IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

State of Washington,	)	DIVISION ONE
	)	
Respondent,	)	No. 64076-3-I
	)	
v.	)	
	)	UNPUBLISHED OPINION
Martez Winters,	)	
	)	
Appellant.	)	FILED: December 13, 2010
_____	)	

Dwyer, C.J. — Martez Winters was convicted of several felonies based upon evidence that he entered a woman's home uninvited in order to elude police officers, used this woman as a human shield, and repeatedly returned to threaten this woman over the course of a few days. Winters appeals from the judgment entered on the jury's verdicts, contending that he received ineffective assistance of counsel when his attorney did not object to the admission of gang-related evidence, did not propose a limiting instruction as to the gang-related evidence, and supported the withdrawal of the State's limiting instruction as to the gang-related evidence. Winters also contends that there was insufficient evidence to convict him on two counts of unlawful possession of a firearm. Winters raises further claims in his statement of additional grounds. Finding no

error, we affirm.

I

On June 28, 2008, police were dispatched to Cedar Village, a Seattle apartment complex, to investigate "a crime of violence where a firearm had been involved." Report of Proceedings (RP) (March 31, 2009) at 56. Theresa Croone, who lived in Cedar Village, observed a woman trying to buy crack cocaine from a woman named Mimi just before the police arrived. Once the police arrived, Mimi hid a rock of crack cocaine under some landscaping bark in front of Croone's apartment before entering another apartment.

The police suspected that Martez Winters was involved in the crime that they were investigating. In an effort to hide from police, Winters sought refuge in Croone's apartment. Croone saw Winters enter her apartment uninvited and followed him inside. After entering the apartment, she saw Winters holding a black gun. Croone told Winters to leave her apartment. Winters refused. Winters "said he had to get away from the police . . . and that he would shoot the police before he would go back . . . to jail." RP (March 31, 2009) at 152.

While in Croone's apartment, Winters frequently spoke on his cellular telephone in an effort to determine where the police were located. Croone testified that Winters "had his gun drawn the whole time." RP (April 1, 2009) at 15. She also testified that, at one point, Winters "grabbed the back of [her] arm and basically used [her] as a human shield with his gun pointed in [her] back,

and proceeded to walk out with [her]." RP (April 1, 2009) at 18-19. Eventually, after again using Croone as a human shield in order to leave Croone's apartment, Winters jumped through an open window into the apartment in which Mimi was located.

Later that same day, Winters returned to Croone's apartment with Mimi after discovering that the rock of crack cocaine that Mimi had hidden under the bark was missing. Winters claimed that the rock of crack cocaine belonged to him. Winters believed that Croone had taken the drugs. She denied having done so but Winters did not believe her. Winters threatened to kill Croone if she did not give him either the drugs or money for the drugs. The next day, Winters returned to Croone's apartment and asked Croone for the drugs. When Croone again denied having the drugs, Winters pulled out a silver gun. He told Croone that she was going to die if he did not get his money. Shortly after this incident, Croone called 911.

A few days later, on July 3, Winters returned to Croone's apartment, pointed a silver gun at her head, and stated, "you are going to give me my money, or you are going to die. And I'm not going to tell you again." RP (April 1, 2009) at 53. Once Winters departed, Croone telephoned the police to give them a description and a partial license plate number of the SUV in which Winters was riding. Shortly thereafter, police officers spotted the vehicle and conducted a felony traffic stop.

The driver immediately exited the vehicle. Winters was seated in the front passenger seat of the SUV and, although ordered "to open the door and show his hands," did not comply. RP (April 2, 2009) at 123. After an officer repeated the order, Winters opened the door. Winters was then ordered to show both of his hands but, instead, extended only one hand out of the door. Winters eventually exited the vehicle and was handcuffed. Two guns were found under the driver's seat of the SUV. One of the guns recovered from the vehicle was a black gun and the other was a "stainless-steel-colored handgun." RP (April 3-April 6, 2009) at 73.

Based upon the preceding incidents, Winters was charged 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.

Approximately two months after the incidents in question, Croone was contacted by the prosecutor's office about a program called the "Gang Crime Witness Relocation Program," which could assist her in relocating from Cedar Village to a new home. With the assistance of this program, Croone was able to relocate. The program provided about $3,000 to pay a deposit and first and last months' rent to Croone's new landlords.

During the course of Winters' trial, defense counsel communicated to the prosecutor and the court that he intended to discuss the relocation program and

that he did not object "to the explanation that this was a witness relocation program for victims of gang members." RP (April 1, 2009) at 62-63. The prosecutor posited that this discussion would open the door to "[t]he gang aspect" of the relocation program but defense counsel asserted, "I don't think it opens doors into voluminous gang activities. I think it is on the relocation monies." RP (April 1, 2009) at 63. Additionally, the State submitted a limiting instruction relating to the relocation program but defense counsel believed "that that instruction perhaps would distract more than assist the jury," so the State withdrew the proposed instruction. RP (April 8-April 9, 2009) at 2-3. After this comment by defense counsel, the trial judge stated, "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." RP (April 8-April 9, 2009) at 3.

