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REC'D
MAR 31 2010
King County Prosecutor
Appellate Unit

NO. 64076-3-I

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

STATE OF WASHINGTON,

Respondent,

v.

MARTEZ WINTERS.

Appellant.

COURT OF APPEALS
STATE OF WASHINGTON
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ON APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR KING COUNTY

The Honorable Michael J. Fox, Judge

BRIEF OF APPELLANT

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TABLE OF CONTENTS

	Page
A. <u>ASSIGNMENTS OF ERROR</u>	1
<u>Issues Pertaining to Assignments of Error</u>	1
B. <u>STATEMENT OF THE CASE</u>	2
1. <u>Procedural History</u>	2
2. <u>Substantive Facts</u>	3
a. <u>State’s Case</u>	3
b. <u>Defense Case</u>	10
C. <u>ARGUMENTS</u>	14
1. INEFFECTIVE ASSISTANCE OF COUNSEL DENIED WINTERS HIS RIGHT TO A FAIR TRIAL.....	14
2. THE EVIDENCE WAS INSUFFICIENT TO SUPPORT THE TWO UNLAWFUL POSSESSION OF A FIREARM CONVICTIONS BECAUSE THE STATE FAILED TO PROVE WINTERS ACTUALLY OR CONSTRUCTIVELY POSSESSED THE FIREARMS.	22
D. <u>CONCLUSION</u>	25

TABLE OF AUTHORITIES

	Page
<u>WASHINGTON CASES</u>	
<u>In re Brett</u>	
142 Wn.2d 868, 16 P.3d 601 (2001).....	15
<u>State v. Aho</u>	
137 Wn.2d 736, 975 P.2d 512 (1999).....	15
<u>State v. Asaeli</u>	
150 Wn.App. 543, 208 P.3d 1136 (2009).....	19
<u>State v. Barragan</u>	
102 Wn.App. 754, 9 P.3d 942 (2000).....	20
<u>State v. Callahan</u>	
77 Wn.2d 27, 459 P.2d 400 (1969).....	23
<u>State v. Campbell</u>	
78 Wn.App. 813, 901 P.2d 1050 <i>review denied</i> , 128 Wn.2d 1004 (1995).....	17
<u>State v. Cote</u>	
123 Wn.App. 546, P.3d 410 (2004).....	24, 25
<u>State v. Crediford</u>	
130 Wn.2d 747, 927 P.2d 1129 (1996).....	23
<u>State v. Ermert</u>	
94 Wn.2d 839, 621 P.2d 121 (1980).....	15
<u>State v. George</u>	
146 Wn.App. 906, 193 P.3d 693 (2008).....	24, 25
<u>State v. Hendrickson</u>	
138 Wn.App. 827, 158 P.3d 1257 (2007) <i>aff'd</i> , 165 Wn.2d 474, 198 P.3d 1029 <i>cert. denied</i> , ___ U.S. ___, 129 S.Ct. 2873, 174 L.Ed.2d 585 (2009).....	15

TABLE OF AUTHORITIES (CONT'D)

	Page
<u>State v. Hundley</u> 126 Wn.2d 418, 895 P.2d 403 (1995).....	23
<u>State v. Jones</u> 146 Wn.2d 328, 45 P.3d 1062 (2002).....	23
<u>State v. Nyegaard</u> ___ Wn.App. ___, ___ P.3d ___, 2010 WL 610764 (Feb 23, 2010).....	24
<u>State v. Powell</u> 126 Wn.2d 244, 893 P.2d 615 (1995).....	17
<u>State v. Ra</u> 144 Wn.App. 688, 701, 175 P.3d 609 <i>review denied</i> , 164 Wash.2d 1016, 195 P.3d 88 (2008)	19
<u>State v. Scott</u> 151 Wn.App. 520, 213 P.3d 71 (2009).....	17, 19
<u>State v. Spruell</u> 57 Wn.App. 383, 788 P.2d 21 (1990).....	24
<u>State v. Thomas</u> 109 Wn.2d 222, 743 P.2d 816 (1987).....	14
<u>State v. Townsend</u> 142 Wn.2d 838, 15 P.3d 145 (2001).....	15
<u>State v. Wade</u> 98 Wn.App. 328, 989 P.2d 576 (1999).....	23
 <u>FEDERAL CASES</u>	
<u>In re Winship</u> 397 U.S. 358, 25 L. Ed. 2d 368, 90 S. Ct. 1068 (1970).....	23
<u>Strickland v. Washington</u> 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984).....	14, 15

TABLE OF AUTHORITIES (CONT'D)

