

64076-3

64076-3

NO. 64076-3-I

COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION I

STATE OF WASHINGTON,

Respondent,

v.

MARTEZ WINTERS,

Appellant.

APPEAL FROM THE SUPERIOR COURT FOR KING COUNTY

THE HONORABLE MICHAEL J. FOX

BRIEF OF RESPONDENT

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A. ISSUES PRESENTED

1. To establish ineffective assistance of counsel, Winters must show both that defense counsel's representation was deficient, and that defense counsel's deficient representation prejudiced the defendant. Courts begin with a strong presumption that the representation was effective. Legitimate trial strategy or tactics cannot be the basis of a claim of ineffective assistance of counsel. Winters' attorney made a legitimate tactical decision to impeach the victim with evidence of bias, her receipt of money from the government, knowing that the State had a right to, and would, introduce evidence of the source of the money – a gang crime witness relocation program. Has Winters failed to establish that defense counsel's decision fell below an objective standard of reasonableness?

2. With respect to a limiting instruction regarding prior bad acts, courts presume that counsel did not request a limiting instruction because to do so would reemphasize the evidence. The name of the gang crime witness relocation fund was mentioned briefly during testimony a week before closing arguments. A later witness described the program simply as a victim relocation fund and testified that the victim's ability to get that assistance was not

tied in any way to her participation in the prosecution of Winters.

Was it a reasonable tactical decision not to include in the instructions a reminder of the gang reference?

3. In addition to showing deficient performance, Winters must affirmatively show prejudice to establish ineffective assistance of counsel. During this trial, evidence was presented of Winters' violent criminal past and his high level drug dealing, of repeated threats and intimidation by Winters during the six days over which the charged crimes occurred, and of a violent community hostile to cooperation with the police. Has Winters established a reasonable probability that, but for the gang reference in the name of the relocation fund, the result of the proceeding would have been different?

4. When sufficiency of the evidence is challenged, the evidence is reviewed in a light most favorable to the State, including all reasonable inferences that can be drawn in favor of the State. A conviction will be affirmed if any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. Winters was arrested in an SUV with a black .45 caliber Glock pistol and a silver 9mm Ruger pistol hidden under a seat. Many surrounding circumstances connected Winters to the

guns recovered, including his pointing a gun of the same description as the Ruger in the victim's face minutes before his arrest. Did the circumstances justify the jury's inference of Winters' dominion and control over both guns?

B. STATEMENT OF THE CASE

1. PROCEDURAL FACTS

The defendant, Martez Winters, was charged by amended information with burglary in the first degree, kidnapping in the first degree, felony harassment, assault in the second degree, and two counts of unlawful possession of a firearm in the first degree. CP 10-12. Winters was tried in King County Superior Court, the Honorable Michael Fox presiding. 2RP 1.¹ A jury found Winters guilty as charged on all counts. CP 115-20; 9RP 80-83.

At sentencing, the trial court found that the State had proved that Winters had prior convictions on two separate occasions for robbery in the first degree, which is classified as a most serious offense under RCW 9.94A.030(29). 11RP 36. Because the current

¹ The verbatim report of proceedings will be referred to in this brief as follows: 1RP: August 14, 2008; 2RP: March 24-25, 2009; 3RP: March 30, 2009; 4RP: March 31, 2009; 5RP: April 1, 2009; 6RP: April 2, 2009; 7RP: April 3 and 6, 2009; 8RP: April 7, 2009; 9RP: April 8-9 and May 14, 2009; 10RP: May 28, 2009; and 11RP: August 18, 2009.

convictions of burglary in the first degree, kidnapping in the first degree, and assault in the second degree each are defined as most serious offenses, the trial court concluded that Winters was a persistent offender as defined by RCW 9.94A.030(34) and sentenced him to a term of life imprisonment on each of those counts, pursuant to RCW 9.94A.570. CP 346-56; 11RP 41.

2. SUBSTANTIVE FACTS

a. Burglary 1 And Kidnap 1 – June 28

On June 28, 2008, TC² was outside her apartment when two cars sped into the parking lot and defendant Winters and several other men jumped out, including TC's neighbor, John Dickerson (JD). 4RP 56, 62-63, 130-35; 8RP 11. About 2 minutes later, a man drove a Cadillac into the parking lot and Winters waved that driver over. 4RP 131-37. Then many police cars arrived just outside the complex and officers got out with rifles drawn. 4RP 59-62, 138-41.