A jury found Winters guilty on all counts.

Winters appeals.

II

Winters first contends that defense counsel provided ineffective assistance when he did not object to the admission of or propose a limiting instruction regarding the gang-related evidence, and when he supported the withdrawal of the State's proposed limiting instruction concerning this evidence. We disagree.

To establish ineffective assistance of counsel, a defendant must show both deficient performance and resulting prejudice.[1] Strickland v. Washington, 466 U.S. 668, 687, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984). Deficient performance occurs when counsel's performance falls below an objective standard of reasonableness. State v. Stenson, 132 Wn.2d 668, 705, 940 P.2d 1239 (1997). A strong presumption of effective assistance exists and the defendant bears the burden of demonstrating an absence in the record of a strategic basis for the challenged conduct. State v. McFarland, 127 Wn.2d 322, 335-336, 899 P.2d 1251 (1995). Prejudice occurs where there is a reasonable probability that the outcome of the proceedings would have been different had counsel's performance not been deficient. McFarland, 127 Wn.2d at 335. Failure to establish either prong of the test is fatal to the claim of ineffective assistance of counsel. Strickland, 466 U.S. at 697.

The record establishes that defense counsel herein acted strategically in his decision to elicit testimony about the relocation program. Defense counsel's strategy was to have evidence admitted establishing that Croone received money from the relocation program. The purpose of such evidence was to challenge Croone's credibility as a witness by suggesting that the money used to facilitate her move was a motive for Croone's decision to testify on the State's behalf. This strategy is evidenced by defense counsel's statement during his

[1] We review de novo a claim of ineffective assistance of counsel. State v. Binh Thach, 126 Wn. App. 297, 319, 106 P.3d 782 (2005).

closing argument that the jury should consider whether Croone had a personal interest in testifying because she received assistance in moving. Defense counsel also spent time cross-examining Croone as to whether the police approached her to testify, whether she ever said that she did not want to testify, how she found out that she could get assistance in moving, and whether moving or finding out that she was going to move made her feel differently about testifying. Thus, defense counsel's goal in introducing evidence of the gang victim relocation program was to impeach one of the State's witnesses. This is a strategic lawyering decision. See In re Pers. Restraint of Stenson, 142 Wn.2d 710, 735, 16 P.3d 1 (2001) (quoting State v. Piche, 71 Wn.2d 583, 590, 430 P.2d 522 (1967)).

However, "once counsel open[s] the gate of special privileges the reason for those privileges bec[o]me[s] relevant." United States v. Castleberry, 642 F.2d 1151, 1153 (9th Cir. 1981).[2] Here, defense counsel intended to diminish Croone's credibility by eliciting testimony regarding the financial assistance that she received from the relocation program. As a result of this decision, certain information about the program—particularly the reason for which such assistance was offered—became relevant. Therefore, it was proper for the State to inquire into the basis for Croone receiving such assistance—that the program

[2] In Castleberry, defense counsel indicated in his opening statement that he expected the evidence to show that one of the State's witnesses had been given "immunity regarding federal prosecution," had received "compensation in return for his cooperation separate and apart from the normal witness fees," had "been given assistance in relocating and finding a new job, [and] perhaps even assistance in locating a job." 642 F.2d at 1152.

assisted gang victims. Accordingly, it was reasonable for defense counsel to refrain from interposing a futile objection to testimony that this was a "gang victim" relocation program. Counsel's performance was not deficient.[3]

The record additionally establishes that defense counsel acted strategically in his decision not to propose a limiting jury instruction and in his related decision not to object to the withdrawal of the State's proposed limiting instruction. Defense counsel stated his belief that the State's proposed limiting jury instruction concerning the gang victim relocation program "perhaps would distract more than assist the jury." RP (April 8-April 9, 2009) at 2-3. This comment suggests that defense counsel was wary of over-emphasizing the "gang" aspects of the case and believed that having no limiting instruction on the issue was the strategically preferable route. Indeed, it is well established "that failure to request a limiting instruction . . . may be a legitimate tactical decision not to reemphasize damaging evidence." State v. Yarbrough, 151 Wn. App. 66, 90, 210 P.3d 1029 (2009). Here, the trial judge commented that he thought including the instruction would have been prejudicial to the defendant. Defense counsel's resistance to a limiting instruction did not constitute deficient

[3] It makes no difference that the State brought out the impeaching evidence first, on direct examination of Croone. Where the State reasonably anticipates that the defendant will attack a witness's credibility, the State is permitted to raise impeaching evidence on direct examination in an effort to "pull the sting" of defense counsel's cross-examination. State v. Bourgeois, 133 Wn.2d 389, 402, 945 P.2d 1120 (1997). Because defense counsel had informed the prosecution that he intended to elicit testimony from Croone regarding the assistance that she received from the relocation program, it was reasonable for the State to anticipate that Winters would use the relocation program assistance to impeach Croone. It was, thus, appropriate for the State to elicit this evidence on direct examination.

performance.