Page

United States v. Roark
924 F.2d 1426 (8th Cir. 1991)17

OTHER JURISDICTIONS

Neal v. State
854 So.2d 666 (Fla. App. 2003)21

People v. Forbes
203 A.D.2d 609, 609 N.Y.S.2d 961 (N.Y. App. Div. 1994)21

People v. Perez
170 C.R. 619 (Cal. App. 1987).....17

State v. Stone
802 P.2d 668 (Ore. 1990)17

RULES, STATUTES AND OTHER AUTHORITIES

ER 40420

RCW 9.41.04022

RCW 9.94A.0302

RCW 9.94A.5702

U.S. Const. amend. 614

U.S. Const. amend. 1423

Const. art. 1, § 323

Const. art. 1, § 2214

A. ASSIGNMENTS OF ERROR

1. Appellant was denied effective assistance of counsel where counsel failed to object to inadmissible gang related evidence.

2. Appellant was denied effective assistance of counsel where counsel failed to request a limiting instruction and agreed to withdrawal of the State's proposed limiting instruction.

3. There was insufficient evidence to support the two first-degree unlawful possession of a firearm convictions.

Issues Pertaining to Assignments of Error

1. Was appellant denied effective assistance of counsel where counsel failed to object to testimony that the State provided the named victim with relocation funds from the Gang Crime Witness Relocation Program when there was no evidence the crimes were gang related?

2. Was appellant denied effective assistance of counsel where counsel failed to request an instruction limiting the jury from considering evidence the named victim was provided funds from the Gang Crime Witness Relocation Program for any purpose other than credibility and agreed to withdrawal of the State's proposed limiting instruction?

3. Was there insufficient evidence to support the two first degree unlawful possession of a firearm convictions when there was no evidence appellant had actual or constructive possession of the two firearms?

B. STATEMENT OF THE CASE

1. Procedural History

Martez Winters was charged in King County Superior Court with first-degree burglary (count I), first degree kidnapping (count II), felony harassment (count II), second-degree assault (count IV) and two counts of first degree unlawful possession of a firearm (counts V and VI). CP 10-12. Theresa Croone was the named victim in Counts I-IV. Id. It was alleged in counts V and VI that Winters' possession of the firearms was unlawful because he was previously convicted of a serious offense. Id.; RCW 9.94A.030(34)(a)(ii).

A jury found Winters guilty as charged. CP 115-120. The court found Winters was previously convicted of two serious offenses -- first degree robberies committed in 2000 and 2003. 11RP 36-37¹. Winters was sentenced to a life sentence without the possibility of parole on counts I, II and IV, 60 months on count III and 116 months on count V and count VI. CP 346-356; RCW 9.94A.570.

¹ 1RP refers to the verbatim report of proceeding for August 14, 2009; 2RP March 24th and 25th, 2009; 3RP March 30, 2009; 4RP March 31, 2009; 5RP April 1, 2009; 6RP April 2, 2009; 7RP April 3rd and 6th, 2009; 8RP April 7, 2009; 9RP April 8th, April 9th and May 14th 2009; 10 RP May 28, 2009; 11 RP August 18, 2009.

2. Substantive Facts

a. State's Case

Theresa Croone and her 12 year old daughter, Emma Barron, moved into the Cedar Village apartment complex in early 2008. 4RP 101-102; 6RP 3. Cedar Village was the only place that would rent Croone a “Section 8” (subsidized housing) apartment. Id.; 5RP 78. Croone, who rented apartment 12, went to school with John Dickerson, who she knew as “J.D.”, who also lived at the Cedar Village in apartment 11 with his wife Trina Dickerson and their child.² 4RP 103, 109.

Croone met Winters sometime in April 2008. 4RP 117-119. Winters flirted with Croone and she was flattered but she told him she was not interested in him because he was too young. 4 RP 118, 120; 5RP 97, 100-101.

On the morning of June 28, 2008, Croone walked from her apartment to a nearby 711 store and bought a Tilt, an energy drink containing alcohol. 4RP 122-124; 5RP 105. When she returned Winters was standing in the window of apartment 2 and he told her to let him know if she needed anything. 4RP 126-127. Croone went into her apartment and woke her daughter then went outside and sat with a

² To avoid confusion, John Dickerson is referred to as J.D. and his wife, Trina Dickerson, is referred to as Dickerson.

neighbor, "Bo" and drank her Tilt. 4RP 120, 128. There were a number of other people from the apartment complex outside as well because it was a nice day. 4RP 138.