The police were responding to a report of a violent crime that involved a firearm. 4RP 45, 56. The person reporting that crime gave a physical description of the person who committed that

² To protect TC's privacy and her child's privacy, the State refers to both of them by initials.

crime, along with the nickname of Tez or Taz. 4RP 47, 51. Based on that information, detectives concluded that a possible suspect was Martez Winters, who was possibly associated with apartment 2 in the complex. 4RP 63.

The complex where TC lived is Cedar Village, known to the police for its violence, drug activity, gang activity, guns, and shootings. 4RP 43, 53, 57, 64. As a result, at least a dozen patrol cars responded to this report and all stayed outside the complex until a team of six officers with guns went in, walked through the complex, searched apartment 2, and seized the Cadillac that belonged to the alleged victim of the reported incident. 4RP 62-70. Police did not locate Martez Winters that day. 4RP 73. Police were at the complex for almost three hours. 4RP 72.

When the police first arrived, TC saw Winters go into her apartment through her open door. 4RP 144-45. She did not invite him in – he had never been inside her apartment before. 4RP 127, 145; 8RP 124. Winters immediately met TC's young daughter, EJB³, and told her "You don't say anything, you didn't see anything, or don't do anything." 6RP 14.

³ EJB was 12 years old at the time of trial. 6RP 5.

TC got into her apartment and saw Winters holding a gun with a black barrel with a very white hand towel draped over it. 4RP 149-51. When TC told Winters to get out, he said he was wanted by police for shooting someone in the face and was not going to leave. 4RP 150-51; 6RP 18-19. Winters said that he would kill the police before he would go back to jail. 4RP 152; 6RP 22.

Winters stayed in TC's apartment for one to two hours, peeking out between blinds and calling people on his cell phone to keep tabs on the police outside. 4RP 153-54, 156; 5RP 29; 6RP 25, 28. Finally, Winters went outside with TC walking in front of him, with his gun in TC's back, using her as a human shield. 5RP 18-23. He climbed into the window of another apartment, where he apparently stayed until the police left the complex. 5RP 24; 71-72.

TC did not call the police that day because she had traffic warrants and did not want to go to jail. 4RP 150; 5RP 29-31. She also did not report the incident to police because she did not want to be labeled a snitch, which would put her family and home in danger of harm. 5RP 31-32.

b. Felony Harassment – June 30

That might have been the end of the conflict between Winters and TC but for a large amount of crack cocaine left outside TC's apartment when the police arrived at the complex on June 28th. A woman named Mimi⁴ hid the bag of cocaine on the ground, partially covered with bark. 5RP 147-48; 8RP 133.

Winters testified that he was a crack cocaine dealer and that it was his cocaine that was hidden outside. 8RP 53-55, 61, 133. He claimed that he paid \$800 for that cocaine and would have made \$2500 to \$3000 selling it. 8RP 94-95. Winters and Mimi returned to TC's apartment after the police left but could not find the cocaine. 5RP 32. Mimi argued with TC and Winters told TC that if he did not get his cocaine or his money, he would kill TC. 5RP 34. He did not show TC a gun during this confrontation. 5RP 34.

The next day, June 30th, Winters knocked on TC's door. 5RP 36. A huge man was with Winters. 5RP 37. Winters again demanded his drugs or money to pay for them. 5RP 37. TC said she did not have the drugs and told Winters to leave her alone. 5RP 37. Then Winters pulled out a silver gun and told TC that if

⁴ Referred to as "the Samoan woman" through most of the trial, Winters testified that the woman's name was Mimi, giving no last name. 8RP 132.

she did not pay him, she was going to die. 5RP 38. TC believed that Winters was serious and knew he could carry out the threat. 5RP 40. Winters walked away and his companion again told TC to give the drugs back. 5RP 38.

After this threat, TC called police, concluding that it would be better to go to jail than if she or her daughter was shot. 5RP 41. She asked to meet police at a nearby convenience store, so she would not be seen talking to them, and there gave a statement. 5RP 42-43. The next day TC met the police at the store again, viewed a photo montage, and identified Winters as the man who had held her at gunpoint and kept returning, threatening her. 5RP 41-43, 45-47; 6RP 106-08.

c. Assault 2 And Unlawful Possession Of Firearms – July 3

On July 3, 2008, TC was on her porch when Winters walked up to her again, pointed a gun at her face and repeatedly threatened to kill her if she did not give him money for the cocaine. 5RP 51-53. TC's daughter, EJB, heard the commotion and looked out of her upstairs window; she saw Winters point a gun in TC's face and heard Winters threaten to kill her mother. 6RP 42-47. EJB could see that her mother was afraid and was crying. 6RP 47.

TC was screaming and pleading, desperate and afraid for her life.

