 U.S. at 763. But the search of Haugsted's motel room was not

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[3] Haugsted's conditions, which he had signed, also stated:

> **Arrest, Search, and Seizure**: I am aware that I am subject to search and seizure of my person, residence, automobile, or other personal property if there is reasonable cause on the part of the [DOC] to believe that I have violated the conditions/requirements or instructions above.

CP at 39.

made incident to his lawful arrest; it was made pursuant to former RCW 9.94A.631 based on Springer's well-founded suspicion that Haugsted had violated a condition of his sentence. And this court has determined that a DOC officer may constitutionally conduct a warrantless search if the officer has "some valid reason to believe that a parole violation has occurred." *Simms*, 10 Wn. App. at 87.

Here, Haugsted's felony DOC warrant for escape and his bench warrant for failing to appear provided Officer Springer with a valid reason to believe that Haugsted had violated a sentencing condition. In addition, Springer had a tip from a confidential informant that Haugsted was operating a methamphetamine lab. Together with Haugsted's conduct in giving a false name when Springer confronted him at the door of his motel room and his admission that he used drugs two days prior to the motel room search, the confidential informant's tip supported Springer's reasonable belief that Haugsted had violated a condition of his sentence. *See Simms*, 10 Wn. App. at 88 (Where a parole officer bases her search on an informant's tip, the Fourth Amendment requires, at a minimum, that the information carries "some indicia of reliability to support an inference that the informant is telling the truth. In short, the officer must at least have a well founded suspicion that a parole violation has occurred."). Accordingly, the trial court did not err by denying Haugsted's motion to suppress.

Prosecutorial Misconduct

Next, Haugsted contends that the prosecutor committed misconduct by misstating the reasonable doubt standard to the jury at closing. Specifically, Haugsted contends that the prosecutor committed misconduct by stating that (1) a reasonable doubt is "a doubt for which there is a reason" (RP (Apr. 29, 2008) at 318; (2) the reasonable doubt standard "is something

that we use every day to make reasonable decisions and choices" (RP (Apr. 29, 2008) at 318; and (3) "[c]ommon sense is one of those tools that you have, you can use, and I encourage you to use." RP (Apr. 29, 2008) at 338.

A defendant claiming prosecutorial misconduct bears the burden of establishing the impropriety of the prosecuting attorney's comments and their prejudicial effect. *State v. Brown*, 132 Wn.2d 529, 561, 940 P.2d 546 (1997), *cert. denied*, 523 U.S. 1007 (1998). We review a prosecutor's allegedly improper comments in the context of the total argument, the issues in the case, the evidence addressed in the argument, and the instructions given. *State v. Russell*, 125 Wn.2d 24, 85-86, 882 P.2d 747 (1994), *cert. denied*, 514 U.S. 1129 (1995). In determining whether prosecutorial misconduct occurred, we first evaluate whether the prosecuting attorney's comments were improper. *State v. Reed*, 102 Wn.2d 140, 145, 684 P.2d 699 (1984). If the prosecuting attorney's statements were improper and the defendant made a proper objection to the statements, then we consider whether there was a substantial likelihood that the statements affected the jury. *Reed*, 102 Wn.2d at 145. Absent a proper objection and a request for a curative instruction, the defense waives a prosecutorial misconduct claim unless the comment was so flagrant or ill-intentioned that an instruction could not have cured the prejudice. *State v. Charlton*, 90 Wn.2d 657, 661, 585 P.2d 142 (1978).

First, the prosecutor's statement to the jury that a reasonable doubt is "a doubt for which there is a reason" (RP (Apr. 29, 2008) at 318) was not improper and, thus, did not constitute misconduct. In *State v. Thompson*, 13 Wn. App. 1, 4, 533 P.2d 395 (1975), this court addressed similar language in a jury instruction that read, "The doubt which entitles the defendant to an acquittal must be a doubt for which a reason exists." *Thompson* held that the instruction did not