While Croone and Bo were talking, a car pulled into the apartment complex followed by two other cars. 4RP 131. Winters must have left the apartment at some point because according to Croone, Winters was in the passenger seat of the first car and J.D. was in one of the other cars. 4RP 132-134. Winters got out of the car and came over to where Croone was sitting. 5RP 110-111. Winters, who carried a paper bag, sat next to Croone and they talked. 5RP 111.

A short time later about 20 police officers from different jurisdictions descended on the Cedar Village in response to an allegation a violent crime had been committed. 4RP 44, 56, 58-63. Police believed Winters was a possible suspect in the alleged crime. 4RP 63.

The police were armed with rifles when they got out of their cars and they ordered everyone outside back into their apartments. 4RP 138-140. A woman, who Croone described as Samoan, was trying to make a drug deal with another woman near Croone's apartment when police arrived. 4RP 143. The Samoan woman dropped a plastic bag containing a big white rock onto the ground in front of Croone's apartment and then

used her foot to cover the bag with bark. 4RP 147-148; 5RP 119. The woman then went into one of the apartments. 4RP 143-144.

When Croone went back into her apartment she ran into her daughter, Barron, at the front door. Barron was crying and told Croone that Winters was upstairs in their apartment with a gun. 4RP 149; 5RP 124-125.

Barron, on the other hand, testified she heard a noise, came downstairs from her bedroom and saw Winters. Winters nicely asked her to go back upstairs and told her “you don’t say anything, you don’t see anything, you don’t do anything.” 6RP 14-15. Barron believed Croone invited Winters so she went back upstairs. Id. Barron went back downstairs when she heard Croone talking to Winters. 6RP 17.

Croone said that after briefly speaking with Barron, she saw Winters. 4RP 149, 152. She testified Winters had a black gun wrapped in white towel. 4RP 150-151. Contrary to Croone’s testimony, Barron said Winters did not have a gun. 6RP 32. Winters told Croone he was wanted by police for shooting someone in the face. 4RP 150. Croone, also had warrants for her arrest. She was afraid if she notified police that Winters was in her apartment she would also be arrested and her daughter sent to a foster home. Id.

Croone however told Winters to leave but he refused. 4RP 151-152. Winters stayed in the apartment for about 2 hours. 5RP 29; 6RP 28. During that time Winters made and received several calls on a cell phone. 4RP 155. After receiving one phone call, Winters pointed his gun at Croone and told her to go outside and pick up the drugs the Samoan woman dropped on the ground outside Croone's apartment. 4RP 159-160. Croone refused. Id.

Croone wanted to make Winters believe she was "on his team" so she suggested to him ways he could leave her apartment without being seen by the police outside. 4RP 161-169. Croone periodically opened her back door, sometimes at Winters' insistence and sometimes on her own, to see if Winters could leave her apartment through the back door without being seen by police. 4RP 164-165; 5RP 15.

Eventually Winters grabbed Croone's arm, put his gun lengthwise on her back and walked out the back door of the apartment using her as a shield. 5RP 18-20. After a few steps Winters went back into the apartment but Croone kept walking to show him there were no police and it was safe to leave. 5RP 19, 21. After Croone returned to the apartment, Winters again put Croone in front of him with his gun against her back and they walked outside and down to the back of apartment 2. 5RP 22-23. Barron, however, testified she never saw Croone leave the house. 6RP 31.

According to Croone, when she and Winters got to apartment 2 Winters asked Croone to lift him up onto apartment's balcony. At the same time the Samoan woman opened the window of apartment 3 and Winters jumped through the window. 5RP 23-24. Croone went back to her apartment then she and Barron left to go to the manager's apartment. 5RP 24.

Later that day, after the police left, Croone was standing on her porch when Winters and the Samoan woman showed up to look for the drugs the woman earlier dropped on the ground in front of Croone's apartment. 5RP 32. The drugs were gone. Id. Winters turned to Croone and asked her for the drugs. When Croone said she did not know where the drugs were, the Samoan woman became hostile and wanted to fight Croone. 5RP 33. Winters told Croone if she did not give him back his drugs he was going to kill her. 5RP 34.

The following day Winters came to Croone's apartment with another man and told Croone to either give him back his drugs or pay for them. 5RP 36-37. Croone said Winters pulled out a silver gun and told her if she did not give him money for the drugs she would die. 5RP 38. J.D. and his wife, Dickerson, were close by and Croone tried to talk to Dickerson but Dickerson told her to give the drugs back. 5RP 38-40.

Croone then called police. 5RP 41. Croone was scared and did not want anyone to know she contacted police so she arranged to meet an officer at the nearby 711 store. 5RP 41-42. Croone met with Kevin Savage of the King County Sheriff's Department and told him what happened the day before and that the man police were looking for had been in her apartment. 5RP 43; 6RP 70-80. The next day, July 1st, Croone met Detective Kurt Litsjo at the same 711 store and she was shown a montage. She identified a photograph of Winters as the man who was in her apartment. 4RP 90-94; 5RP 45-47; 6RP 108.

Two days later, on July 3rd, Croone was on her porch braiding a neighbor's hair when Winters walked up to her with a silver gun in his hand, pointed the gun at her, and told her that he was tired of playing games and that he was going to kill her. 5RP 49-52. Barron, who was at one of the apartment's windows told Winters to leave her mother alone. Dickerson, who was standing nearby, told Barron to go inside and then Dickerson went inside her apartment. 5RP 52-53. Croone said she screamed for help and William, a man Croone knew, walked up and told Winters they should leave. 5RP 54-59. William and Winters walked to a black SUV and Croone followed so she could get the car's license plate number. 5RP 59-62, 64. William, Winters and another man got into the car and drove away.

Croone was able to get the license plate number of the car. 5RP 65-69. Although Croone testified she called Detective Aaron Thompson, Litsjo, however, said Croone called him. 5RP 69; 6RP 110-112. Croone gave Litsjo a description of the car and two partial license plate numbers. 6RP 114, 117.

A short time later, Litsjo and his partner were passed by a SUV that matched the description given by Croone. 6RP 116. They stopped the car. 6RP 117-120. There were four people in the car. William Weeden was the driver and Winters was in the front passenger seat. 7RP 50-51. Under the driver's seat police found two handguns. One was a black Glock and the other a stainless steel Ruger. 6RP 159-161; 7RP 60-72, 97-98. A DNA analysis did not show Winters had touched either of the guns. 6RP 173-180.

At the scene of the stop, Weeden and Winters were initially detained in the same police car. According to police, Winters yelled at Weeden "don't talk the them, collect your thoughts." 7RP 55-56. After Winters was placed in another police car, he became loud and when an officer told him to be quiet, Winters responded, "this is silly and stupid" and "that bitch is never going to testify." 6RP 98. On July 12th, while in jail, Winters was interviewed by police and gave a recorded statement. 7RP 142-146.

Croone claimed that sometime after Winters was arrested she told police and the prosecuting attorney she was scared and did not want to stay at Cedar Village but she had no money to move. 5RP 78. Croone testified the State paid about \$3,000.00 for her first and last month's rent and security deposit at another apartment through the "Gang Crime Witness Relocation Program." 5RP 78-80. Croone moved out of Cedar Village in December 2008. 5RP 73.

After Croone testified, the State revealed to the defense and the court that Croone also received money from police for information she gave related to another case. 6RP 99-108. Detective Thompson testified sometime in September 2008 Croone called him with information regarding a crime at the Cedar Village. 7RP 115-116. Thompson paid her \$200.00 for the information. 7RP 118. Thompson said he only told the prosecution attorney about the payment after listening to Croone's testimony. 7RP 162. He admitted he did not know if Croone was given any other money by any other law enforcement officer for information. 7RP 165.

b. Defense Case

Winters testified he frequently spent the night with friends who lived at the Cedar Village apartments and he hung out there during the day. 8RP 50-52. Winters made his living by selling crack cocaine. 8RP

53. He admitted he had two prior serious offenses and was prohibited from possessing a firearm. 8PR 52.

Winters talked to Croone a few times before June 28th and he tried to “pick her up.” 8RP 58-59. On the night of June 27th Winters stayed with a woman named Linda who lived at the Cedar Village in apartment 2. Winters sold drugs out of the apartment. 8RP 57, 136-137.

On June 28th Winters saw Croone outside her apartment and she asked him to get her a Tilt and some cigarettes from the store. 8RP 61. Winters returned from the store, gave Croone the Tilt and cigarettes she asked for and then sat with her. Id. As they were talking, somebody yelled “police.” Id. Winters gave the drugs he had to a woman he knew, Mimi, and she sloughed the drugs on the ground in front of Croone’s apartment. 8RP 61, 133. Winters then ran into J.D.’s apartment. 8RP 61.

Winters was unsure if the police saw him go into the apartment so he told J.D. to call Croone and ask if he (Winters) could come over to her apartment. Croone agreed and told J.D. that Winters should come inside her apartment through the back door. 8RP 61-62. When Winters got to the apartment, he told Croone’s daughter that she did not see or hear anything. 8RP 121-122.

While in Croone’s apartment, Winters and Croone periodically looked out the window at the police. At some point Winters asked Croone

where his drugs were. Croone pointed out the window and Winters saw the drugs on the ground outside Croone's apartment. 8RP 63, 126.