5RP 57-58. As he walked away, Winters threatened TC again.

5RP 59.

Winters was with William Weeden and left in Weeden's SUV.

5RP 53-54; 6RP 134. TC immediately called the police, crying and pleading for help, giving them a partial license plate and a description of the SUV. 5RP 7; 6RP 111-14.

Police responded to the area and stopped an SUV matching TC's description. 6RP 116, 118. Because they believed a firearm could be in the vehicle, they approached the SUV with guns drawn. 6RP 122. The driver, Weeden, jumped out and was ordered to the ground. 6RP 122-23. Winters was the front seat passenger; he did not respond to the first command to get out, after the second command he opened the door; when he was ordered to show both hands, he put only one hand out the door. 6RP 123. Finally, Winters got out. 6RP 123. Demar Roberts and Antoinette Mayo got out of the back seat. 6RP 124-25, 134-35.

Winters was in the back seat of a patrol car while Weeden was being questioned at the front of the car. 6RP 127, 129.

Winters yelled at Weeden not to talk to the police. 6RP 129; 7RP 55-56. Police moved Winters to a car further away from Weeden,

where he continued to try to communicate with his companions. 6RP 97-98, 130. Deputy Savage approached Winters there and told him to be quiet; Winters responded, "This is silly and stupid. That bitch is never going to testify." 6RP 98.

The police discovered two guns under the driver's seat of the SUV: a black .45 caliber semi-automatic Glock pistol, loaded with copper-jacketed ammunition and a round in the chamber; and a silver 9mm semi-automatic Ruger pistol, loaded with hollow point bullets. 7RP 58-85, 90-93.

d. Winters' Statement To Police

Winters sent a jail kite (communication) to police and detectives took a statement from him at the jail on July 12, 2008. 6RP 136-40; 7RP 141-46. A redacted recording of that statement was played for the jury. Ex. 43; 7RP 146-48. Winters wanted to know what the driver (Weeden) had told police about the guns found in the SUV and to declare that they were not his guns. Ex. 43, Ex. 44 at 2-4, 12.

In that statement, Winters said that when the police appeared at Cedar Village on June 28th, he left immediately and did

not go into any apartment. Ex. 43, Ex. 44 at 5-6.⁵ He said that he had never been in TC's apartment. Ex. 43, Ex. 44 at 8. Winters admitted losing a lot of cocaine that day, and said that he had sent someone to ask TC about that. Ex. 43, Ex. 44 at 8-10. He denied ever threatening her. Ex. 43, Ex. 44 at 7.

e. Defense Witnesses

Latrina Dickerson lived in the apartment next door to TC. 8RP 13. She grew up with Winters and considers him family. 8RP 14-15, 20-21. She testified that she worked nights and slept through the events of June 28th. 8RP 13, 17-18.

On July 3, she saw Winters arrive in a dark SUV, get out of the back seat, walk up to TC's door and knock. 8RP 27, 31. Three other people who came with Winters in the SUV also got out. 8RP 43. Dickerson knew that drugs that Winters was going to sell had gone missing the day the police had come and that Winters had repeatedly come over to confront TC about that. 8RP 28-29. Everyone who was at TC's apartment went to hide when they saw Winters coming. 8RP 43.

⁵ References to the reading guide used by the jury are provided for the convenience of the court. Ex. 44; 7RP 146-47.

Dickerson admitted that Winters yelled at TC, threatened to shoot TC, and told TC that he was going to kill her. 8RP 38-39. TC looked frightened. 8RP 42. Dickerson did not mention seeing a gun, but Winters' back was to Dickerson when he threatened to kill TC. 8RP 39.

Winters testified that he was a crack cocaine dealer with outstanding arrest warrants, and that he had been in prison for a long time. 8RP 52-55, 147. When the police arrived on June 28th, he gave a half ounce bag of cocaine to Mimi and saw her conceal it. 8RP 61, 133. He fled to the Dickersons' apartment, then went to TC's apartment after JD called and got TC's permission. 8RP 61. Winters denied that he had a gun or threatened TC. 8RP 66, 69.

Winters admitted going back to TC's apartment with Mimi that afternoon to get the cocaine and confronting TC about it. 8RP 75-77, 135. He admitted going back on June 30th and confronting TC about the lost cocaine again. 8RP 78-79. Winters said that he threatened to beat up TC that day. 8RP 80-81. He may have confronted her and made threats on July 1st and 2nd. 8RP 83-84.

Winters claimed that he was walking around the complex on July 3rd and happened to see TC. 8RP 143-48. He threatened to beat up TC if he did not get back his missing cocaine. 8RP 87.

Then he told her "If you don't give me my dope back, I'm going to shoot you." 8RP 89, 152. He meant what he said and wanted TC to believe it. 8RP 153. TC looked frightened. 8RP 89.

Winters said that he had yelled at Weeden not to talk to police after they were arrested. 8RP 165-66. He agreed that he lied in his recorded statement of July 12, 2008. 8RP 131-32.

C. ARGUMENT

1. DEFENSE COUNSEL PROVIDED EFFECTIVE ASSISTANCE, MAKING SOUND TACTICAL DECISIONS IN HIS EFFORT TO IMPEACH THE VICTIM.

Winters asserts that ineffective assistance of counsel deprived him of a fair trial because his attorney did not request the deletion of the word "gang" from the name of a fund from which TC received money to relocate after these crimes, and declined a limiting instruction regarding that reference. This claim is without merit. His attorney made a legitimate tactical decision to impeach TC with her receipt of money from the state. There is nothing in the record to support the claim that an objection to TC's explanation of the nature of the relocation program would have been sustained. The decision to forgo a limiting instruction as to the nature of the

relocation program was a legitimate tactical decision not to reemphasize the reference, was specifically approved by the trial court, and did not constitute ineffective assistance.

To establish ineffective assistance of counsel, Winters must show both that defense counsel's representation was deficient, *i.e.*, that it "fell below an objective standard of reasonableness based on consideration of all the circumstances," and that defense counsel's deficient representation prejudiced the defendant. In re Pers. Restraint of Hutchinson, 147 Wn.2d 197, 206, 53 P.3d 17 (2002) (applying the test of Strickland v. Washington, 466 U.S. 668, 687, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984)). The benchmark for judging a claim of ineffective assistance of counsel is whether counsel's conduct "so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result." Strickland, 466 U.S. at 686.

Judicial scrutiny of counsel's performance must be highly deferential. Strickland, 466 U.S. at 689. The United States Supreme Court has warned that, "[i]t is all too tempting for a defendant to second-guess counsel's assistance after conviction or adverse sentence, and it is all too easy for a court, examining counsel's defense after it has proved unsuccessful, to conclude that a particular

act or omission of counsel was unreasonable." Id. at 689. Therefore, every effort should be made to "eliminate the distorting effects of hindsight," and judge counsel's performance from counsel's perspective at the time. Id. at 689.

In judging the performance of trial counsel, courts must begin with a strong presumption that the representation was effective. Strickland, 466 U.S. at 689; Hutchinson, 147 Wn.2d at 206. This presumption of competence includes a presumption that challenged actions were the result of reasonable trial strategy. Strickland, 466 U.S. at 689-90. Legitimate trial strategy or tactics cannot be the basis of a claim of ineffective assistance of counsel. State v. Garrett, 124 Wn.2d 504, 520, 881 P.2d 185 (1994).

The defendant "must show in the record the absence of legitimate strategic or tactical reasons supporting the challenged conduct by counsel." Hutchinson, 147 Wn.2d at 206 (quoting State v. McFarland, 127 Wn.2d 322, 335, 899 P.2d 1251 (1995)). Courts should recognize that, in any given case, effective assistance of counsel could be provided in countless ways, with many different tactics and strategic choices. Strickland, 466 U.S. at 689.

In addition to overcoming the strong presumption of competence and showing deficient performance, Winters must

affirmatively show prejudice. Strickland, 466 U.S. at 693. Prejudice is not established by a showing that an error by counsel had some conceivable effect on the outcome of the proceeding. Id. at 693. If the standard were so low, virtually any act or omission would meet the test. Id. Winters must establish a reasonable probability that, but for counsel's errors, the result of the proceeding would have been different. Id. at 694.

a. Relevant Facts

After defense counsel stated his intention to impeach TC based on her receipt of relocation assistance from the Gang Crime Witness Relocation Program, the State brought out the payment during direct examination. 5RP 63, 77-80. The State elicited the circumstances of the grant of funds for TC's move, including her fear for her safety and her understanding that based on "the situation at hand," she qualified for help from the "Gang Crime Witness Relocation Program." 5RP 77-80. The money was not paid directly to TC, but at least \$3000 was paid to help TC move, via a real estate agent and a moving company. 5RP 79-80; 7RP 119-20.

Defense counsel tried to establish that TC was unwilling to testify against Winters until she received money. 5RP 84-85, 154-59. As a result of that approach, TC repeatedly testified that she was afraid, even after Winters was in custody. 5RP 84-85, 134-35, 153-58. When defense counsel asked TC about how she found out about the possibility of getting assistance to move, TC repeated that she was told she might qualify for an assistance program, "something about when you are the victim of a gang member, that you can be relocated." 5RP 157.

Detective Thompson testified that TC's ability to get money from the relocation fund was not in any way linked to her participation in the prosecution of Winters. 7RP 120. He remembered it being "a victim relocation fund." 7RP 120. Detective Thompson did not use the word "gang" in connection with the fund. 7RP 119-20.

The State proffered a limiting instruction as to evidence of prior convictions that was admitted during trial and a limiting instruction as to the name of the relocation fund. CP 378-79. Defense counsel agreed to the first but declined a limiting instruction as to the name of the relocation fund, opining on the record that it would distract more than assist the jury. 9RP 2-6.

b. Defense Counsel Made A Legitimate Tactical Decision to Impeach TC With Her Receipt of Money To Relocate.

Defense counsel at trial made the tactical decision to raise the issue of the payments made by the Gang Witness Relocation Fund to enable TC to move from Cedar Village. Benefits received as part of a witness protection program can be considered strong impeachment, as evidence of bias or interest. Allen v. Woodford, 395 F.3d 979, 995 (9th Cir.), cert. denied, 546 U.S. 858 (2005); United States v. Castleberry, 642 F.2d 1151, 1152-53 (9th Cir.), cert. denied, 452 U.S. 966 (1981).

The defense attorney who raises the issue of money received by a witness does so knowing that the reason for the receipt of the money will be presented as well. Castleberry, 642 F.2d at 1152-53; see United States v. Vaccaro, 816 F.2d 443, 450 (9th Cir.). cert. denied, 484 U.S. 914, 928 (1987) (defense motion to preclude reference to witness placement in witness protection program was predicated on defense agreement not to inquire about money paid to the witness as part of the program). When a witness receives benefits as part of a witness protection program, the attorney must weigh the relative value of the impeachment against

the prejudice generated by the explanation for the witness's placement in the program. Castleberry, 642 F.2d at 1153; United States v. Librach, 536 F.2d 1228, 1232 n.6 (8th Cir.), cert. denied, 429 U.S. 939 (1976). Defense counsel in this case knew that the court would allow the reference to a "gang crime witness" relocation program before he proceeded with this strategy. 5RP 62-63. This is a classic example of a tactical decision.

In this case, after defense counsel stated his intention to impeach TC based on the relocation assistance, the State brought out the payment during direct examination. 5RP 62-63, 77-80. This does not alter the nature of the evidence as impeachment—a party is permitted to raise impeaching information during direct examination to avoid the suggestion that it is concealing information. State v. Bourgeois, 133 Wn.2d 389, 402-03, 945 P.2d 1120 (1997).

Defense counsel spent substantial time on cross-examination of TC trying to establish that she was unwilling to testify against Winters until she received money, suggesting that motivated her testimony. 5RP 84-85, 154-59. Suggesting that this critical witness had a financial motive was an important point for the defense, and counsel must have concluded that it was worth the

minor prejudice of a brief reference to gangs in the title of the program, given the context of violence and repeated threats by the defendant, including Winters' admission that he had prior convictions for serious crimes, including robbery in the first degree, and makes his living selling crack cocaine. 8RP 52-55, 94-95, 147, 172-73.

Winters' argument that defense counsel should have moved to exclude the use of the word "gang" in relation to the relocation fund relies on the inaccurate assertion that the trial judge would have granted the motion. App. Br. at 18. To the contrary, when the parties were discussing the scope of expected testimony about the relocation funds, the trial court stated that examination about receipt of the relocation funds would open the door to the purpose of this particular relocation fund. 5RP 63.

The State has the right to explain why a witness has received relocation money or been admitted into a witness protection program. United States v. Partin, 601 F.2d 1000, 1010-11 (9th Cir. 1979), cert. denied, 446 U.S. 964 (1980); Castleberry, 642 F.2d at 1153. In this case, the witness properly was permitted to testify about her fears, which continued even after Winters was in custody. 5RP 77-80, 84-85, 134-35, 153-58; see Bourgeois, 133

Wn.2d at 402 (attack on witness credibility warranted testimony about witness's fear and reluctance to testify). The name of the relocation program was part of that context of fear and funds provided for witness protection. A party may not raise a subject and drop it at a point that is advantageous to him, barring further inquiry and leaving the jury with a half-truth. State v. Gefeller, 76 Wn.2d 449, 455, 458 P.2d 17 (1969); State v. Berg, 147 Wn. App. 923, 938-40, 198 P.3d 529 (2008). The judge properly indicated that reference to the funds received opened the door to the nature of the program.

The decision to refuse a limiting instruction as to the gang reference also was a tactical decision and not deficient. With respect to a limiting instruction regarding prior bad acts, the courts will presume that counsel did not request a limiting instruction because to do so would reemphasize the evidence. State v. Price, 126 Wn. App. 617, 649, 109 P.3d 27, rev. denied, 155 Wn.2d 1018 (2005); State v. Barragan, 102 Wn. App. 754, 762, 9 P.3d 942 (2000); State v. Donald, 68 Wn. App. 543, 551, 844 P.2d 447, rev. denied, 121 Wn.2d 1024 (1993).

In this case, the danger in reemphasizing the testimony was particularly apparent because TC mentioned the name of the fund

during her testimony on April 1st, but when Detective Thompson testified about the relocation funds on April 6th, he described the program simply as a victim relocation fund. 5RP 78, 157; 7RP 119-20. Detective Thompson also testified that TC's ability to get that assistance was not tied in any way to her participation in the prosecution of Winters. 7RP 120. It was a reasonable tactical decision not to include a reminder of the gang reference that occurred a week before the jury was instructed.

In its final discussion of instructions, the trial court responded to defense counsel's decision not to request a limiting instruction with the following comments:

Let me just say that in terms of the record in this case, I don't think there's any record whatsoever about any involvement of any gang affiliation by the defendant, and the only real reference to gangs during the trial was the fact that a couple of officers wore uniforms that said "gang unit" on it. That was explained to the jury that they do other things.

And there was a reference to gang relocation funds, but there was also an indication in the record that that didn't necessarily have anything to do with gangs and the whole purpose of relocating the alleged victim was just to provide her a safer place to live.

So I think that giving that instruction would have just called attention to an issue that really isn't an issue in this case and would have been, in my opinion, prejudicial to the defendant to include it.

9RP 3. The trial judge explicitly agreed that the limiting instruction would have been prejudicial to Winters, and the argument in this

appeal that the decision by counsel to refuse it was objectively unreasonable should be rejected.

c. Winters Has Not Shown Actual Prejudice In The Context Of The Other Evidence Of His Violence And Intimidation.

Even if TC's use of the word "gang" in relation to the relocation program was the result of deficient representation, Winters has not shown how that testimony "so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result." Strickland, 466 U.S. at 686. Winters must establish a reasonable probability that, but for counsel's errors, the result of the proceeding would have been different. Id. at 694.

Any error in the challenged reference was insignificant in the context of the evidence in this case. After TC's testimony, the word "gang" was never used again. It was not used in police testimony about the relocation fund or in closing arguments of the prosecutor or the defense. 7RP 119-20; 9RP 12-76.

Further, the receipt of money from the Gang Crime Witness Relocation Program was not particularly tied to Winters' behavior. TC repeatedly testified that the whole culture in the apartment

complex, which she referred to as "the ghetto," opposed what she called "snitching." 5RP 31-32, 42, 74-75, 122-23, 134-35, 156. She repeatedly explained that if she were labeled a snitch, she might be shot at. 5RP 31-32, 42, 74-75, 122-23. TC lived next door to the Dickersons, who considered Winters to be family. 8RP 14-15, 20-21. A deputy previously had testified that prior to June 28, 2008, Cedar Village was known for its gang activity, as well as violent assaults and drugs. 4RP 57. There was testimony that TC provided information in another investigation as well while she lived at Cedar Village. 7RP 115-19. TC testified that after Winters was arrested and while she was still living at Cedar Village, she received threats, including an unsigned note left on her door telling her that she had better keep her mouth shut and watch her back. 5RP 73.

There is no reasonable probability that but for the reference to a gang victim relocation fund the result of the proceeding would have been different. There was overwhelming evidence of Winters' guilt, provided by the victim's testimony as corroborated by her daughter, the guns recovered, defense witness Latrina Dickerson, and Winters' own testimony. The judge described TC's testimony:

I've seen very few witnesses as impressive as [TC] in a case like this, someone who, with limited education, funds, and so forth had the self-possession on the stand to testify as she did. I think her testimony was powerful. It was emotional. It was specific, and it was consistent. It was logical, and it was not seriously shaken on cross-examination.

7RP 12. EJB and Dickerson both heard Winters threaten to kill TC on July 3rd. 6RP 43-47; 8RP 39.

Further, the jury knew that on June 28th the police were looking for Winters in connection with a reported crime involving a firearm. 4RP 45, 51, 56, 63. TC described Winters telling her that he had shot a man in the face and that he would shoot and kill police if he had to in order to avoid going back to jail. 4RP 150-152, 159. EJB also heard Winters say that he would shoot the police if they tried to take him. 6RP 22.

Winters tried to intimidate Weeden and prevent him from talking to police. 6RP 128-30; 7RP 55-57. When Winters was arrested on July 3rd, he told police it did not matter, "that bitch is never going to testify," suggesting either that he believed that TC would be afraid to do so or that she would be prevented from doing so. 6RP 98.

Winters testified that he made a living selling crack cocaine, that he had prior convictions of serious crimes, including robbery,⁶ and that he had spent a long time in prison. 8RP 52-55, 94-95, 147, 172-73. The trial court ordered Winters not to tell the jury that this case was a persistent offender case, but at the end of the State's rebuttal closing argument Winters interrupted the proceedings and told the jury, "This is a three-strike case." 8RP 3-4; 9RP 76-77.

Winters admitted being inside TC's apartment on June 28th, trying to avoid the police, although he contradicted the incriminating details related by TC. 8RP 61-68. Winters admitted returning to TC's apartment that afternoon to confront her, and confronting her repeatedly about his lost cocaine. 8RP 75-84, 87-89, 135, 152. He admitted repeatedly threatening to beat up TC, and threatening to shoot her. 8RP 80-81, 83-84, 87, 89, 152-53.

The prejudice of the reference to a gang crime relocation fund cannot be significant in light of the other evidence of the defendant's violent criminal past and his high level drug dealing, the evidence of a community hostile to cooperation with the police, and the overwhelming evidence of repeated threats and intimidation by

⁶ The evidence of his prior convictions was admitted as relevant to Winters' credibility, as well as to the predicate crime elements of the firearms charges. CP 83.

Winters during the six days over which the charged crimes occurred.

2. SUFFICIENT EVIDENCE SUPPORTED THE CONVICTIONS OF UNLAWFUL POSSESSION OF A FIREARM IN COUNTS 5 AND 6.

Winters contends that there was insufficient evidence to support the jury's verdict on the charges of unlawful possession of a firearm in the first degree, claiming that evidence of Winters' possession of the firearms was lacking. Many surrounding circumstances connected Winters to the guns recovered, including his pointing a gun of the same description as the Ruger pistol in TC's face minutes before. The circumstances justified the jury's inference of his dominion and control over both guns.

When there is a claim that evidence is insufficient to support a conviction, the evidence is reviewed in a light most favorable to the State, and all reasonable inferences that can be drawn from the evidence must be drawn in favor of the State and interpreted most strongly against the defendant. State v. Salinas, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992). Specifically with respect to mental

elements, a trier of fact may infer a mental state where it is a logical probability. State v. Delmarter, 94 Wn.2d 634, 638, 618 P.2d 99 (1980).

A conviction will be affirmed if any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. Salinas, 119 Wn.2d at 201. The trier of fact is the sole arbiter of credibility determinations and those credibility decisions cannot be reviewed on appeal. State v. Camarillo, 115 Wn.2d 60, 71, 794 P.2d 850 (1990). The court will defer to the trier of fact issues of conflicting testimony and the persuasiveness of the evidence. State v. Thomas, 150 Wn.2d 821, 874-75, 83 P.3d 970 (2004).

A person commits the crime of unlawful possession of a firearm in the first degree when he has previously been convicted of a serious offense and knowingly has in his possession or control a firearm. RCW 9.41.040(1); CP 97-99. In this appeal Winters challenges the sufficiency of proof only as to his knowing possession or control of the two firearms. The instructions in this

case specified:

Possession means having a firearm in one's custody or control. It may be actual or constructive. Actual possession occurs when the weapon is in the actual physical custody of the person charged with possession. Constructive possession occurs when there is no actual physical possession but there is dominion and control over the item.

CP 109. The evidence was sufficient for a rational trier of fact to conclude that Winters had knowing control of the two pistols on July 3, 2008.

The cases on which Winters relies find mere proximity to contraband insufficient to establish dominion and control. E.g., State v. George, 146 Wn. App. 906, 920-23, 193 P.3d 693 (2008); State v. Cote, 123 Wn. App. 546, 550, 96 P.3d 410 (2004).

"Determining whether there is constructive possession requires examination of the 'totality of the situation' to ascertain if substantial evidence tending to establish circumstances from which the trier of fact can reasonably infer the defendant had dominion and control over the contraband exists." Cote, 123 Wn. App. at 549, citing State v. Partin, 88 Wn.2d 899, 906, 567 P.2d 1136 (1977). The court in George specifically recognized that other facts establishing the defendant's recent connection with similar contraband or other

circumstances could support the inference of dominion and control.
146 Wn. App. at 921-22.