III

Winters next contends that there was insufficient evidence to convict him on both counts of unlawful possession of a firearm in the first degree because the State did not prove that he possessed the guns.[4] We disagree.

In determining the sufficiency of the evidence, the standard of review is "whether, after viewing the evidence in a light most favorable to the State, any rational trier of fact could have found the essential elements of the charged crime beyond a reasonable doubt." State v. Rempel, 114 Wn.2d 77, 82, 785 P.2d 1134 (1990). "A claim of insufficiency admits the truth of the State's evidence and all reasonable inferences drawn therefrom." State v. Fleming, 155 Wn. App. 489, 506, 228 P.3d 804 (2010).

The pertinent statute provides that

> [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 or found not guilty by reason of insanity in this state or elsewhere of any serious offense as defined in this chapter.

RCW 9.41.040(1)(a). "Possession may be actual or constructive, and constructive possession can be established by showing the defendant had dominion and control over the firearm or over the premises where the firearm

[4] Winters contends that there was insufficient evidence as to the possession element of RCW 9.41.040(1)(a). He does not raise any sufficiency challenge regarding the other elements of unlawful possession of a firearm in the first degree.

was found." State v. Echeverria, 85 Wn. App. 777, 783, 934 P.2d 1214 (1997). "[T]he ability to reduce an object to actual possession is an aspect of dominion and control," but "[n]o single factor . . . is dispositive in determining dominion and control. The totality of the circumstances must be considered." State v. Turner, 103 Wn. App. 515, 521, 13 P.3d 234 (2000) (citations omitted). Thus, proximity alone is insufficient to establish constructive possession. Turner, 103 Wn. App. at 521.

Winters contends that, because there was no evidence that he was in actual possession of the guns, "the jury necessarily found Winters possessed the guns under a constructive possession theory." Appellant's Br. at 24. He asserts that the State did not provide sufficient evidence that he had "constructive possession" of the guns.

The record contains sufficient evidence to prove that Winters had "dominion and control" over the firearms and, thus, had constructive possession of both guns. Croone testified that Winters threatened her with both a black gun and a silver gun. Two guns, one black and one silver or "stainless-steel-colored," were recovered from the vehicle in which Winters was riding. The guns were found the same night that Winters used the silver gun to threaten Croone. When the police officer ordered Winters out of the vehicle, he hesitated before getting out. In fact, when the police officer first ordered Winters to show his hands, he only put one hand out of the door. A reasonable juror could infer

from such evidence that Winters placed the guns under the driver's seat—where the guns were eventually found—before leaving the vehicle. Thus, after reviewing the totality of the circumstances, there was sufficient evidence that Winters had constructive possession of the guns. Therefore, there was sufficient evidence for a jury to find Winters guilty of two counts of unlawful possession of a firearm.

IV

In his statement of additional grounds, Winters first contends that his right to a speedy trial, pursuant to the Sixth Amendment of the United States Constitution and article I, section 22 of the Washington Constitution, was violated when his trial date was continued on several occasions. However, no evidence in the appellate record addresses this issue. Where "[t]he portion of the record certified to this court does not contain any of the motions or proceedings relevant to [the issue,]" this court cannot consider the alleged error. State v. Mannhalt, 33 Wn. App. 696, 704, 658 P.2d 15 (1983). Thus, we will not further discuss this claim of error.

V

In his statement of additional grounds, Winters next contends that he received ineffective assistance of counsel when his attorney neither moved to suppress evidence of the two guns nor objected at trial to the admission of the guns. We disagree.

As stated above, Winters must show both deficient performance and resulting prejudice in order to establish such a claim. Strickland, 466 U.S. at 687. As relevant to this issue, "[c]ounsel's performance is deficient if he or she fails to bring a viable motion to suppress when there is 'no reasonable basis or strategic reason' for failing to do so." State v. Barron, 139 Wn. App. 266, 276, 160 P.3d 1077 (2007) (quoting State v. Rainey, 107 Wn. App. 129, 136, 28 P.3d 10 (2001)). Additionally, "[b]ecause this court presumes that the failure to object was a legitimate tactical decision, [the defendant] must demonstrate an absence of legitimate strategy or tactics in failing to object." State v. Johnston, 143 Wn. App. 1, 21, 177 P.3d 1127 (2007).