Winters was in Croone's apartment about 20 minutes when Croone told him to leave because she was concerned about losing her Section 8 housing. 8RP 65-66, 118. Winters asked Croone to go outside and get his drugs first but she refused. 8RP 67. Winters also asked Croone to go outside and see if the police were still around but she would not do that either. 8RP 68. Winters did not immediately leave the apartment but stayed for about 5 more minutes until he was satisfied he could leave without the police seeing him. 8RP 66, 118. He did not have a gun and he never used Croone as a shield or hostage. 8RP 69, 74.

When he felt it was safe, Winters left Croone's apartment through the back door. 8RP 70. Winters went into apartment 3 and called Mimi, who was in another apartment, and asked her to go outside and get his drugs. Winters stayed in apartment 3 until police left then went to apartment 2. 8RP 71-74.

Mimi later found Winters in apartment 2 and told him the drugs were gone. 8RP 75. Winters and Mimi unsuccessfully looked for the missing drugs and then confronted Croone. 8RP 75. Croone and Mimi were both angry so to avoid a problem, Winters and Mimi left. 8RP 76-77.

On June 30th Winters went back to Cedar Village and again confronted Croone about the missing drugs. 8RP 78-79. He told Croone if she did not give him the drugs back he would beat her up. 8RP 80. He did not threaten her with a gun because he did not have a gun. 8RP 81.

On July 3rd William Weeden and others were shooting dice in front of the apartment next to Croone's apartment. 8RP 84. Winters watched the dice game and noticed there were 3 guns on the ground. 8RP 85-86. Croone then came over and told them all to leave or she would call police. 8RP 85. Winters again argued with Croone over the missing drugs. Winters said he threatened to beat Croone and he told her if she not did give him the drugs back he would shoot her. 8RP 85-89, 152. Croone was carrying a phone and it appeared she was going to call police so Winters grabbed the phone, threw it on the ground and then left with Weeden in an SUV. 8RP 91, 154.

Later that evening police stopped Weeden who was driving the car. 8RP 91. Winters admitted he told Weeden not to talk to police but he denied he told police the "bitch is not going to testify." 8RP 165, 169. Winters did not see any guns in the car. 8RP 92.

Dickerson testified she remembered one occasion where Winters bought Croone some beer and cigarettes. 8RP 11-17. She said the evening Winters was arrested, Winters arrived at the apartment complex in

a dark SUV and knocked on Croone's door. 8RP 27. Winters asked Croone to give him back his drugs. 8RP 19. Croone told Winters she did not have his drugs and the two argued. 8RP 19. Dickerson heard Winters tell Croone he would beat her up or shoot her. 8RP 39. As Winters left, Croone followed him while calling police on her phone. 8RP 19. Winters grabbed the phone. 8RP 40-42.

C. ARGUMENTS

1. INEFFECTIVE ASSISTANCE OF COUNSEL DENIED WINTERS HIS RIGHT TO A FAIR TRIAL.

The state and federal constitutions guarantee an accused reasonably effective representation by counsel. U.S. Const. amend. 6; Const. art. 1, § 22; 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, 225-226, 743 P.2d 816 (1987). Deficient performance by counsel that prejudices the accused fails to secure this constitutional right and denies the accused a fair proceeding. Strickland, 466 U.S. at 687.

To obtain relief based on ineffective assistance of counsel the record must establish that (1) counsel's performance was deficient and (2) counsel's deficient performance prejudiced the defense. Strickland, 466 U.S. at 687. A claim of ineffective assistance of counsel presents a mixed

question of law and fact that is reviewed de novo. In re Brett, 142 Wn.2d 868, 873, 16 P.3d 601 (2001).

The defendant must overcome the presumption that there might be a sound strategy for counsel's actions. Strickland, 466 U.S. at 689. Only a legitimate strategy or tactic, however, constitutes reasonable performance. State v. Aho, 137 Wn.2d 736, 745, 975 P.2d 512 (1999). Failure to object to improper testimony critical to the State's case may constitute ineffective assistance of counsel. See, State v. Hendrickson, 138 Wn.App. 827, 831-33, 158 P.3d 1257 (2007) (failure to object to testimony that was inadmissible hearsay and violated the confrontation clause was ineffective assistance), *aff'd*, 165 Wn.2d 474, 198 P.3d 1029, *cert. denied*, ___ U.S. ___, 129 S.Ct. 2873, 174 L.Ed.2d 585 (2009). If unsupported by a legitimate trial strategy or tactic, counsel's failure to object can constitute ineffective assistance of counsel justifying reversal. State v. Townsend, 142 Wn.2d 838, 847, 15 P.3d 145 (2001); State v. Ermert, 94 Wn.2d 839, 621 P.2d 121 (1980).