infringe on the constitutional right that a defendant is presumed innocent and that the statement, when read in context with the entire instruction, "[did] not direct the jury to assign a reason for their doubts, but merely point[ed] out that their doubts must be based on reason, and not something vague or imaginary." 13 Wn. App. at 5. Similarly, here, the prosecutor's statement that a reasonable doubt is "a doubt for which there is a reason" (RP (Apr. 29, 2008) at 318) did not shift the burden of proof to the defendant but instead informed the jury that its doubts must "be based on reason, and not something vague or imaginary." *Thompson*, 13 Wn. App. at 5. Moreover, the prosecutor's statement accurately stated the law as presented in the trial court's jury instructions: "A reasonable doubt is one for which a reason exists and may arise from the evidence or lack of evidence." CP at 108. This jury instruction was derived from 11 *Washington Practice: Washington Pattern Jury Instructions: Criminal* 4.01, at 85 (3d ed. 2008) (WPIC), which has been examined and approved by our Supreme Court. *State v. Pirtle*, 127 Wn.2d 628, 658, 904 P.2d 245 (1995), *cert. denied*, 518 U.S. 1026 (1996); *see also State v. Bennett*, 161 Wn.2d 303, 318, 165 P.3d 1241 (2007) (instructing trial courts to use WPIC 4.01 to inform the jury on the State's burden to prove every element of the charged crime beyond a reasonable doubt).

The prosecutor's statement that a reasonable doubt "is something that we use every day to make reasonable decisions and choices" (RP (Apr. 29, 2008) at 318) is more problematic because it invites the jury to regard their decision as to the guilt of a criminal defendant in the same manner in which they make everyday personal decisions. The reasonable doubt standard requires a degree of certainty unique to the criminal law. This court recently addressed a similar issue in *State v. Anderson*, 153 Wn. App. 417, 220 P.3d 1273 (2009). In *Anderson*, this court held that

the prosecutor's comments discussing the reasonable doubt standard in the context of everyday decision making were improper "because they minimized the importance of the reasonable doubt standard and of the jury's role in determining whether the State has met its burden." 153 Wn. App. at 431. In finding the prosecutor's statements improper, *Anderson* stated:

> By comparing the certainty required to convict with the certainty people often require when they make everyday decisions-both important decisions and relatively minor ones-the prosecutor trivialized and ultimately failed to convey the gravity of the State's burden and the jury's role in assessing its case against [the defendant]. This was improper.

153 Wn. App. at 431.

We similarly note that, taken out of context, the prosecutor's statement here could trivialize the gravity of the State's burden to prove Haugsted's guilt beyond a reasonable doubt. But we hold that "[t]he trial court's instructions regarding the presumption of innocence minimized any negative impact on the jury." *Anderson*, 153 Wn. App. at 432. Thus, Haugsted fails to demonstrate that the comment was so flagrant or ill-intentioned that a timely objection and instruction could not have cured the prejudice. *Charlton*, 90 Wn.2d at 661.[4]

Last, the prosecutor's statement inviting the jury to use common sense in its deliberations did not constitute misconduct. Taken in context, the prosecutor's statement informed the jury that it could employ common sense when evaluating the evidence. As stated in the trial court's

[4] Because the trial court's instructions properly instructed the jury on the presumption of innocence, even if Haugsted's defense counsel objected to the prosecutor's improper comment, he could not demonstrate a substantial likelihood that the statement affected the jury. *Reed*, 102 Wn.2d at 145. Thus, his ineffective assistance claim also fails. In order to prevail on an ineffective assistance of counsel claim, the defendant must show that (1) trial counsel's performance was deficient in that it fell below an objective standard of reasonableness, and (2) counsel's deficient performance prejudiced the defendant, in that there is a reasonable probability that, but for counsel's errors, the outcome of the proceeding would have differed. *State v. Hendrickson*, 129 Wn.2d 61, 77-78, 917 P.2d 563 (1996).

jury instruction number 3, "Circumstantial evidence is evidence of facts or circumstances from which the existence or nonexistence of other facts may be reasonably inferred from common experience." CP at 109.

The trial court properly denied Haugsted's motion to suppress evidence seized in the search of his motel room and the prosecutor did not commit misconduct in its closing statements. Accordingly, we affirm.

A majority of the panel having determined that this opinion will not be printed in the Washington Appellate Reports, but will be filed for public record pursuant to RCW 2.06.040, it is so ordered.

QUINN-BRINTNALL, J.

We concur:

BRIDGEWATER, P.J.

HUNT, J.