Dominion and control need not be exclusive. State v. Nyegaard, 154 Wn. App. 641, 647, 226 P.3d 783 (2010). The court in Nyegaard also held that other circumstances in that case were sufficient to establish that a passenger had dominion and control over contraband, and that dominion and control may be exercised by the manipulation of contraband in order to hide it. 154 Wn. App. at 648.

The two pistols were found under the driver's seat of the SUV in which Winters was a passenger. 7RP 57-59. The 9mm Ruger met the specific description of the gun that Winters pointed in TC's face minutes earlier: a silver gun that was double-action, and would make the clicking noise that TC heard as Winters brandished the gun. 5RP 57; 6RP 95-96; 7RP 58-59, 72-72, 81-83. The second gun, the black .45 Glock, matched the description of the gun that Winters brandished in TC's apartment on June 28th. 4RP 150-52; 6RP 95-96; 7RP 58-59, 66-67. Moreover, In a seat pocket above the guns was a white towel that matched TC's description of the towel that Winters kept draped over the gun on June 28th. Ex. 35, pictures C, D, F; 4RP 150-51. Further evidence

that the Glock was in Winters' control was its location with the gun that TC has just seen Winters brandish. 7RP 58-59.

The two pistols were both oriented with the handles toward the back seat of the SUV and were located just in front of the back seat floor mat, making it unlikely that they were put there by the driver. Ex. 35, picture C; 7RP 97. Winters testified that Demar Roberts, the passenger riding behind the driver in the SUV, does not carry guns. 6RP 134-35; 8RP 170. Dickerson testified that when Winters arrived at TC's apartment in Weeden's SUV that night, he got out of the back seat. 8RP 27, 46. No one saw which seat Winters took when he left TC's apartment, but Winters testified that everyone got out of the SUV when they made two stops after they left and before they were stopped by the police. 5RP 66; 8RP 48, 161-63.

When the SUV was stopped by police, the driver (Weeden) immediately jumped out of the vehicle. 6RP 122. Winters, who was in the front passenger seat at this time, did not respond to the first police command to get out of the car. 6RP 123. When he did open his door, he initially showed only one hand instead of the two hands he was directed to show. 6RP 123. The immediate response by Weeden contrasts with the delayed response by

Winters and supports the inference that Winters was occupied with making sure the guns were hidden, as there was no other contraband found in the vehicle.

Further, Winters' attempts to intimidate Weeden when police were speaking to Weeden at the scene of the arrest is evidence that the firearms in the car were Winters' guns and he was afraid that Weeden would tell the police. 6RP 129; 7RP 55-57. At that point, police had not yet discovered the guns, so the jury could infer that Winters' reaction to Weeden's speaking to police was based on his own knowledge that the guns were under the seat. 7RP 52-57.

There were many surrounding circumstances connecting Winters to the guns recovered, justifying the jury's inference of his dominion and control over both guns. Just one of these facts, the discovery of Winters in the SUV with a gun matching TC's description of the gun that Winters pointed in her face minutes before, is sufficient in and of itself to support the inference that Winters had dominion and control over the guns found together in the SUV. Sufficient evidence supported the guilty verdicts on these charges.

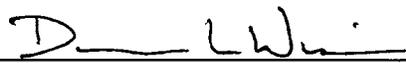
D. CONCLUSION

For the foregoing reasons, the State respectfully asks this Court to affirm Winters' convictions and sentences.

DATED this 12TH day of July, 2010.

Respectfully submitted,

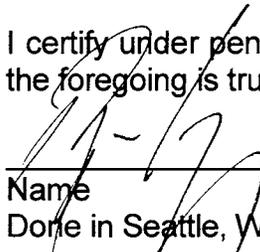
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Certificate of Service by Mail

Today I deposited in the mail of the United States of America, postage prepaid, a properly stamped and addressed envelope directed to ERIC J. NIELSEN, the attorney for the appellant, at Nielsen Broman & Koch, P.L.L.C., 1908 E. Madison Street, Seattle, WA 98122, containing a copy of the Brief of Respondent, in STATE V. MARTEZ WINTERS, Cause No. 64076-3-I, in the Court of Appeals, Division I, for the State of Washington.

I certify under penalty of perjury of the laws of the State of Washington that the foregoing is true and correct.



Name
Done in Seattle, Washington

07-12-10

Date

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STATE OF WASHINGTON
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