When defense counsel learned the State relocated Croone with funds from the Gang Witness Relocation Program, counsel indicated he intended to ask Croone if she received relocation funds. 5RP 62-63. The prosecuting attorney indicated she was "uncomfortable" that counsel's examination would open the door to evidence the relocation program is for

victims of gang violence contrary to the court's ruling prohibiting gang related evidence. 5RP 63. Counsel responded he did not believe evidence that Croone received relocation funds opened the door into "voluminous gang activities." Id.

During Croone's direct examination, the prosecuting attorney asked Croone if she told police and the prosecutor she was scared because she found out things about Winters and did not want to stay at Cedar Village. 5RP 77-78. Croone answered she did but she did not have any money to move. 5RP 78. Croone said she was contacted by a paralegal from the prosecutor's office who told her about the Gang Crime Witness Relocation Program. 5RP 79. Croone testified she qualified for the program and the program paid \$3,000.00 so she could move into another apartment. 5RP 80-81. Defense counsel did not object to any of the testimony.

On cross examination defense counsel asked Croone how she found out she could get assistance to move out of the Cedar Village Apartments. 5RP 157. She responded she was told she might qualify for an assistance program "when gang members – something about when you are the victim of a gang member, that you can be relocated." 5RP 157. Counsel did not move to strike the answer.

Evidence of gang affiliation is prejudicial. State v. Scott, 151 Wn.App. 520, 527, 213 P.3d 71 (2009) (citations omitted). Because of the grave danger of unfair prejudice, evidence of gang affiliation is inadmissible unless the State establishes a sufficient nexus between the defendant's gang affiliation and the crime charged. State v. Campbell, 78 Wn.App. 813, 823, 901 P.2d 1050, *review denied*, 128 Wn.2d 1004 (1995). The danger of unfair prejudice exists when evidence is likely to stimulate an emotional rather than a rational response. State v. Powell, 126 Wn.2d 244, 264, 893 P.2d 615 (1995). Evidence that the defendant is a member of a group considered disreputable by the public has virtually no probative value and carries a high potential for prejudice because it allows the jury to infer guilt by association. See, United States v. Roark, 924 F.2d 1426 (8th Cir. 1991) (in narcotics prosecution, government attempted to tie the defendant's guilt to his membership in Hells Angels motorcycle club; reversed); People v. Perez, 170 C.R. 619 (Cal. App. 1987) (error to admit irrelevant evidence of gang affiliation); State v. Stone, 802 P.2d 668 (Ore. 1990) (error to allow evidence of likely gang affiliation for unlawful use of a car, where it was not relevant to the issue of knowledge that the car was stolen).

Evidence that Croone was relocated with funds from the Gang Crime Witness Relocation Program was unfairly prejudicial and denied

Winters his right to a fair trial. Although defense counsel's decision to present evidence the State paid to have Croone moved to another apartment complex to show her bias may have been legitimate, counsel's failure to request the funds not be identified as coming from the Gang Crime Witness Relocation Program and his failure to object when the State asked Croone if she was received the funds from that program because she was scared after learning things about Winters, was not. Evidence that Croone received relocation funds from the State could have been presented without mentioning the source of the funds were from a program designed to aid gang crime witnesses. For example, when Thompson was asked about his involvement in helping Croone relocate he did not name the source of the relocation funds. Instead he referred to the funding source as location funds and victim relocation funds. 5RP 119-120.

If counsel had objected to any reference the source of funds used to relocate Croone were from the Gang Crime Witness Relocation Program the court would have sustained the objection. The State agreed it would not introduce evidence of Winters' alleged gang membership and the court was careful to limit how other potential prejudicial evidence was presented. 2RP 138, 142-143. For example, the court limited the evidence the State could present evidence that the reason police converged

on the Cedar Village on July 28th was because they received information Winters was involved in an armed carjacking and the court encouraged the State to ask its witnesses leading questions to avoid even using the term carjacking. 2RP 141-143. It is likely the court would have exercised that same care and caution and required the relocation money testimony be sanitized to avoid indentifying the source of the funds were from the Gang Crime Witness Relocation Program.

When there is no connection between a defendant's gang affiliation, if any, and the offense, admission of gang evidence is prejudicial error. State v. Scott, 151 Wn.App. at 530; State v. Asaeli, 150 Wn.App. 543, 208 P.3d 1136, 1155-1156 (2009); State v. Ra, 144 Wn.App. 688, 701-702, 175 P.3d 609, *review denied*, 164 Wash.2d 1016, 195 P.3d 88 (2008). Here, the Gang Crime Witness Relocation Program testimony was unfairly prejudicial. The only logical and possible inference the jury could draw from the evidence was that the crimes were gang related and Winters was a gang member. The State's case rested primarily on whether the jury believed Croone or Winters. In making the credibility determination, the inherently prejudicial evidence that Winters was a gang member and the crimes were gang related allowed jurors to make the credibility determination based on their visceral response to gang activity and the belief Winters was a bad person. Thus, the evidence

unfairly tipped the credibility scale against Winters, denying him the right to a fair trial.

Counsel not only failed to object, he failed to request a limiting instruction to mitigate the damaging and prejudicial testimony. The prosecuting attorney was cognizant the testimony was prejudicial so she proposed a limiting instruction. Supp CP ____ (Sub. No. 89, filed April 6, 2010, attached hereto as appendix); 9RP 2-3. The instruction would have told the jury Croone's receipt of the Gang Crime Witness Relocation Program funds could only be considered in determining Croone's credibility and for no other purpose. Appendix. Defense counsel, however, believed the instruction would distract the jury and asked it be withdrawn. 9RP 2-3.

Under certain circumstances, courts have held the failure to request a limiting instruction may be a legitimate trial strategy because the instruction would have reemphasized the damaging evidence. See, State v. Barragan, 102 Wn.App. 754, 762, 9 P.3d 942 (2000) (failure to propose a limiting instruction for the proper use of ER 404(b) evidence of prior fights in prison dorms was a tactical decision not to reemphasize damaging evidence). But that theory is inapplicable here. The limiting instruction would have directed the jury to properly consider the evidence for the sole purpose of determining Croone's credibility and not as

evidence that Croone was the victim of gang related crimes and the logical and prejudicial inference that Winters was a member of the gang. Trial counsel's decision not to request a limiting instruction and to ask the State's limiting instruction be withdrawn was objectively unreasonable. See, Neal v. State, 854 So.2d 666, 668-69 (Fla. App. 2003) (petitioner made facially valid ineffective assistance of counsel claim based on counsel's failure to request instruction limiting use of prior inconsistent statement for purposes of determining credibility and not as substantive evidence, thus requiring reversal of conviction and remand); see also, People v. Forbes, 203 A.D.2d 609, 610-611, 609 N.Y.S.2d 961 (N.Y. App. Div. 1994) (counsel's failure to request instruction limiting use of prior acts evidence for impeachment only left open the opportunity for the jury to consider that testimony as proof of defendant's criminal propensity).

Given the court's ongoing concern about exposing the jury to prejudicial evidence and the State's belief a limiting instruction was warranted, there is little doubt the court would have given the jury the proposed limiting instruction if counsel had not ask that it be withdrawn. Counsel's decision not to request the limiting instruction compounded the inherent prejudice engendered by the gang evidence.

Defense counsel's failure to object to the Gang Witness Relocation Program testimony coupled with his failure to request a limiting

instruction constituted ineffective assistance of counsel. Because Winters was unfairly prejudiced by counsel's deficient performance he was denied his right to a fair trial. Thus, this Court should reverse his convictions.

2. THE EVIDENCE WAS INSUFFICIENT TO SUPPORT THE TWO UNLAWFUL POSSESSION OF A FIREARM CONVICTIONS BECAUSE THE STATE FAILED TO PROVE WINTERS ACTUALLY OR CONSTRUCTIVELY POSSESSED THE FIREARMS.

Winters was charged with two counts of first degree unlawful possession of a firearm. CP 12. RCW 9.41.040(1)(a) defines unlawful first degree firearm possession as follows:

A person, whether an adult or juvenile, is guilty of the crime of unlawful possession of a firearm in the first degree, if the person owns, has in his or her possession, or has in his or her control any firearm after having previously been convicted in this state or elsewhere of any serious offense as defined in this chapter.

The court instructed the jury in relevant part that to convict Winters it had to find that on or about July 3, 2008 he "knowingly had a firearm (Glock .45) in his possession" (count V) and he "knowingly had a firearm (Ruger 9mm) in his possession" (count VI). CP 97-98. The State failed to prove Winters possessed either gun.

In all criminal prosecutions, due process requires that the State prove every fact necessary to constitute the charged crime beyond a reasonable doubt. U.S. Const. amend. 14; Const. art. 1, § 3; In re Winship, 397 U.S. 358, 364, 25 L. Ed. 2d 368, 90 S. Ct. 1068 (1970); State v. Crediford, 130 Wn.2d 747, 749, 927 P.2d 1129 (1996). A reviewing court should reverse a conviction for insufficient evidence where no rational trier of fact, when viewing the evidence in a light most favorable to the State, could have found the elements of the crime charged beyond a reasonable doubt. State v. Hundley, 126 Wn.2d 418, 421-22, 895 P.2d 403 (1995); State v. Wade, 98 Wn.App. 328, 338, 989 P.2d 576 (1999).

Actual possession requires physical custody of the item. State v. Callahan, 77 Wn.2d 27, 29, 459 P.2d 400 (1969). Constructive possession occurs when the person has dominion and control over the item enabling that person to immediately convert the item to actual possession. State v. Jones, 146 Wn.2d 328, 333, 45 P.3d 1062 (2002). Although control of the item does need to be exclusive, as a matter of law mere proximity to the item and even evidence of momentary handling does not support a finding of constructive possession. State v. Nyegaard, ___ Wn.App. ___, ___ P.3d ___, 2010 WL 610764 (Feb 23, 2010) State v. George, 146 Wn.App. 906,

920, 193 P.3d 693 (2008) State v. Spruell, 57 Wn.App. 383, 388, 788 P.2d 21 (1990).

In State v. Cote, 123 Wn.App. 546, P.3d 410 (2004). The court held the evidence insufficient to prove constructive possession where Cote was a passenger in a truck containing components of a methamphetamine lab and his fingerprints were found on Mason jars containing chemicals in the back of the truck. Id. at 550. In State v. George, supra, this Court held the evidence insufficient to prove constructive possession where George was seated in the back seat behind the driver, the car had the strong odor of burnt marijuana and there was a pipe on the floorboard behind the driver's seat next to where George had been sitting. George, 146 Wn.App. at 912-913.

Here, the jury was instructed it had to find Winters possessed the guns (the Glock and Ruger) on July 3rd when police found the guns in the SUV. Because there was no evidence whatsoever that Winters was in actual possession of the guns the State argued and the jury necessarily found Winters possessed the guns under a constructive possession theory. 9RP 31-34.

The evidence however only shows the guns were under the driver's seat and Winters was riding in the front passenger seat. There was no forensic evidence that Winters ever handled the guns and there was no

evidence that the others in the car disclaimed ownership of the guns. Moreover, there was no evidence the guns found in the car were the same guns Croone said Winters had when he threatened her. As in Cote and George, under these facts, there was insufficient evidence to support a finding Winters constructively possessed the guns. Thus, his convictions for unlawful possession of a firearm should be reversed.

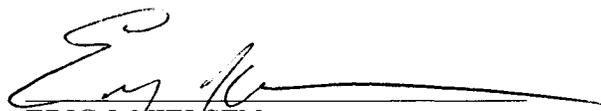
D. CONCLUSION

For the above reasons Winters' convictions should be reversed. Alternatively there was insufficient evidence to support Winters' convictions for two counts of first degree unlawful possession of firearm and those convictions should be dismissed.

DATED this 30 day of March 2010.

Respectfully submitted,

NIELSEN, BROMAN & KOCH, PLLC



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Attorney for Appellant

Certain evidence has been admitted in this case for only a limited purpose. This evidence consists of the defendant's alleged gang affiliation because Teresa Croone received money for relocation pursuant to a Gang Crime Witness Relocation Program. Such evidence may be considered by you in deciding what weight or credibility should be given to the testimony of Teresa Croone and for no other purpose. Any discussion of the evidence during your deliberations must be consistent with this limitation.

WPIC 5.30 modified(2008)

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

STATE OF WASHINGTON,)	
)	
Respondent,)	
)	
v.)	COA NO. 64076-3-1
)	
MARTINEZ WINTERS,)	
)	
Appellant.)	

DECLARATION OF SERVICE

I, PATRICK MAYOVSKY, DECLARE UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOLLOWING IS TRUE AND CORRECT:

THAT ON THE 31ST DAY OF MARCH, 2010, I CAUSED A TRUE AND CORRECT COPY OF THE **BRIEF OF APPELLANT** TO BE SERVED ON THE PARTY / PARTIES DESIGNATED BELOW BY DEPOSITING SAID DOCUMENT IN THE UNITED STATES MAIL.

[X] MARTINEZ WINTERS
 DOC NO. 819051
 WASHINGTON STATE PENITENTIARY
 1313 N 13TH AVENUE
 WALLA WALLA, WA 99362

SIGNED IN SEATTLE WASHINGTON, THIS 31ST DAY OF MARCH, 2010.

x *Patrick Mayovsky*