Winters contends that his attorney should have moved to suppress the evidence of the guns because Winters was not in possession of them. This is not a legitimate reason to move to suppress the guns.[5] Here, there is no indication that Winters' constitutional rights were violated by the manner in which the State obtained the guns. Therefore, there was no basis upon which to suppress the guns and, thus, defense counsel had no basis to bring a suppression motion. Because there was a reasonable basis for defense counsel's decision not to bring a motion to suppress, Winters has failed to show that defense counsel acted deficiently. See Barron, 139 Wn. App. at 276

[5] See 12 Royce A. Ferguson, Jr., Washington Practice: Criminal Practice & Procedure § 2302 at 516 (3d ed. 2004) ("The bases for bringing exclusionary motions are generally founded in the Constitutions of the United States and the State of Washington, and it is because the state has violated one or more of the defendant's constitutional rights in obtaining the evidence that the same cannot be used against him.").

(quoting Rainey, 107 Wn. App. at 136).

For the same reason, defense counsel did not act deficiently by not objecting to the admission of the guns at trial. No rule of evidence provided a basis for an objection to the admission of the guns. Therefore, it is reasonable that defense counsel did not object. Moreover, Winters makes no argument as to why defense counsel's decision not to object to the admission of the guns was not a tactical decision. Winters has failed to establish that defense counsel acted deficiently by not objecting. See Johnston, 143 Wn. App. at 21.

VI

Finally, in his statement of additional grounds, Winters contends that the trial court erred by finding him to be a persistent offender. We disagree.

Prior to this case, Winters had two previous convictions for robbery in the first degree. Winters pleaded guilty to both of those crimes. Winters contends that the plea forms for both of those convictions contained an error, which makes the convictions invalid and unable to be used as a basis for enhancing his sentence in the present case. The error, Winters asserts, is that the plea forms stated that he "*may* be found to be a Persistent Offender," while the law states that a person *is* a persistent offender where the necessary criteria are met. See RCW 9.94A.030(36)(a)(i),(ii). Thus, Winters contends, the equivocal "may" language misinformed him of the consequences of both of his pleas and, hence, those pleas were involuntary.

When ruling on this issue, the trial court determined that there was "accurate information provided to Mr. Winters prior to the entry of the guilty pleas" and "that the State has carried its affirmative burden of proving the constitutional validity of the prior convictions." RP (August 18, 2009) at 12-13.

We review de novo "a sentencing court's decision to consider a prior conviction as a strike." State v. Thiefault, 160 Wn.2d 409, 414, 158 P.3d 580 (2007).

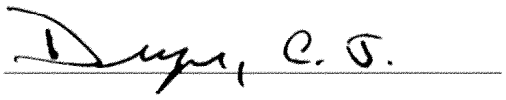
> When sentencing a defendant under the [Persistent Offender Accountability Act], '[a]ll that is required by the constitution and the statute is a sentencing hearing where the trial judge decides by a preponderance of the evidence whether the prior convictions exist' . . . . The burden of proving prior convictions by a preponderance of the evidence rests on the State.

State v. Vickers, 148 Wn.2d 91, 120, 59 P.3d 58 (2002) (second alteration in original) (quoting State v. Wheeler, 145 Wn.2d 116, 121, 34 P.3d 799 (2001)). "[A] prior conviction which has been previously determined to have been unconstitutionally obtained or which is constitutionally invalid on its face may not be considered. Constitutionally invalid on its face means a conviction which without further elaboration evidences infirmities of a constitutional magnitude." State v. Ammons, 105 Wn.2d 175, 187-88, 713 P.2d 719, 718 P.2d 796 (1986) (citations omitted). "[D]ocuments signed as part of a plea agreement may be considered in determining facial invalidity when those documents are relevant in assessing the validity of the judgment and sentence." In re Pers. Restraint of Hemenway, 147 Wn.2d 529, 532, 55 P.3d 615 (2002). However, "the question

is always whether the judgment and sentence is facially invalid—not whether a plea document is facially invalid." State v. Langstead, 155 Wn. App. 448, 457, 228 P.3d 799 (2010).

Here, the judgment and sentence forms for Winters' two previous convictions were not invalid on their face. The judgment and sentence forms for both convictions are "consistent with a voluntary plea." Langstead, 155 Wn. App. at 457. Moreover, even if the language in the *plea forms* had misinformed Winters of the circumstances under which he would be found to be a persistent offender, a holding we do not make, this would still not be an error on the face of the *judgment and sentence forms*. Because Winters has failed to prove any facial invalidity on the pertinent judgment and sentence forms, the two prior convictions were properly used to enhance his sentence herein.

Affirmed.



We concur: